

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9631 SENATE LABOR & COMMERCE

April 4, 1998

The Honorable Representative Alan Austerman
Alaska State Legislature
Room 434
State Capitol (MS 3100)
Juneau AK 99801-1182

Re HB 416
S
SB 346

Dear Representative Austerman:

My name is Tom Meade, and I work for a local phone company that serves about 5000 lines in 21 villages from Little Diomed to Ft. Yukon, Galena to Dutch Harbor. GCI wants to compete with us to provide local phone service. Well, not in Little Diomed or Ft. Yukon, they couldn't make any money there. Maybe in Dutch Harbor though (which subsidizes Ft. Yukon.) Anyway, I thought some of the arguments GCI has used to support H.B. 416 was what our attorneys would call "disingenuous," and we have ratepayers who would be seriously harmed by local competition. I strongly urge you to vote against H.B. 416.

Local Rates

I'd like to start by talking about local rates. Like most local exchange carriers (LECs), our rates are "geographically averaged." That is, a customer in Cold Bay pays the same as a customer in Dutch Harbor, even though it costs more to serve Cold Bay. How can we do that? The customer in Dutch Harbor subsidizes the customer in Cold Bay. Unless you introduce competition in Dutch Harbor. If that happens, rates will go down in Dutch, and up in Cold Bay.

Whether a residential user in Cold Bay should pay \$45 per month so a business customer in Dutch Harbor can pay \$20 is a policy call. Fortunately, Congress already made the call in favor of comparable rural and urban rates. The "benefits of competition" in urban areas wouldn't do much to calm down subscribers in the bush if their rates skyrocket. Remember, competition doesn't reduce cost, it simply drives price toward cost, and costs in the bush are unavoidably high.

Rural Areas

GCI's bill would require competition for all companies with more than 1500 lines. I'll discuss why that conflicts with the 1996 Telecommunications Act later. Let's start with what it means first. It means that competition would be automatically approved for 99.3% of the lines in the state. Why stop at 1500? Because there aren't many cherries left to pick among the remaining 2700 lines scattered over 30 villages.

What did Congress determine "rural" was? They said 50,000 lines or less. Sure they live in a city of 1,000,000. But you only see one airline "competing" in the Juneau market, so maybe Congress wasn't too far off.

Examples of Competition in Rural Markets

Speaking of airline "competition," is anybody really happy about the effect airline deregulation and "competition" had in rural areas? Airline deregulation is a good example of competition's effect on

rural markets. Do you have a wide variety of choices? Are rural rates comparable to urban rates? Do you like the service on bush routes? Do you have any recourse if you don't like it?

So deregulation led to an unregulated monopoly. Is that in the public interest?

Rural Exemptions

Congress also recognized that competition in rural areas could undermine affordable local service. It specifically exempted rural LECs from the requirement to allow competition through unbundling networks. And Congress required the state commissions to rule on a case-by-case basis whether it would be appropriate to remove the rural exemption. It appears that the proposed legislation is in direct conflict with the Telecommunications Act of 1996.

Choices

What benefits would bush subscribers get from a "choice" of carriers? New services? LECs have been providing new services, and have state of the art network, but they can't get the services through the toll carriers, including GCI! And if the portion of the bill requiring "unbundling" passes, the customer will still be using the same LEC facilities!

"Unbundling"

The bill requires that LECs "unbundle" their networks. Unbundling means letting a competitor rent pieces of its network. GCI claims it has to have unbundling to compete. If that's true, isn't that an admission that GCI can't provide the service as inexpensively as the LEC? Doesn't it also mean that LEC facilities are already capable of transmitting the best service GCI has to offer?

If the airline industry had to unbundle, you'd have Delta, United, and Alaska Airlines selling seats on the same plane, with three sets of carts in the aisle. It doesn't make much sense in the telephone industry, either, at least not in rural Alaska.

The Information Age

A typical dial-up voice grade phone line in our service area will allow data transmission at speeds between 26.4 kbps and 33.6 kbps. The maximum speed you can expect from a toll carrier serving the bush is 14.4 kbps. GCI and AT&T have committed themselves to technologies that will continue to restrict data transmission speeds to the bush for years to come. GCI is trying to blame the LEC for its own inferior service, then use "poor service" as an excuse to enter the local market. It reminds me of the auto glass shop owner who was throwing bricks off the over-pass to drum up business - he finally got caught when he hit a driver. Which reminds me of GCI's exploding earth station next to the Shungnak school. The explosion shows why any public interest determination should be left to the APUC.

Since GCI's toll facilities are the major impediment to good service in the bush, rhetoric that competition will improve information technology is more than a little suspicious.

Toll Competition

GCI claims its entry into the toll market drove down toll rates. It did, but not by creating efficiencies. Instead, toll competition reduced the subsidies that toll carriers paid to LECs to keep local rates down. Toll rates went down, but local rates went up in most markets as subsidies that held down local rates were reduced or eliminated.

GCI claims that competition in Anchorage has already driven prices down. If you look closely, GCI undercut ATU's basic rate by \$.25, and raised Cable TV rates \$2.00 to cover it. Yes, they operate cable TV as an unregulated monopoly. Since GCI insists that its new \$200 million fiber optic submarine cable is part of a "private network," not subject to regulation or resale requirements, it's unlikely it will unbundle its cable TV network to allow competition in the cable TV industry.

If you truly believe GCI's arguments that competition always benefits the consumer, require GCI to unbundle its cable TV network on the same terms it wants from the LECs for their telephone networks. See if GCI thinks its cable TV customers should have a choice, too.

The APUC

The APUC's responsibility is to protect the public interest. GCI's job is to protect GCI's shareholder's interests. A recent \$1 increase in stock price enriched the top 5 GCI officers by \$1,450,000 in stock options alone! It's not a criticism, that's why they're in business. But it highlights the difference between self-interest and the public interest. H.B. 416's fate won't have any financial impact on anyone at the APUC, so the APUC may be a little more impartial in judging where competition is in the public interest, not GCI's interest.

The APUC has set a course toward regulations that will bring Alaska into full compliance with the Telecom Act. At the APUC hearings on April 2 & 3, GCI supported the priorities and schedule, and agreed to work with the Commission and the rest of the industry to implement these regulations in a timely manner. It's difficult to understand what legitimate need GCI could have for H.B. 416.

I apologize for the length of this letter, but our company's resources are too limited for me to meet with you in person. Please feel free to contact me at (907) 349-2400 for any further information or clarification. Thanks for your consideration and patience.

Sincerely,



Tom Meade
P.O. Box 112473
Anchorage AK 99511

SB

349

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. SB349

Revision Date: _____
 Title: Unemployment Exempt Amateur
Sports Official
 Sponsor: Senate Rules
 Requestor: Senate L&C

Department Affected: Labor
 BRU: Employment Security
 Component: Unemployment Insurance

COMPONENT SERIAL NO. 2276

EXPENDITURES/REVENUES:

(Thousands of Dollars)

OPERATING	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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CHANGE IN REVENUE FUND SOURCE #						
--	--	--	--	--	--	--

FUNDING:

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY98) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

This bill excludes from unemployment insurance coverage, the services of sports officials at amateur sporting events. This bill is pending amendments to the Federal Unemployment Tax Act, (FUTA), requiring passage by U.S. Congress on or before 12/31/99.

No fiscal impact is anticipated at this time.

Prepared by: Rebecca Gamez, Director *Rebecca Gamez* Phone: 465-2711
 Division: Employment Security Division Date: 4/3/98

Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*
 Agency: Department of Labor Date: 4/3/98

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SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/30/98

FURTHER: Finance

Date of 5-Day Notice: 4-2-98
 (in accordance with Uniform Rule 23)

DATE TURNED
 IN TO OFFICE: 4-8-98

Labor and Commerce Committee considered

SENATE BILL NO. 349

"An Act exempting services of certain sports officials at amateur sporting events from coverage under the Alaska Employment Security Act; and providing for an effective date."

and recommends:

- be replaced with _____ CS SB 349 (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill:**
 same title
 new title
House Bill:
 same title
 technical title
 new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
CHAIR: <i>[Signature]</i>	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

<i>Labor</i>	<i>4/3/98</i>	✓	

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill



Official Business

Alaska State Legislature

SENATE

State Capitol
Juneau, AK 99801-1182

Senate Labor & Commerce Committee

Memo

TO: Terry Cramer, Legal Counsel
Legislative Legal and Research Services
via fax: X 2029 this page only

FROM: Annette Kreitzer, Aide to
Senate Labor & Commerce Committee
PH: X 3844

A handwritten signature in dark ink, appearing to be "AK", enclosed in a circular scribble.

DATE: April 8, 1998

RE: **FINAL CS SB349 (L&C) - Passed 4/7/98 from L&C**

Please deliver a final L&C Committee Substitute for SB 349: Unemployment Exempt Amateur Sports Official to Capitol Room 115 with the following change:

Include Amendment)-LS1709E.1 by Cramer dated 4/3/98.

The Senate L&C Committee moved this bill from committee yesterday. There were no other changes. Call if you have questions.

AMENDMENT #1

adopted, no objection

OFFERED IN THE SENATE

TO: SB 349

- 1 Page 1, line 6, following "of":
- 2 Insert "the state, including the University of Alaska, a political subdivision of the
- 3 state, or"

- 4 Page 1, line 8, following "the":
- 5 Insert "state, political subdivision, or"

Draft

1 (a)(1) Section 3306(c) of Title 26, United States Code, is amended by adding the
2 following new paragraph:

3 (2) services performed in the employ of a State, or any political subdivision
4 thereof, or any organization exempt from income tax under section 501(a) in an
5 officiating capacity at amateur sporting events for which such State, political subdivision,
6 or organization agrees to provide such officiating.^o

7 (2) Paragraph (2) shall be effective for such services performed after December 31, 1998. -

DRAFT FEDERAL LANGUAGE FROM
SENATOR STEVENS' OFFICE, OURS
MUST CONFORM, HENCE THE AMENDMENT.

Alaska State Legislature

Sen. Tim Kelly, Chairman
Anchorage
Sen. Loren Leman, Vice-Chair
Anchorage
Sen. Robin Taylor
Wrangell
Sen. John Torgerson
Kasilof
Sen. Jim Duncan
Juneau



Official Business

Senate Rules Committee

State Capitol
Juneau, AK 99801-1182
(907) 465-3822
Fax: (907) 465-3756
1-800-770-3822
(JANUARY - MAY)
INTERNET: /http://www.state.ak.us

716 West 4th, Suite 400
Anchorage, AK 99501
(907) 258-8180
Fax: (907) 258-4524

SPONSOR STATEMENT / SECTIONAL

SB 349 - Unemployment Exemption For Amateur Sports Officials

SB 349 would exempt Alaska's amateur sports officials from unemployment tax liabilities. It would not relieve them from income tax liability. This measure is predicated upon the successful passage of corresponding federal language, now being pursued by Senator Ted Stevens.

Recreational, nonprofessional sports are a large and expanding component of our state's athletic and social life, and the role of amateur sports officials is vital to the continuation and development of that segment of activity. The essential character of this avocation will be adversely impacted if tax pressures on modest stipends is not relieved. Most amateur officials provide their own transportation, uniforms, protective gear, and other costs, without reimbursement from those non-profit organizations and recreational units of local government which hire them.

Further, without the modest relief provided by SB 349, we may likely see a decline in the availability of qualified amateur sports officials as they pick up other work, or worse, force increases in costs to the many non-profit organizations which sponsor amateur sporting events. This increase in costs may lead to unavoidable program reductions.

The Alaska Legislature once exempted amateur sports officials from employment tax liabilities, however the exemption was lifted a year later under threat of losing federal funds at the Department of Labor. Federal law did not correspondingly provide for the exemption.

SECTION 1 - adds amateur sports officials to the list of those occupations exempted from unemployment liability under AS 23.20.526(a).

SECTION 2 - since the exact effective date is not known at this time, this reference states that SB 349 applies to officiating services performed after either possible effective date.

SECTION 3 - is the conditional language that provides for SB 349 taking effect only upon the passage of corresponding federal law. Senator Ted Stevens is currently working for passage of federal language this year.

SECTION 4 - is the effective date, indicating that the provisions of SB 349 apply whenever the federal law takes effect, and that can be one of the two identified possibilities.

Senate Bill 349 is supported by the Farthest North Umpires Assn., the Alaska School Activities Assn., and the Anchorage Sports Assn. It is not opposed by the AFL-CIO. The bill carries a zero fiscal note. For information, contact Tim Benintendi at 465-3770.

04/07/98
13:36:57

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LTN1150
BY:JNU
FOR:ALL

LOCATION: ANCHORAGE

SB 349	✓JOHN	PENN	ANCH FOOTBALL	TESTIFY
SB 349	✓PATRICIA	LILLIAN	AK AMAT SOFTBALL	TESTIFY
SB 349	✓GARY	MATTHEWS	AK SCHOOL ACT.	TESTIFY
SB 349	✓BOB	WALKER	SOFTBALL	TESTIFY
SB 346	TOM	MEADE	TEL AK	TESTIFY
SB 346	DAVID	FAUSKE		TESTIFY
SB 346	KEN	TROUT	SUMMIT TELE CO	TESTIFY

LOCATION: FAIRBANKS

SB 349	MR.	✓JERRY	WATSON	F.N. UMPIRES	TESTIFY
SB 349	MR.	✓BRUCE	KEMMERER	ALASKA A.S.A.	TESTIFY
SB 349	MR.	✓LEFTY	SCHALLOCK	FBX BASKETB. ASST	TESTIFY
SB 349	MS.	✓KIM	KILLION	OFFICIALS ASSOC	TESTIFY
SB 349	MR.	✓ROBERT	WALKOTTE	FBX FOOTBALL ASST	TESTIFY

LOCATION: MATSU

SB 346	MR	GREG	BERBERICH	TESTIFY
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~~NO PARTICIPANTS FOR SB 312~~

AT THIS TIME:

Anchorage Amateur Softball Umpires Association

P. O. Box 210504
Anchorage, Alaska
99521-0504



To: Senator Loren Leman
Senate Labor & Commerce Chairman

April 1, 1998

From: Bob Walker, President
AASUA

Subj: Amateur Sports Officials

Dear Senator Leman

On the advice of my fellow colleagues I'm writing you in the hope that you will support a piece of legislation in the Senate (SB 349) that will save all amateur sports officials here in Alaska and all amateur sports as well. In 1989 a bill sponsored by Rep Terry Martin was passed by the legislature (HB 147) recognizing amateur sports officials as independent contractors. This same law was promptly repealed in 1990 due to conflict with U.S. Dept. of Labor law and the potential loss of millions of dollars in federal matching funds for unemployment insurance benefits. However no one bothered to tell the amateur sporting community of this minor little change. In 1994 we came under scrutiny for Workmen's Compensation requirements, not realizing all the while we were no longer covered by HB 147. We were successful in getting AS23.30.230(a) made into law in 1994 exempting us from Workmen's Comp.

What happened next was predictable. We along with all other amateur sports officials were told by our various non-profit officials groups that we were independent contractors and our taxes were our responsibility and were not entitled to unemployment or work comp benefits either. This relationship had gone the way for almost ten years until last summer in Fairbanks when an amateur umpire new to Alaska filed for unemployment at the end of the season based on perceived policy from their home state. Alaska Dept of Labor completed an investigation and based on the current law found Farthest North Umpires Association liable for the benefits. We all became painfully aware that we were not exempted by state law and that we could also be liable to the IRS for the same reasons.

Where are we now? Farthest North Umpires case is under appeal with the Alaska Dept. of Labor. Senator Ted Stevens is introducing legislation that would exempt us from the Federal Unemployment Tax Act (FUTA) and the jurisdiction of the U.S. Dept of Labor. We have asked Representative Norm Rokeberg to introduce a bill in the House asking that state law be changed to match any new change to federal law.

Post-It® Fax Note	7871	Date	4-1-98	# of pages	2 of 2
To	Senator LEMAN	From	Bob WALKER		
Co/Dept.	Alaska Senate	Co.	AASUA		
Phone #		Phone #	694-5713		
Fax #	465-3810	Fax #	694-5713		

What are the potential consequences of failure? This could very well fold amateur sports at all levels. High school, recreational you name it. That is why legislation was introduced in 1989. We that officiate amateur sports are not here for the money. We are here because we love the game and the people that play them, most of us are "old" players ourselves. We all have regular full time jobs; we all receive 1099's for our game fees and pay the taxes on the money we receive. An average softball umpire makes \$15.00 a game, then take administrative fees and that drops it to about \$13.00. Almost all the money we earn is used to buy uniforms go to officiating clinics and pay for travel. If the various associations have to take on the expense of unemployment, work comp, the IRS and the costs of that administration, game fees will drop to the point where amateur officials will have to pay to call games. If these cost rise, as significantly as they appear, sports officials will just not be found or the user groups, those same amateur athletes or their parents will be paying even higher costs to have officials to call their games. Either of these situations could severely impact all Alaska amateur athletic programs.

It is my hope to speak with you on this matter during the Labor & Commerce Committee hearing on April 7, 1998. Please call if you have any questions or if I can help in any way possible.

Sincerely



Bob Walker, President
AASUA, 604-5714



April 1, 1998

Sen. Loren Leman
Chairman, Senate Labor & Commerce Committee
Juneau, Alaska

Re: Senate Bill 349

Dear Senator Leman,

I encourage your help in passing this very important bill as it will effect thousands of athletes state wide.

SB 349 pertains to Unemployment Insurance for Amateur Sports Officials. When we add stipulations onto officials for employment, we lose officials from the ranks. If we have no officials, we will not have legal games for our teams to play.

We then lose teams from our leagues and players from all sports. With nothing to do, idol minds find other things to occupy their time.

Recreational sports are a necessity for a community to survive. Not only large cities but rural communities as well. People have played sports for thousands of years and have had officials calling their games.

Thank you for your time and help in this matter,

ANCHORAGE SPORTS ASSOCIATION



Kent Seibert
Softball/Basketball Director

Author: jwatson@mosquitonet.com (Jerry S. Watson) at CC2MHS1

Date: 4/1/98 4:23 PM

Priority: Normal

TO: Senator Loren Leman at LAA_SLEM

Subject: House Bill #349

Senator Leman:

As president of Farthest North Umpires Association in Fairbanks, I ask for your support of House Bill # 349. The issue here is unemployment compensation being paid by part time amateur sports officials. We all have real jobs, and participate as officials simply for the love of the game. Yes we are compensated for our time, but if you consider the expenses of uniforms, travel, affiliate membership and numerous others, we really do not make much money. We all claim the income on schedule C on our federal tax returns as we should. But if we now have to start withholding unemployment compensation and who knows what else, things become much more difficult.

We have a difficult time recruiting new officials, and this issue will make that job much more difficult. If we cannot recruit a sufficient number of officials, then this becomes a quality of life issue. Many of our contracts involve youth sports, and it simply is not acceptable to make our youth suffer because of a lack of sports officials.

Our Fairbanks association is simply the tip of the iceberg. If we are held liable by the State Department of Labor, then they intend to go after all sports officials organizations in the state.

Again I ask for your support on House Bill # 349.

Thank you for your time.

Sincerely,

Jerry S. Watson
President,

Farthest North Officials Assn.



April 3, 1998

Senator Loren Leman
Alaska State Legislature
Juneau, Alaska
Fax (907) 465-3810

Dear Senator Leman:

A situation is developing that you should be aware of.

Alaska currently has hundreds of amateur sports officials that provide officiating services for school, club and community teams throughout the state. Alaska School Activities Association (ASAA) registers more than 800 sports officials annually so that they may officiate high school interscholastic contests. There are other governing bodies whose affiliates within Alaska serve a similar function.

Traditionally, amateur sports officials receive small stipends for each game that they officiate. To the best of my knowledge, nearly every official holds down a full-time job not related to officiating and does not depend on this stipend as his or her sole source of income.

In the more populous areas of the state, amateur sports officials have formed loose-knit "associations" to handle the scheduling of game assignments. In the less populated areas, schools seek out officials and pay them to officiate interscholastic contests.

A recent case before the Alaska Department of Labor could jeopardize the future of amateur sports officiating throughout the entire state. If these officials are determined to be employees of their "associations" or of the schools that hire them to officiate their contests, then the officials would be eligible for unemployment compensation when the particular sports season concludes. Such a determination would subject the officials "associations" and schools to the additional expenses required of an employer.

Please introduce legislation that will classify amateur sports officials as "independent contractors," not eligible for unemployment compensation.

Please feel free to call me at 563-3723 at your convenience if I may further clarify this matter.

Respectfully,

Gary Matthews
Executive Director



ALASKA SCHOOL ACTIVITIES ASSOCIATION

DATE: 4/3/98

PLEASE DELIVER TO: Senator Lewman

FAX NUMBER: 465-3810

FROM: Gary Matthews

RE: Amateur Sports Officials

PAGES: 2 (including cover)

CONFIDENTIAL: YES NO

FAX MESSAGE

ALASKA SCHOOL ACTIVITIES ASSOCIATION, INC.
 4120 Laurel Street, Suite 102 • Anchorage, AK 99508 • Phone: (907) 563-3723 • Fax: (907) 561-0720

Guy Warren, Past President
Juneau-Douglas Officials Association
4362 Taku Blvd.
Juneau, AK 99801

April 3, 1998

The Honorable Loren Leman
Alaska State Senator, District G
Chair, Senate Labor and Commerce Committee
State Capitol
Juneau, AK 99801-1182

Dear Senator Leman:

I would like to express my appreciation for your prompt scheduling of Senate Bill 349, "An Act exempting services of certain sports officials at amateur sporting events from coverage under the Alaska Employment Security Act." I would urge the committee to work towards advancing the legislation as soon as possible.

Senate Bill 349 represents an opportunity for the Legislature to demonstrate its continued support for amateur athletics in Alaska, and do so at no real additional cost to the citizens of the state.

Many things are needed to provide adequate amateur athletic programs for the people of the state. One of these things is officials. While one might be inclined to berate the officials for every judgment call which goes the other way, I am certain that everybody understands that the officials are a critical part of any sporting contest.

Fortunately for amateur sports in Alaska there are people willing to serve as sports officials. Most, if not all, serve in this capacity because they enjoy participating in athletics, albeit in an unusual fashion. Many receive a small amount of compensation for their efforts, but never enough to even remotely considering making a living out of officiating. The very few who enter officiating for the money rapidly discover that the relatively small amounts received could easily be exceeded working in almost any other endeavor. However, this is not to say that the money paid to officials plays no role whatsoever in the decision to continue officiating. This money helps pay for special uniforms, vehicle expenses, and an occasional offering to the "officiating widow(er)" who has tolerated the official being away for hours at a time, engaging in an activity which would seem to provide so little reward to those outside the officiating community.

Unfortunately, current interpretations of the State and Federal Employment Security laws will work to reduce the small amount of compensation even further, and do so without providing any real benefit to anyone. It has been determined that amateur sports officials fall under the provisions of the Employment Security (Unemployment Insurance)

programs. This is despite the fact, that very few, if any, amateur sports officials engage in officiating as their only (or even most significant) form of employment.

The Legislature has acted on this matter in the past. In 1989, Chapter 100, Section 26 of the Session Laws of Alaska exempted amateur sports officials from these laws.

2

The Legislature has acted on this matter in the past. In 1989, Chapter 100, Section 26 of the Session Laws of Alaska exempted amateur sports officials from these laws. Unfortunately, the Federal Government was not as willing to consider the needs of amateur sports officials, and the Legislature was forced to rescind this exemption in 1990. There is now hope that, with the efforts of the Alaska delegation in Congress and others, the Federal Government may permit this exemption. However, even with congressional action, re implementing this exemption will require action by the Legislature. SB 349 provides this action. SB 349 has also been carefully drafted to not leave the state in non-compliance with federal law if the needed congressional action is not forthcoming.

Considering the costs officials (and indirectly those operating amateur sport programs) would incur being a part of the Employment Security program, the benefits to be received from the program are very insignificant. First, since almost all officials have other occupations, unemployment as an official would be extremely unlikely to trigger the receipt of benefits. Second, since very few officials make any great amount of money in officiating, any benefits that might be received would be trivial.

In conclusion, I would once again like to thank you for scheduling the bill, and hope that the Legislature will be able to take this action to support amateur officials, and amateur sports.

Sincerely,



Guy Warren
Past-President

Juneau-Douglas Officials Association

S B

3 5 3

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SB 353 | _____

Revision Date (Note if correction) _____	Dept. Affected <u>Law</u>
Title <u>An Act relating to property exemptions; and</u>	BRU <u>Civil Division</u>
<u>providing for an effective date.</u>	Component <u>Collections & Support</u>
Sponsor <u>Senate Judiciary Committee</u>	<u>Commercial</u>
Requester <u>Senate Labor and Commerce Committee</u>	Component Serial No. <u>2210/1</u>

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

SB 353 makes numerous changes to Title 9, Chapter 38: the Alaska Exemptions Act. The changes include increasing the homestead exemption, an amount of property that cannot be sold to enforce a judgement, from \$54,000 to \$250,000 for individuals and \$500,000 for married couples.

Passage of this legislation will have no impact on the Department of Law's caseload.

Prepared by Joah M. Kasson
 Division Attorney General's Office

Approved by Commissioner Bruce M. Botelho, Attorney General
 Agency Department of Law

Phone 465-5370
 Date 4/29/98
 Date 4/29/98

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TCN:80750 SCHEDULED FOR:04/28/98 13:30 TO 15:00
PUBLIC HEARING SENATE LABOR & COMMERCE

LTN1150
BY:JNU
FOR:ALL

LOCATION: ANCHORAGE

✓ SB 451	PATRICK	REINHART		TESTIFY
✓ SB 411	DOUG	GRIFFIN	ANS ? ABC BRD	TESTIFY
✓ SB 353	STEVE	GREER		TESTIFY
✓ SB 354	DOUGLAS	BLATTMACHER		TESTIFY
✓ SB 354	RICHARD	THWAITES		TESTIFY

LOCATION: FAIRBANKS

✓ WELLS BOARD: P MS.	PATRICIA	PEIRSOL		TESTIFY
✓ BOARD, CHARLIE MR.	CHARLES	PARR		TESTIFY
✓ SB 353 MR.	MIKE	KRAMER		TESTIFY
✓ SB 354 MR.	RICH	HOMPESCH		TESTIFY

Linda

Holbert

Alaska State Legislature

Chairman,
Judiciary Committee

Member,
Resources Committee
Rules Committee
Committee on Committees



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Senator Robin L. Taylor
Senate Majority Leader

SPONSOR STATEMENT

SB 353

This bill seeks to update the exemptions which are presently allowed Alaska residents for a family home and insurance. With respect to the homestead exemption, Alaska last amended its homestead exemption in 1988. Several states; Florida, Iowa, Kansas, Texas, and South Dakota, grant their citizens an unlimited homestead exemption, while many other states provide that real property held as "tenants by the entirety" is exempt from creditor claims. Thus, 28 states grant their citizens greater homestead protection than that given to Alaska residents.

This bill, although not granting an unlimited exemption for the family home, would at least put the family home on par with the new federal income tax capital gain exclusion. Given the growing popularity of trusts as estate planning tools, a section is added to give individuals who have their assets placed in the name of a trust, the same protection that would exist had the assets been in the individuals' own names. This would apply only to those trusts where the trust income is still taxable to the grantor.

In addition the bill adds three new exemptions. First, for the reserves set aside for condominium associations. Second, a limited exemption for annuities. Third, an exemption for the new Roth IRA.

The exemption provided for condominium reserves is meant to protect the many individuals who reside in condominiums in Alaska. The bill assures them that the money which they have paid in the form of monthly dues will continue to be used for the purposes for which they were intended, i.e., ongoing maintenance and repairs.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

This bill would protect insurance policies and their related cousin, annuities (up to \$100,000) from unforeseen financial disasters. It should be noted that the states of Alabama, New York, Florida, California, Missouri, New Mexico, North Carolina, Oregon, and Texas have seen fit to give its citizens an unlimited exemption for insurance policies.

S B

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SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 4/14/98

FURTHER: Judiciary

Date of 5-Day Notice: 4-23-98
 (in accordance with Uniform Rule 23)

DATE TURNED
 IN TO OFFICE: 4-29-98

Labor and Commerce Committee considered

SENATE BILL NO. 354

"An Act relating to wills, intestacy, nonprobate transfers, and trusts; and amending Rule 24, Alaska Rules of Civil Procedure."

and recommends:

be replaced with _____ CS _____ (_____)

adopt previous _____ CS _____ (_____)

attached amendment(s)

adopt Letter of Intent by _____ Committee

further referral to the _____ Committee

Senate Bill:
 same title
 new title
House Bill:
 same title
 technical title
 new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
<i>[Signature]</i>		<i>[Signature]</i>	✓		
		<i>[Signature]</i>	✓		
CHAIR: <i>[Signature]</i>	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

Law	4/14/98	✓	

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SB 354

Revision Date (Note if correction) _____ Dept. Affected Law
 Title An Act relating to wills, intestacy, nonprobate BRU Civil Division
transfers, and trusts; and amending Rule 24 ... Civil Procedure. Component Commercial
 Sponsor Senate Judiciary Committee
 Requester Senate Labor and Commerce Committee Component Serial No. 2211

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

SB 354 amends various sections of the Uniform Probate Code. The bill adds a new section, AS 13.06.068, primarily dealing with which state's laws will be applicable to testamentary dispositions of both real and personal property. Sections 1 through 8, 18 and 19 of the bill correct inconsistencies regarding choice of law throughout the Uniform Probate Code. The remainder of the bill largely deals with trust administration. In particular, Section 12 adds new sections to Article 3 which deal with the duties and liabilities of trustees.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by Joan M. Kasson
 Division Attorney General's Office
 Approved by Commissioner Bruce M. Botelho, Attorney General
 Agency Department of Law

Phone 465-5370
 Date 4/29/98
 Date 4/29/98

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Senator Robin L. Taylor
Senate Majority Leader

SPONSOR STATEMENT

SB 354

THE ALASKA TRUSTS ACT

This bill is a companion bill to House Bill 196. It puts finishing touches on the Alaska Trust Act passed in 1997 by taking common law and codifying it into statute. In writing the trust document, people who write trusts for Alaska, will be able to include references to the statutes as opposed to having to individually list all the provisions in the trust document.

SB 354 makes a number of important improvements to Alaska's estate and trust laws. Section 1-8, 18, and 19 of the bill change Alaska law to permit a person who is domiciled outside of Alaska to select Alaska as the jurisdiction for the probate of their estate. This provision should bring significant business to our state.

Sections 9 and 10 of the bill allow a person to limit the liability of a trustee in their trust when more than one trustee is serving. The person could provide that only the trustee who exercises a power will be held liable for its actions and that the other trustee who did not participate in the exercise of the power would not be held liable. This provision will encourage trustees in Alaska to work with other trustees of the same trust.

Portions of the Uniform Trusts Act (draft 1997) which clarifies many issues involving the administration of trusts in Alaska is included in Section 11 of the bill.

District A:

Hyder • Ketchikan • Kupreanof • Meyers Chuck • Petersburg • Saxman • Sitka • Wrangell

Section 12 protects an Alaska trustee who in good faith defends an Alaska trust from the claims of a creditor who seeks to set the trust aside. If the trustee acts in good faith, then the trustee gets a first lien on all trust assets for payment of its fees, costs and attorneys' fees. Delaware has adopted a similar provision to protect its trustees.

Section 13 allows a trustee who has the power to invade the corpus of a trust to appoint the assets of the trust to another trust for the beneficiaries to postpone estate and similar taxes. This provision would allow a trustee to move a trust to Alaska and to appoint the assets to an Alaska trust.

Section 14 clarifies that a trust created in another state or country can be moved to Alaska even though the trust was settled before the Alaska Trust Act was passed last year.

Alaska does not have a statutory provision that sets out the powers of a trustee. Sections of the Uniform Trustee's Powers Act (draft 1994-1997) is enacted in Section 16 of the bill. These statutory powers would supplement the powers set forth in a trust agreement.

A number of miscellaneous provisions are included elsewhere in the bill. Section 15 allows a person to include a penalty clause in their trust. Section clarifies the accounting of bond premiums and discounts. Section 20 amends AS 34.40.110(d) to be consistent with the Uniform Fraudulent Transfers Act (HB321 currently in Senate Rules). Section 21 precludes an action by creditors of the grantor of the trust against those who assist in the creation of the trust.

This bill will improve our estate and trust laws and will make Alaska's laws more favorable to our residents. In addition, the bill will make our laws more attractive to people outside of Alaska who are considering Alaska for the administration of their estates and trusts.

Overview of legislation affecting trusts and other financial services in Alaska

Various bills have been introduced, both last year and this year, to enable Alaska to develop a National and International financial services industry as well as provide unique wealth management and estate planning opportunities for individual Alaskan and non-Alaskan residents. These bills, both enacted and proposed, provide opportunities for Alaska and Alaskans with virtually no downside.

The first legislation was House Bill 101, enacted on April 1, 1997. This Act was the first step in an effort to expand business opportunities for Alaskans and Alaskan businesses. House Bill 101 allowed for perpetual trusts and self-settled spendthrift trusts. This legislation has provided for unique estate planning opportunities for all Americans. There have been over (50) articles featured in national publications discussing this Alaska legislation. This exposure has resulted in many trusts being established here in Alaska.

The second legislation was House Bill 266, effective July 1, 1997. This legislation took advantage of the changes that the Internal Revenue Service made regarding Limited Partnerships and Limited Liability Companies. House Bill 266 has changed certain provisions enabling Alaska Limited Partnerships and L.L.C.'s to be most effective from a wealth management and estate planning perspective. Many Alaskan Trusts are funded using these L.P. and L.L.C.'s.

This year additional legislation has been proposed to strengthen Alaska Trust laws and provide for additional opportunities for Alaska financial service providers, Alaska residents, and non-Alaska residents.

HOUSE BILL 199 is designed to allow Alaskans, as well as those Americans residing in states that do not have community property laws, to have the voluntary option of selecting a portion of their assets to be considered community property. This can provide significant income tax savings to a family when the first spouse dies. Thus, allowing for additional trusts to be established in Alaska.

HOUSE BILL 196 is designed to clarify many of the common law provisions regarding trusts. These changes will make Alaska an even more favored jurisdiction for Alaskans and non-Alaskans to have their trusts administered here in Alaska. HB196 provides clarification to House Bill 101 to make this legislation more advantageous for individuals to establish trusts in Alaska.

HOUSE BILL 321 makes changes to the fiduciary standards that trustees have in the investment of trust assets. This legislation provides for more flexibility for the trustee in making investments, as well as more accountability to the beneficiaries by incorporating modern portfolio theory. This legislation coincides well with House Bill 101 and 199 in that it incorporates additional flexibility and standards for trustees.

PREMIUM TAX LEGISLATION is designed to make Alaska the premier jurisdiction for large insurance policies to be issued. By reducing the premium taxes on large insurance policies, Alaska will become the most competitive state to have insurance policies written. This should be a significant advantage to the Alaska insurance industry. By allowing a reduction in premium tax, Alaska will become more attractive for individuals to establish Alaska Trusts (HB101) using large insurance policies. This legislation should generate additional revenue to the state of Alaska in that without this legislation these large policies would not be issued in Alaska.

SECURITY EXEMPTION This proposed legislation would make Alaska Limited Partnerships and LLC's more attractive by changing those securities that have to be registered. IRS regulations require that if a security has to be registered under state law, it is considered a tax shelter and must use the accrual method of accounting. For many individuals forming LLC's or L.P.'s, using the cash method of accounting is much more attractive and economical. This legislation makes it effective for non-Alaskans to use Limited Partnerships and LLC's.

Under current law, even if all of the partners are non-Alaskans and no transactions occur in Alaska, the partnership must still be registered in Alaska even though it is exempt under the security laws where the partners reside. Our research indicates that Alaska is the *only* state that has this onerous requirement. The proposed change would not require registration in Alaska if a sale does not occur within Alaska.

Also under current law, Alaska exempts registration only if there are less than (10) investors and the offering amount is less than \$100,000. The proposed change would bring Alaska in line with other state registration requirements. The proposal is: if there are less than (10) investors, the offering can be an unlimited amount. This is similar to other proactive states. For example: In New Jersey, less than (10) investors allows an unlimited amount; Indiana, less than (15) allows an unlimited amount; Massachusetts, less than (25); Florida, less than (35); and in New York, if it is a non-public offering, there is no limit on the number of investors. Federal law would still apply where appropriate.

By making these changes, the use of Alaska Limited Partnerships should increase significantly, thus enhancing the use of Alaska Trusts (HB 101).

These pieces of legislation have the ability to compliment the overall focus of trying to give Alaskans the best advantage for wealth management as well as trying to develop the financial services industry.

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Executive Summary

On

HB101, HB266, HB196, HB199, HB321 and other Proposed Legislation

Several bills which have been introduced in the Legislature, two of which were passed in 1997, and two more of which are about to be introduced, all relate to the common goal: Attempting to make Alaska a greater financial center.

HB101, which became effective in 1997, is the Alaska Trust Act. It made Alaska the best jurisdiction in the United States in which to create a trust. Shortly after Alaska passed the Alaska Trust Act, Delaware enacted a similar measure. The Delaware Act, however, has certain drafting errors, most or all of which are expected to be cured in this year. The Alaska Trust Act has resulted in business from individuals residing in other states for Alaska banks, trust companies, attorneys, accountants and others. A request for ruling is pending before the Internal Revenue Service relating to the estate planning benefits of using Alaska trusts, compared to those created in any other American jurisdiction. If and when that ruling is issued, it is expected that it will even more greatly increase trust business in our State.

HB266 revised the Alaska limited partnership and limited liability company laws. It became effective in 1997. It also makes Alaska the most desirable jurisdiction in the country within which to create limited partnerships and limited liability companies for certain tax and estate planning purposes. Several individuals outside of Alaska have now created such entities within the State. This has resulted in fees to the State which otherwise would not have been received and work for professionals. Unfortunately, the unique Alaska security rules (known as "Blue Sky Laws") have inhibited the use of these entities to a significant extent. These rules are more cumbersome and complicated than those in other states, such as Delaware and New York. A new bill is expected to be introduced to bring Alaska's Blue Sky Laws in line with those of other states. It is expected that significant new business will be brought to the state in a way of the creation of limited liability companies and limited partnerships if any when that proposal is enacted.

HB199, known as the Alaska Community Property bill, will allow married Alaskans to elect to have their property treated as community property. This will provide Alaskans with certain income tax benefits now enjoyed by residents only of the nine current community property states in America. In addition, Alaska will be the first state to permit married couples from another state to be able to create community property by creating a Community Property Trust, in Alaska. The income tax benefits to a married couple can be so significant when the first spouse dies that it is expected that significant business will be brought into our State from outside.

HB196, entitled the Omnibus Estate and Trust Improvement Act, will make several changes to laws relating to Will and trust matters. It will modernize the laws of our state, simplify the administration of trusts and is important companion legislation to the matters which have been or will be enacted by other measures.

HB321, would result in the adoption in Alaska of the Prudent Investor Act, which has been enacted by approximately one-half of the other states. This important uniform act reflects modern portfolio theory, allowing trusts to be more efficiently managed, potentially producing higher returns and greater financial benefits for the beneficiaries of Alaska trusts.

Another proposal would reduce the state tax on premiums paid on life insurance (and, perhaps, other insurance). Alaska has a relatively high state premium tax (2.7%). (South Carolina's is only 72/100 of one percent.) There are income tax advantages of investing in life insurance. Many wealthy individuals are investing significant funds in these products. To avoid any state premium tax individuals are acquiring the insurance outside of America. Virtually no Alaskan pays more than \$50,000 per year in life insurance premiums. The proposed legislation would provide that the premium tax would continue to apply at 2.7% on premiums of up to \$100,000 per year but only 1/10 of one percent on amounts above that. Based upon discussions with wealthy individuals who intend to invest in life insurance, it is very likely they would prefer to acquire their insurance in Alaska (paying 1/10 of one percent premium tax on amounts above \$100,000 per year) rather than going offshore (and paying no state premium tax). Not only will this result in new business in our State it will increase State revenues.

As will be discerned, the legislation enacted, pending bills and proposed bills are designed to enhance financial services business in the State. It can be expected that additional measures will be proposed in the future.

TRUSTS ACT

(5) *Applicability of the Act.*

The statute does not apply to trusts in existence when it goes into effect, but only applies to testamentary trusts created by wills or codicils executed after the effective date of the Act and to living trusts created thereafter.

The subject of a common trust fund statute is left to be dealt with separately, in view of the pending regulations of the Federal Reserve Board.

General Statutory Notes

Louisiana. The Louisiana Trust Code contains numerous sections (see table, supra) which constitute a substantial adoption of the major provisions of the Uniform Act. However, these sections contain many variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

North Carolina. Adds sections as follows:

"§ 36A-63. Funds held by a bank awaiting investment or distribution.

"(a) Funds held in a fiduciary capacity by a bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

"(b) Funds held in trust by a bank, awaiting investment or distribution may, unless prohibited by the instrument creating the trust, be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 142-31 as being eligible for the investment of the sinking funds of the State of North Carolina equal in market value of such deposited funds, or readily marketable commercial bonds having not less than a recognized 'A' rating equal to one hundred and twenty five percent (125%) of the funds so deposited.

"The securities so deposited or securities substituted therefor as collateral in the trust department by the commercial or savings or other department (as well as the deposit of cash in the commercial or savings or other department by the trust department) shall be held pursuant to the provisions of G.S. 53-43(c).

"If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of cash

trust which are not fully insured under the provisions of that corporation."

"§ 36A-64. Loan to trust.

"A trustee may make a loan to a trust account and make take as security therefor assets of the trust account provided that such transaction is fair."

"§ 36A-65. Trustee loaning from one trust to another trust.

"A trustee may make a loan to a trust account from the funds belonging to another trust account, when the instrument creating the account from which the loan is made (i) authorizes the making of such loan and (ii) designates the trust account to which the loan is made, provided that the transaction is fair to both accounts."

"§ 36A-71. Bank and trust company assets kept separate, records of securities.

"Every trust company shall keep its trust assets separate and distinct from assets owned by the bank. The books and accounts of the trust company shall at all times show the ownership of all moneys, funds, investments, and property held by the company. Stock or other securities may be kept by the company in either of the following ways:

"(1) All certificates representing the securities of an account may be held separate from those of all other accounts, or

"(2) Certificates representing the securities of the same class of the same issues held for particular accounts may be held in bulk without certification as to ownership attached and, to the extent feasible, certificates of small denomination may be merged into one or more certificates of larger denomination, provided that the trust company, when operating under the method of safekeeping security certificates described in this subdivision shall be subject to such rules and regulations as, in the case of State-chartered institutions,

TRUSTS ACT

the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency, may from time to time issue and, upon demand by any person to whom it has a duty to account, it shall certify in writing the securities held by it for an account".

"§ 36A-73. Powers exercisable by one or more trustees.

"(a) If there are more than two trustees and the trust instrument expressly makes provision for the execution of any of the powers of trustees by all of them or by any one or more of them, the provisions of the trust instrument govern.

"(b) If there is no governing provision in the trust instrument, trustees may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county which is the principal place of administration of the trust, provide that any one or more of the following powers of trustees may be exercised by any designated one or more of them:

"(1) Open bank accounts and draw checks thereon;

"(2) Subject to the provisions of G.S. 105-21, enter any safe-deposit box of the deceased or any safe-deposit box rented by the trust;

"(3) Employ attorneys and accountants;

"(4) List property for taxes and prepare and file State, municipal and county tax returns;

"(5) Collect claims and debts due the trust and give receipts therefor;

"(6) Pay claims against the debts of the trust;

"(7) Compromise claims in favor of or against the trust;

"(8) Have custody of property of the trust.

"For the purposes of this subsection, when there are trustees, the principal place of administration of the trust is (i) the usual place of business of the corporate trustee if there is but one corporate trustee,

or, (ii) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate trustee, and (iii) the usual place of business or residence of any of the trustees as agreed upon by them.

"(c) The voting of corporate shares of stock by trustees is governed by G.S. 65-49(f).

"(d) Subject to the provisions of subsections (a), (b) and (c) of this section, all other acts and duties must be performed by both of the trustees if there are two, or by a majority of them if there are more than two.

"No trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of his co-trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of such joinder.

"(e) No trustee shall be relieved of liability on his bond or otherwise by entering into any agreement under this section."

Oklahoma. The Oklahoma Trust Act contains numerous sections (see table, supra) which constitute a substantial adoption of the major provisions of the Uniform Act. However, these sections contain many variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

Texas. L. 1983, chapters 576 and 547, repealed numerous sections (Vernon's Ann. Civ. St. arts. 7426b-1 to 7426b-24) which formerly constituted a substantial adoption of the major provisions of the Uniform Trusts Act, and enacted provisions entitled the Texas Trust Code (V.T.C.A. Property Code §§ 111.001 to 116.017). While the new Texas Trust Code contains some provisions which are similar to the Uniform Trusts Act, it does not constitute a substantial adoption of said act.

UNIFORM TRUSTS ACT

An Act concerning trusts and trustees and to make uniform the law with reference thereto.

1937 ACT

Section

1. Definitions.
2. Bank Account to Pay Special Debts.
3. Loan of Trust Funds.
4. Corporate Trustee Depositing Trust Funds with Self.
5. Trustee Buying from or Selling to Self.
6. Trustee Selling from One Trust to Another Trust.
7. Corporate Trustee Buying Its Own Stock.
8. Voting Stock.
9. Holding Stock in Name of Nominee.
10. Powers Attached to Office.
11. Powers Exercisable by Majority.
12. Contracts of Trustee.
13. Exoneration or Reimbursement for Tort.
14. Tort Liability of Trust Estate.
15. Withdrawals from Mingled Trust Funds.
16. Unenforceable Oral Trust Created by Deed.
17. Power of Settlor.
18. Power of Beneficiary.
19. Power of the Court.
20. Liabilities for Violations of Act.
21. Uniformity of Interpretation.
22. Short Title.
23. Severability.
24. Repeal.
25. Time of Taking Effect.

Be it enacted . . .

§ 1. (Definitions)

As used in this Act unless the context or subject-matter otherwise requires:

1. "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons having a joint or common interest.
2. "Trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee.
3. "Relative" means a spouse, ancestor, descendant, brother or sister.
4. "Affiliate" means any person directly or indirectly controlling or controlled by another person, or any person under direct or indirect

TRUSTS ACT

§ 1
Note 2

common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.

5. "Trust" means an express trust only.

Action in Adopting Jurisdictions

Variations from Official Text:

Nevada. In subsec. (2), insert "means the person holding property in trust and" following "Trustee".

New Mexico. In subsec. (2), add "and executor, administrator, guardian, conservator, agent and a trustee of an inter vivos or testamentary trust;" at the end thereof.

Library References

Trusts ⇨
C.J.S. Trusts §§ 8, 30.

Notes of Decisions

Construction of trust 6
Corporation as trustee 7
Pleadings 8
Retroactive effect 1
Trusts

Generally 2
Constructive trusts 3
Resulting trusts 4
Spendthrift trusts 5

1. Retroactive effect

Texas Trust Act which was enacted in 1843 had no application to transaction which occurred in 1836 and which allegedly involved a parol trust. *Garcia v. Garcia De Ortiz*, Tex. Civ. App. 1918, 267 S.W.2d 804.

The 1913 trust act did not operate retroactively so as to bar parol evidence of trust arising before its passage, notwithstanding that trial was held thereafter. *Bisford v. Snyder*, 1946, 189 S.W.2d 471, 144 Tex. 134.

2. Trusts—Generally

Testamentary trust providing that the remainder of trust, both income and principal, be administered by trustees for the "care and treatment of needy crippled children of Oklahoma County, Oklahoma," to be selected by trustees, sufficiently established that class to be benefited thereby. *Wilkin v. Wilkin Trust*, D.C.Okla. 1966, 201 F.Supp. 977.

Where title to trustor's condominium, which under terms of trust agreement was to be distributed to named beneficiary upon

trustor's death, was not given trustee before trustor's death, condominium did not become a part of trust estate. *Dahlgren v. First National Bank of Nevada*, 1978, 580 P.2d 478, 94 Nev. 387.

Where testamentary trust specified beneficiaries who were to take trust corpus at trust termination, trust did not fail to specify principal beneficiaries so as to result in such disposition of corpus to beneficiaries at trust termination being characterized as an invalid substitution. *Succession of Materiale*, La. App. 1973, 273 So.2d 617.

No particular language is required to create a trust and it suffices if the instrument as a whole reflects intent to establish a trust relationship. *St. Charles Land Trust, Achille Culbet v. St. Amant*, 1968, 217 So.2d 385, 253 La. 245.

3. — Constructive trusts

Constructive trust is a remedial device by which holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it. *Lacken v. Lacken*, 1982, 650 P.2d 903, 98 Nev. 362.

Constructive trust will arise and affect property acquisitions under circumstances where confidential relationship exists between parties, retention of legal title in a holder thereof against another would be inequitable, and the existence of such a trust is essential to the effectuation of justice. *Id.*

Where oral agreement provided that father was to make certain improvements

upon property, and after patent was granted son was to convey the property to father, but son subsequently refused to convey the property as agreed, imposition of constructive trust upon the land was appropriate, since confidential relationship existed between father and son, detention of legal title by son would be inequitable, and the assistance of the trust was essential to the effectuation of justice. *Id.*

Evidence in action brought by father against son for declaration of constructive trust in land sustained finding that parties orally agreed that father would make certain improvements upon the property, and after patent was granted, son would convey the property to father. *Id.*

Proper basis for impressing constructive trust is to prevent unjust enrichment. *G & M Motor Co. v. Thompson*, Okl. 1977, 567 P.2d 80.

In impressing constructive trust it is not necessary for plaintiff to have suffered any loss or suffer loss as great as benefit of defendant. *Id.*

Proof of circumstances warranting imposition of constructive trust must be by clear and convincing evidence. *Randono v. Turk*, 1970, 485 P.2d 218, 88 Nev. 129.

Imposition of constructive trust on 520 acres of realty was authorized on findings that confidential relationship existed between real estate salesman and husband and wife he advised concerning their investments. That salesman had fraudulently induced couple to give him \$3,984.14 toward purchase of 320 acres of land at \$20 an acre, which in fact was purchased for \$11 an acre, and that salesman failed to disclose purchase of additional 200 acres with money couple advanced. *Id.*

Where land was jointly purchased to be held for six months and then resold in small parcels, transaction constituted a joint adventure and joint adventurers who had been fraudulently induced to advance funds were entitled to imposition of constructive trust on property other adventurer had purchased in his own name. *Id.*

Parol evidence is admissible to prove facts and circumstances constituting fraud from which constructive trust arises. *Id.*

A constructive trust will arise whenever the circumstances under which property was acquired makes it inequitable that it should be retained by him who holds the legal title, as against another, provided some

confidential relationship exists between the two and provided the raising of the trust is necessary to prevent a failure of justice. *Schmidt v. Merriweather*, 1966, 418 P.2d 991, 82 Nev. 872.

Where father was an old man, very ill and suffering from hallucinations when son acquired title to property in dispute, and there was no evidence of consideration given by son and his wife to the father for the transfer, and son's dealings clearly deprived his sister, the only other heir of father and mother, of any share in their property a constructive trust as to such property could be found to have resulted in favor of the daughter. *Id.*

Trust Act did not apply where if plaintiffs were entitled to recover it was under theory of constructive trust. *Consolidated Gas & Equipment Co. of America v. Thompson*, Tex. Civ. App. 1966, 897 S.W.2d 260, reversed on other grounds 465 S.W.2d 838.

4. — Resulting trusts

Contract for sale of realty created, not an "express trust", but a "resulting trust" by operation of law, such being ordinarily the case where a conveyance places the legal title in one and the equitable estate in another. *Leady, Ellis County Fair Ass'n*, 1941, 110 P.2d 1099, 188 Okl. 849.

5. — Spendthrift trusts

A spendthrift trust may be created only for a person or persons other than the settlor. *Ambrose v. First National Bank of Nevada*, 1971, 482 P.2d 828, 87 Nev. 114.

6. Construction of trust

With respect to testamentary trust clause providing that share, of any specified nephews and nieces by marriage who die, in income and corpus of trust was to be divided among the survivors, where plausible interpretation existed which would not result in creation of successive principal beneficiaries and which rather was that the provision was only intended to create successive income interests, such provision would not be deemed to have created successive principal beneficiaries so as to result in a prohibited substitution. *Succession of Materiate*, La. App. 1973, 273 So.2d 617.

When it can reasonably be said court will construe trust instrument so as to sustain the validity of the trust. *St. Charles Land Trust, Achille Guibet v. St. Armand*, 1968, 217 So.2d 885, 263 La. 243.

7. Corporation as trustee

A corporation may act as trustee for real and personal property when its charter power confers such right upon the corporation, and the corporation is organized under a statute permitting it to act as trustee. *Port Arthur Trust Co. v. Mukdrow*, 1956, 291 S.W.2d 312, 166 Tex. 612, 60 A.L.R.2d 813.

8. Hearings

Texas Trust Act was inapplicable to agreement where Act had not been pleaded affirmatively as a defense by any party as required by Vernon's Ann. Rules Civ. Proc. rule 94. *Bradley v. Bradley*, Tex. Civ. App. 1978, 640 S.W.2d 608.

§ 2. [Bank Account to Pay Special Debts]

1. Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

2. If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor.

Action in Adopting Jurisdiction

Variations from Official Text:

Nevada. Omits this section.

North Dakota. Section 2 of the Uniform Act is contained in sections 66-4-7 and 66-4-8 of the North Dakota Act.

Library Reference

Trusts 4-34(1 to 4), 69(1).
C.J.S. Trusts 59 54, 88.

§ 3. [Loan of Trust Funds]

Except as provided in Section 4, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any non-corporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate.

Action in Adopting Jurisdiction

Variations from Official Text:

North Carolina. Inserts "or other business associate" following "or an affiliate"; and inserts "affiliate," following "partner."

Library References

Trusts \Rightarrow 222, 231(1).
C.J.S. Trusts \S 248, 269 et seq.

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constituted illegal self-dealing even if cash balances in trustee's accounts never fell below amounts owing from their accounts to the trustee, and trustee's estate was liable for interest on average amounts owing in each of years in question. *Id.*

5. Liability of trustee

Where letters and instruments delivered to trustee bank by adult beneficiary of revocable trust established the beneficiary's consent, acquiescence, ratification, and release of the acts of the trustee bank in making loans from the trust to entities owned and controlled by the beneficiary and to persons associated with the beneficiary, trustee bank was not liable to the beneficiary for alleged failures to perform discretionary functions in making the loans. *Burnett v. First Nat. Bank of Waco, Texas, Tex. Civ. App. 1976, 638 S.W.2d 800, error refused n.r.e.*

It is incumbent upon the trustee to put trust funds to productive use and the failure to do so within a reasonable period of time can render the trustee personally chargeable with interest. *Langford v. Shamburger, Tex. Civ. App. 1967, 417 S.W.2d 438, error refused n.r.e.*

That trust beneficiary purportedly had knowledge of trustee's failure to invest trust funds did not relieve trustee from liability in view of fact that there was a fiduciary relationship rather than an arm's length transaction. *Id.*

6. Admissibility of evidence

Evidence that beneficiary of trust had been sued in two other cases in which judgments had been taken against him, that his grandfather who had created trust had made numerous gifts to him and members of his family, that he had taken an airplane trip to some half a dozen countries, that he had purchased an expensive sports car and camera and had an expensive lake house should have been excluded on motion in limine for its exclusion in suit against trustee for an accounting, interest on uninvested trust funds and allegedly commingled trust proceeds in view of, inter alia, fact

that beneficiary had stipulated that he would not make any contention against trustee for advancing sums to pay for such judgments. *Langford v. Shamburger, Tex. Civ. App. 1967, 417 S.W.2d 438, error refused n.r.e.*

7. Instructions

Since, in suit brought by successor trustee of employee profit-sharing plan and trust against the former trustee of the plan and trust, all of plaintiff's theories of recovery as set out in its petition were

based on the negotiating, approving and granting of an alleged loan by defendants to their employer on or about March 20, 1969, the trial court, in asking the jury in a series of liability issues if the defendant had approved certain specified documents on or about March 20, 1969, submitted issues not supported by the written pleadings and committed reversible error in doing so over defense objections. *Rosenthal v. Texas Bank & Trust Co., Tex. Civ. App. 1974, 614 S.W.2d 127, error refused n.r.e.*

§ 4. [Corporate Trustee Depositing Trust Funds with Self]

1. A corporate trustee which is subject to regulation and supervision by state or federal authorities may deposit with itself trust funds which are being held necessarily pending investment, distribution, or the payment of debts, provided it pays into the trust for such deposit such interest as it is required by statute to pay on uninvested trust funds, or, if there be no such statute, the same rate of interest it pays upon similar non-trust deposits, and maintains in its trust department as security for all such deposits a separate fund consisting of securities legal for trust investments and at all times equal in total market value to the amount of the deposits. But no such security shall be required to the extent that the deposit is insured or given a preference by any state or federal law.

2. The separate fund of securities shall be marked as such. Withdrawals from or additions to it may be made from time to time, as long as the required value is maintained. The income of such securities shall belong to the corporate trustee. In all statements of its financial condition published, or delivered to (the state banking department), such corporate trustee shall show as separate items the amount of trust funds which it has deposited with itself and the amount of securities which it holds as security for the payment of such deposits.

Action in Adopting Jurisdiction

Variations from Official Text:

Nevada. In subsec. (1), substitutes "may" for "shall" in last sentence.

In subsec. (2), substitutes "must" for "shall" in first sentence and "belongs" for "shall belong" and "administrator of financial institutions, the" for "state banking department, such" in second sentence.

North Carolina. Omits this section.

South Dakota. Section 4 of the Uniform Act is contained in sections 66-4-11 and 66-4-12 of the South Dakota Act.

Virgin Islands. In subsec. (1), substitutes "territorial" for "state" in both instances.

Library References

Trusts \Rightarrow 221.
C.J.S. Trusts \S 273.

§ 5. [Trustee Buying from or Selling to Self]

No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate.

Action in Adopting Jurisdictions

Variations from Official Text:

Nevada. Adds "of a trustee, except with the approval of the district court having jurisdiction of the trust estate and of the accounting thereof." at the end of the section.

South Dakota. Section reads: "No trustee, unless expressly authorized by the trust instrument, shall directly or indirectly lease, buy or sell and property for the trust from or to itself or an affiliate; or from or

to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate. Notwithstanding this provision or any statute to the contrary, a trustee may lease, purchase or sell property from or to the trust he represents as trustee if specifically authorized to do so by a decedent's will or the instrument creating the trustee relationship, including the establishment of a trust service office as provided by chapter 61-10."

Library References

Trusts §§231(1 to 3).
C.J.S. Trusts §§ 249, 249, 251.

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1. Purpose

The purpose of this section is to clarify and strengthen rules regarding loyalty by a trustee to the interests of his cestui que trust. *Wachovia Bank & Trust Co. v. Johnston*, 1967, 163 S.E.2d 449, 268 N.C. 701.

2. Generally

Fact that trustees of public trust were all employees of corporation that would be single largest user of trust's pollution control facilities did not render trust void. *Shipp v. Southeastern Oklahoma Industries Authority*, Okl.1972, 494 P.2d 1395.

Trustor may relieve a trustee of all duties, restrictions, and liabilities imposed by law except for loan of trust funds, deposit of trust funds within the corporate trustee, and trustee's buying or selling from or to itself. *Corpus Christi Nat. Bank v. Gerdes*, Tex.Civ.App.1977, 651 S.W.2d 621, error refused n.r.e.

Trustee shall not buy or sell, directly or indirectly, any property belonging to trust estate, from or to himself, and such self-dealing transactions may be attacked by beneficiary even though he has suffered no damages and even though trustee has acted in good faith. *Harvey v. Casbeer*, Tex.Civ.App.1975, 631 S.W.2d 208.

That trustee who declined to allow settlor income beneficiary to purchase home loan a trustee with funds from trust, per-

mitted home to be placed in trust after settlor purchased it with donation received from settlor's mother did not constitute "self-dealing" on part of trustee. *Holladay v. Fidelity Nat. Bank of Baton Rouge*, La.App.1976, 312 So.2d 883.

Purpose of trust is administration of property for sole benefit of beneficiary and powers and duties of trustee arising by law or under trust instrument must all serve that end and can only be modified to extent that they would not cause an abrogation of purpose of the trust. *Succession of Simpson*, La.App.1976, 811 So.2d 67, writ denied 313 So.2d 889.

Trustee in fiduciary who is in confidential and influential position in relation to beneficiary to whom he owes the highest loyalty. *Id.*

3. Capacity as trustee

Refusal to award damages for self-dealing on part of trustee was not error where whatever breach of fiduciary duty trustee committed was in his capacity as director of corporation and not in his capacity as trustee and trustee did not self-deal with trust property, shares in corporation, but rather with corporation's property, monies used to purchase insurance for trucks. *Adam v. Harris*, Tex.Civ.App.1978, 661 S.W.2d 162, error refused n.r.e.

4. Trust provisions, authorization by

Trustee was not guilty of improper self-dealing or mismanagement in lending money to trust and then using funds to purchase three notes from another related trust it administered where trust agreement gave trustee power to transfer, assign, sell and convey real or personal property constituting the trust estate upon such terms and for such consideration as in the exclusive judgment of trustee may seem to be in the best interest of the trust estate and in its full discretion, to do and perform any and all acts necessary or convenient in handling of trust property. *Burnett v. First Nat. Bank of Waco*, Tex.Civ.App.1978, 667 S.W.2d 873, error refused n.r.e.

Provision in will that trustee of testamentary trust were to have powers of management which were to be exercised as if trustee were the owners in fee simple was no more than a direction that the powers actually granted were to be unfettered and executors, who were empowered with the same general authority granted the trustee, derived no authorization from the

will to make an sale of the estate's property to themselves, either directly or indirectly. *Furr v. Hall*, Tex.Civ.App.1977, 653 S.W.2d 666, error refused n.r.e.

5. Court authorization

Recognizing and reaffirming the stern rule of equity that a trustee cannot be both vendor and vendee, there are rare and justifiable exceptions when the court, in the exercise of its inherent equitable powers, may authorize a purchase of trust property by the trustee, upon full findings of fact that (1) complete disclosure of all facts was made by the trustee, (2) the sale would materially promote the best interests of the trust and its beneficiaries, and (3) there are no other purchasers willing to pay the same or a greater price than offered by the trustee. *Wachovia Bank & Trust Co. v. Johnston*, 1967, 163 S.E.2d 449, 268 N.C. 701.

6. Judicial sale

Where trustee, who held life estate in trust for life tenant, foreclosed a lien and bid in property after foreclosure judgment which represented both principal and interest, resulting trust arose in favor of life tenant in extent of her proportionate interest in the judgment. *San Antonio Loan & Trust Co. v. Hamilton*, 1965, 283 S.W.2d 19, 186 Tex. 52.

Where six of seven beneficiaries of testamentary trust elected, pursuant to permission granted in codicil, to withdraw their respective interests from trust and brought a partition suit for such purpose, wherein trust property, consisting of mixed realty and personally, was ordered sold by a receiver appointed by court at public sale to be held at specified time and place after public notice, authorizing trustees who were also beneficiaries of trust to purchase trust property individually at such sale did not violate this article. *Furr v. Furr*, Tex.Civ.App.1962, 251 S.W.2d 927, error refused n.r.e.

7. Acquiescence of beneficiary

Where one purchaser on his own account that which his duty or trust requires him to sell on account of another, or purchases on account of another that which he sells on his own account, the law will avoid the transaction at the instance of the cestui que trust, even though sale was without fraud, property was sold for its full value, and no actual injury to his interests is proven, but

such sale is not void but voidable only, and if cestui que trust acquiesces, sale is binding on him. *Cobb v. Newman*, 1949, 206 P.2d 848, 201 Okl. 318.

Rule that trustee cannot purchase at his own sale really means that such sale is subject to attack by cestui, and if cestui declines to let sale stand then title of purchasing trustee is unexceptionable. *Harvey v. Casbeer*, Tex.Civ.App.1976, 631 S.W.2d 266.

B. Conflict of interest

Trust indenture authorizing trustees to deal as such with any firm or corporation in which they or any beneficiary may be interested as a principal and authorizing trustees to employ as attorneys, brokers, or agents, any firm or corporation in which any trustee or any beneficiary may be interested and to pay them reasonable and proper compensation for services rendered did not as a matter of law show any necessary conflict of interest and was not void as against public policy. *McCawley v. Slammer*, Tex.Civ.App.1960, 336 S.W.2d 872, error dismissed.

9. Title to property

Where one venturer commits his property to venture, but retains legal title in his own name, he holds such property as trustee for enterprise. *Rhine v. Miller*, 1978, 583 P.2d 658, 83 Nev. 647.

As trustee, joint adventurer who committed property to the venture but retained legal title in his own name was required to account strictly to his coadventurer and could not, by reason of his possession of the property, enjoy unfair advantage or have greater rights in property than his coadventurer. *Id.*

10. Price

In action to foreclose tax lien claimed to exist through former owner against painting which had been alienated to Van Dyke and which had been sold at auction, Government which did not attempt to prove that the painting was an authentic creation of Van Dyke failed to carry its burden of proving that \$260 price paid by successful bidder who was wife of trustee for the painting was inadequate. *U.S. v. Van Cosh*, D.C.Tex.1972, 364 F.Supp. 318.

11. Profits

Trustee committing breach is chargeable with any profit made by him through

breach. *Holloway v. International Bankers Life Ins. Co.*, Tex.Civ.App.1962, 364 S.W.2d 198, reversed on other grounds 368 S.W.2d 667.

12. Holder in due course

Note which was made by maker to secure loan from trustee was negotiated for full consideration by trustee to himself in violation of his fiduciary duty not to self-deal in trust property, and thus such trustee was deprived from classification as "Holder in Due Course." *Harvey v. Casbeer*, Tex.Civ.App.1976, 631 S.W.2d 206.

13. Constructive trust

Proportional share of profit inured to benefit of joint venturer when his coadventurer breached his duty as trustee by appropriating common property to his own use and realizing a profit therefrom; coadventurer held profits by constructive trust. *Rhine v. Miller*, 1978, 583 P.2d 658, 84 Nev. 647.

Law will raise a constructive trust upon breach of a confidential relationship which may exist, although such relationship may not meet technical requirements of a partnership or joint venture. *Guinea v. Hamman*, 1963, 368 S.W.2d 667, 183 Tex. 618.

14. Liability of third parties

Where deed from profit sharing trust to trustee was of record, party which had contracted to purchase realty from trustee was charged with notice that trustee had dealt with trust in a disloyal manner, and, having such knowledge, was charged with consequences of trustee's wrongdoing. *Staves v. United Services Auto. Ass'n*, Tex.Civ.App.1970, 459 S.W.2d 930, *ref. n.r.c.*

15. Remedies

Where trustee defendants are consciously tortious in acquiring their profits by breach of trust, it is proper that they be deprived thereof, although cestui que trust has remedy of obtaining restitution by way of damages as alternative or perhaps even in addition to his rights to such profits, and, in any event, he can choose remedy which seems most advantageous and may elect to deprive trustees of profit rather than to seek damages. *Holloway v. International Bankers Life Ins. Co.*, Tex.Civ.App.1962, 364 S.W.2d 198, reversed on other grounds 368 S.W.2d 667.

16. Specific performance

Trustee, who procured a deed from profit-sharing trust to himself, and shortly thereafter entered into contract to sell land which would bring him a personal profit of approximately \$288,000 and tendered deed showing him as one of grantors even to extent of being joined therein by his wife, came into court with unclean hands and was not entitled to specific performance against purchaser. *Staves v. United Services Auto. Ass'n*, Tex.Civ.App.1970, 459 S.W.2d 930, *ref. n.r.c.*

17. Questions of law

Where trustee has been found to have been guilty of self-dealing with trust fund, trustee's liability as individual is ascertained by court as a matter of law. *Hamman v. Ritchie*, Tex.Civ.App.1977, 647 S.W.2d 898, error refused *n.r.c.*

18. Questions of fact

Where maker of note lacked standing to raise defense that holder of note had violated breach of his fiduciary duty as trustee in purchasing note from trust, whether maker was liable to holder was question for trier

of fact. *Harvey v. Casbeer*, Tex.Civ.App.1976, 631 S.W.2d 206.

In action brought by beneficiaries of trusts against trustee for an accounting and damages, where record showed that stock which was principal asset of trusts was sold to trustee for \$2 per share and then resold by him for 84 per share, material issue of fact existed as to whether trustee did not account to and pay beneficiaries all proceeds to which they were entitled even if majority of directors of corporation had voted to authorize sale of stock to him and even if 30 per share difference between purchase and resale prices was to be his compensation for his labor in connection with sale, thus precluding summary judgment. *Herd v. Stringer*, Tex.Civ.App.1971, 472 S.W.2d 329, error refused *n.r.c.*

19. Exemplary or punitive damages

Proof of profits made by trustee through breach of trust could not be denominational damages to beneficiary and could not support award for exemplary damages in his favor. *Holloway v. International Bankers Life Ins. Co.*, Tex.Civ.App.1962, 364 S.W.2d 198, reversed on other grounds 368 S.W.2d 667.

§ 6. (Trustee Selling from One Trust to Another Trust)

No trustee shall as trustee of one trust sell property to itself as trustee of another trust.

Action in Adopting Jurisdictions

Variations from Official Text.

Nevada. Adds "except with the approval of the district court having jurisdiction of the trust estate and of the accounting thereof." at the end of the section.

North Carolina. Section reads: "A trustee may sell assets held by its as fiduciary in one trust account to itself as trustee in another trust account if the transaction is fair to both accounts and if the transaction is expressly authorized by the instrument or instruments creating the accounts."

South Dakota. Section reads: "A corporate trustee may sell stocks, bonds and other securities listed on all exchanges supervised by the securities and exchange commission as well as obligations of the U.S. treasury and obligations of U.S. government agencies held by it in one account to itself as trustee of another account if the transaction is fair to both accounts and if such transaction is not prohibited by the instruments creating the trustee relationship."

Library References

Trusts 4-23(1 to 3)
C.J.S. Trusts 14 246, 249, 261

Notes of Decisions

1. Trust instrument, authorization by Notwithstanding prohibition of this article against trustee selling property from one trust to another trust of which it is trustee, where trust instrument gave trustee full power to dispose of the trust estate on such terms as may be deemed advisable and gave trustee authority to make loans or investments without any restrictions and at its sole judgment and discretion, this article was not violated by fact that trustee bank transferred certain notes from one trust of which it was trustee to another trust which it also served as trustee. *Burnett v. First Nat. Bank of Waco, Texas*, Tex.Civ.App. 1976, 538 S.W.2d 600, error refused n.r.e.

Trustee was not guilty of improper self-dealing or mismanagement in lending money to trust and then using funds to purchase three notes from another related trust it administered where trust agreement gave trustee power to transfer, assign, sell and convey real or personal property constituting the trust estate upon such terms and for such consideration as in the exclusive judgment of trustee may seem to be in the best interest of the trust estate and in its full discretion, to do and perform any and all acts necessary or convenient in handling of trust property. *Id.*

§ 7. (Corporate Trustee Buying Its Own Stock)

No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate.

Library References

Trusts ¶217.4, 231(1).
C.J.S. Trusts § 248, 328.

Notes of Decisions

1. Generally That successor-trustee of trust owning 420 of 500 authorized shares of stock of

national bank was selected director of bank did not disqualify successor-trustee. *Stuart v. Stuart, Okl.1970, 468 P.2d 609.*

§ 8. (Voting Stock)

A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it.

Action in Adopting Jurisdictions

Variations from Official Text

North Carolina. Section reads: "A trustee owning shares of corporate stock or other securities may vote it in person or by

general or limited proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock, in voting it or in not voting it."

Library References

Corporations ¶197, 198.1(f).
Trusts ¶217.4

C.J.S. Corporations § 545, 552.
C.J.S. Trusts § 328.

§ 9. (Holding Stock in Name of Nominee)

A trustee owning stock may hold it in the name of a nominee, without mention of the trust in the stock certificate or stock registration book; provided that (1) the trust records and all reports or accounts rendered by the trustee clearly show the ownership of the stock by the trustee and the facts regarding its holding; and (2) the nominee shall deposit with the trustee a signed statement showing the trust ownership, shall endorse the stock certificate in blank, and shall not have possession of the stock certificate or access thereto except under the immediate supervision of the trustee. The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stock so held.

Action in Adopting Jurisdictions

Variations from Official Text:

Nevada. Par. (2) reads: "the nominee shall deposit with the trustee a signed statement showing the trust ownership. The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stock so held."

New Mexico. In par. (2), omits "shall endorse the stock certificate in blank."

North Carolina. Section reads:

"A trustee may hold shares of stock or other securities in the name of a nominee, without mention of the trust relationship in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

"(1) The records and all reports or accounts rendered by the trustee clearly show the ownership of the stock or other securities by the trustee and the facts regarding its holding; and

"(2) The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the trustee or when such securities are deposited by the fiduciary in a clearing corporation as defined in U.S. 25-B-102(4).

"The trustee shall be personally liable for any act or omission of such nominee in connection with such stock or other securi-

ties so held, as if such had done such acts or been guilty of such omissions."

South Dakota. Section reads:

"A trustee owning any stocks, bonds, notes, debentures, or other written obligations of any public or private corporation may hold the same in the name of a nominee, without mention of the trust in the records of such corporation or in the stock certificate or stock registration book of such corporation; provided that

"(1) The trust records and all reports or accounts rendered by the trustee clearly show the ownership of such stocks, bonds, notes, debentures, or other written obligations of such public or private corporation by the trustee and the facts regarding its holding; and

"(2) The nominee shall deposit with the trustee a signed statement showing the trust ownership, shall endorse the stock certificate or other said instrument in blank, and shall not have possession of the stock certificate or other said instrument or access thereto except under the immediate supervision of the trustee.

The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stocks, bonds, notes, debentures, or other written obligations of any public or private corporation so held."

Library References

Corporations ¶98.
C.J.S. Corporations § 252, 289.

§ 10. (Powers Attached to Office)

Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal.

Library References

Trusts §171.
C.J.H. Trusts §246.

Notes of Decisions

1. Actions by trustee

Under general trust law, a trustee may maintain a suit in his own name to recover the trust property or to enforce the obligations of third parties in the trust; unless

the duties and obligations of the trustee are in question or there is a conflict between the trustee and the beneficiary, the beneficiary is not a necessary party. *Carter v. DeJarnatt*, Tex.Civ.App.1975, 527 S.W.2d 88, ref. n.e.e.

§ 11. (Powers Exercisable by Majority)

1. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of such joinder.

2. Nothing in this section shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust.

Action in Adopting Jurisdictions

Violations from Official Text: 55-4-4, and 55-4-5 of the South Dakota Act.
North Carolina. Omits this section.
South Dakota. Section 11 of the Uniform Act is contained in sections 55-4-3.

Library References

Trusts §238, 239.
C.A.S. Trusts § 268.

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1. Generally
Reconveyance by three grantees of 3.18 acre tract to grantors who had conveyed

land to five grantees, designated as trustees, to be used as park for educational and recreational purposes for all persons who purchased property within 500 acre tract owned by grantors revealed title therein in grantors under this article providing that any power vested in three or more trustees may be exercised by majority of such trustees. *Butler v. Shelton*, Tex.Civ.App.1966, 408 S.W.2d 530, ref. n.e.e.

App.1971, 473 S.W.2d 581, error refused n.e.e.

A cotrustee may alone appeal from a decree of distribution, if the other cotrustees refuse to join him, where the appeal is taken to protect the estate and the unascertained and unborn remaindermen. *Id.*

3. Estoppel

In absence of contention that there were any acts on part of grantors prior to execution of trust deed which could have raised issues necessary to create estoppel, grantors were not estopped from asserting their title and right of possession to 8.18 acre tract which had been conveyed to trustees to be used as park for educational and recreational purposes and which had been reconveyed in grantors by majority of trustees. *Butler v. Shelton*, Tex.Civ.App.1966, 408 S.W.2d 530, ref. n.e.e.

2. Appeals in judicial proceedings

One trustee of testamentary trust had authority to prosecute appeal from judgment decreeing that the trustees were authorized to distribute all proceeds from sale of oil, gas and timber on the trust property to the devisees without withholding any portion of the income for the benefit of remaindermen, even though the two other trustees had voted not to appeal or seek a motion for new trial. *Commercial Nat. Bank in Nacogdoches v. Hayler*, Tex.Civ.

§ 12. (Contracts of Trustee)

1. Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

2. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the [Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of

charitable trusts the [Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

3. The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability.

Action in Adopting Jurisdiction

Variations from Official Text:

Nevada. In subsec. (1), omits parenthetical material.

New Mexico. Omits this section.

South Dakota. Section 12 of the Uniform Act is contained in sections 55-4-19, 55-4-20, and 55-4-21 of the South Dakota Act.

In subsec. (1), add a sentence at the end thereof which reads: "Any beneficiary, or

in the case of charitable trusts the attorney general and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover."

In subsec. (2), omits the final sentence.

Virgin Islands. In subsec. (2) substitute "United States attorney" for "[Attorney General]" in both instances.

Library References

Trusts — 209 to 213
C.J.R. Trusts 44 275, 27A to 280.

Notes of Decisions

- Generally 1
- Intervention 7
- Nature of proceeding 2
- Necessary or indispensable parties 6
- Notice of action 3
- Persons entitled to maintain action or proceeding
- Generally 4
- Charitable trusts 6

1. **Generally**
Where settlors of trust, along with other trustees, signed written agreement authorizing trustees to make trust party to lease agreement between leasing company and corporation, provision of trust instrument allowing settlors, in writing, to confer additional power on trustees was exercise of trustees' power to guarantee lease. *Transamerican Leasing Co. v. Three Bears, Inc.*, Tex. 1979, 586 S.W.2d 472.

2. **Nature of proceeding**
Provision that party may sue trustee in his representative capacity, and that judg-

ment shall be collectible out of trust property, was not applicable to proceeding in which district court on remand by Supreme Court awarded attorney fees to attorneys of trustees, since the proceeding was not a "suit" or "action." *American Nat. Bank of Beaumont v. Biggs*, Tex. Civ. App. 1936, 214 S.W.2d 209, ref. n.r.e.

3. **Notice of action**
Requirement for notice to all beneficiaries of trust in event of litigation against trust does not always require notice in time for trial as this article places some discretion with court to require notice within such other time as court may fix so long as it is 30 days before judgment. *Transamerican Leasing Co. v. Three Bears, Inc.*, Tex. 1979, 586 S.W.2d 472.

Upon learning of trustees' noncompliance with this article requiring each beneficiary of trust to be notified prior to entry of judgment in suit involving trust, trial court, rather than granting mistrial, properly va-

dated original judgment, required all beneficiaries to be notified and then entered new judgment more than 30 days after notices were served, where all principal beneficiaries of trust were participants in case and had answered as defendants in their capacity as trustees, all of beneficiaries were closely related and had common interest in issues in litigation and all of those first cited after verdict were contingent beneficiaries. *Three Bears, Inc. v. Transamerican Leasing Co.*, Tex. Civ. App. 1978, 574 S.W.2d 197, affirmed in part, reversed in part on other grounds 588 S.W.2d 472.

Provision that no judgment shall be rendered unless plaintiff notifies each of the beneficiaries of the existence and nature of the action, was not applicable to proceeding in which district court on remand by Supreme Court awarded attorney fees to attorneys of trustees, since the proceeding was not a suit or action. *American Nat. Bank of Beaumont v. Biggs*, Tex. Civ. App. 1936, 214 S.W.2d 209, ref. n.r.e.

4. Persons entitled to maintain action or proceeding—Generally

Generally, mere contributor to charitable fund, which is made up of contributions from many persons, cannot call trustees of that fund to an accounting for misapplication of funds or any other breach of trust unless contributor has some special interest in the trust, or a reversionary interest in the fund different from that of his fellow contributors. *McFarland v. Atkins*, Okl. 1978, 694 P.2d 768.

Absent any allegation that plaintiff, who made contributions to charitable organizations, was an express third-party beneficiary of contract between organizations and operator of family planning center, such plaintiff, who alleged that operator was not complying with laws and regulations, lacked standing, on a third-party beneficiary basis, to seek injunctive relief against the charitable organizations. *Id.*

Plaintiff, as contributor to charitable organizations, did not have standing to seek injunctive relief against use of such organizations' funds for any purpose prohibited by law where it was not alleged that plaintiff's interest in the fund to which she contributed differed from that of her fellow contributors. *Id.*

Person who is not directly interested in administration of trust cannot maintain legal proceeding to control actions of trust-

tee. *Sarkova v. Independent School Dist. No. 40*, Cleveland County, Okl. 1970, 592 P.2d 629.

Settlor's lineal descendant, who was a nonintervening party appearing as a visitor in action based on contention that transaction involving sale of most of certain stock held by charitable corporation was an act of indirect self-dealing would not have had standing to maintain such an action and did not have standing, as a visitor, to appeal from judgment approving settlement entered into by parties of record and intervening Attorney General; absent fraud or collusion, the authority of Attorney General, whose intervention had been sought by such descendant, to settle the litigation was exclusive. *Id.*

Private individual must be a party to charitable trust indenture, representative of such party, or interested personally and individually as the beneficiary rather than as a taxpayer or a member of the community, before he may attempt to enforce such trust. *Id.*

Individual member of public has no right of action for mismanagement of charitable trust fund. *Id.*

5. — Charitable trusts

At common law, Attorney General has duty of representing public interest in securing enforcement of charitable trusts. *Barkey v. Independent School Dist. No. 40*, Cleveland County, Okl. 1978, 683 P.2d 629.

Suit involving charitable trust may be brought by Attorney General or it may be brought by him on relation of third person, who need not have a direct interest in enforcement of the trust but who will be liable for costs otherwise to be paid by the state; but even if suit is brought on relation of a third person, Attorney General has charged on conduct of the suit. *Id.*

Generally, Attorney General has preclusive right to maintain proceedings to protect charitable trust and to prevent a mis-use of property devoted to public charity. *Id.*

The State, as parens patriae, through its Attorney General, has the commonlaw right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. *Sigmund Sternberger Foundation v. Tancrubium*, 1984, 161 S.E.2d 118, 273 N.C. 658.

Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it is generally recognized that the Attorney General, in his capacity as representative of the State and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such a gift or trust. *Id.*

6. Necessary or Indispensable parties

Contingent beneficiaries of trust, who were solvins, were not "indispensable parties" in suit by attorney against client and corporate defendant to recover fee and to set aside fraudulent conveyance of trust assets by client to corporate defendant as trustee, and, as long as beneficiaries were given notice and opportunity to intervene in suit, judgment could be rendered against corporate defendant, as trustee, without

joining beneficiaries as defendants. *Nowell v. Dick*, C.A.Tex.1969, 418 F.2d 1204.

In absence of conflict of interest between contingent beneficiaries of trust and trustee-beneficiaries or of a pleading that contingent beneficiaries were inadequately represented, beneficiaries who did not participate in trial were not necessary parties in action by leasing company against trust which guaranteed lease. *Transamerican Leasing Co. v. Three Bears, Inc.*, Tex 1979, 688 S.W.2d 472.

7. Intervention

Trial court has discretion to permit third person to intervene in proceeding which involves a charitable trust and which is properly brought by Attorney General, trustee or by persons having a special interest. *Serkeya v. Independent School Dist. No. 30*, Cleveland County, Okl.1979, 692 P.2d 629.

§ 13. [Exoneration or Reimbursement for Torts]

1. A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if (1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or (2) although the tort was not a common incident of such activity, if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

2. If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

3. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

Action in Adapting Jurisdiction

Variations from Official Text:
New Mexico. Omit this section.

South Dakota. Section 13 of the Uniform Act is contained in sections 64-4-22.

65-4-21, and 65-4-24 of the South Dakota Act.

Literary References

Trusts ¶235, 286
C.F.S. Trusts §4 247, 286.

Notes of Decisions

1. Generally

Broad grant of authority given to testamentary trustee constituting exoneration of the trustee for mistakes, if any, must be

accorded respect by a court, especially in a family setting. *Bank of Nevada v. Sichel*, 1979, 603 P.2d 1074, 95 Nev. 870, certiorari denied 101 S.Ct. 531, 449 U.S. 994, 90 L.Ed.2d 291.

§ 14. (Tort Liability of Trust Estate)

1. Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

2. In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

3. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

4. The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in Section 13.

6. Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees.

Action in Adopting Jurisdictions

Variations from Official Text:

New Mexico. Omit this section.

South Dakota. Section 18 of the Uniform Act is contained in sections 66-4-26 to 66-4-29 of the South Dakota Act.

In subsec. (1), add a sentence at the end thereof: "Any beneficiary may intervene in such action and contest the right of the plaintiff to recover."

In subsec. (3), omit the final sentence.

Library References

Trusts 226.
C.J.S. Trusts § 242.

Notes of Decisions

Generally 1 Block transactions 2

1. Generally

A testamentary trustee is a fiduciary who must act in good faith and with fidelity to beneficiary of the trust; he should not place himself in a position where it would be for his own benefit to violate his duty to the beneficiary. *Bank of Nevada v. Speirs*, 1079, 603 P.2d 1074, 96 Nev. 870, certiorari denied 101 S.Ct. 631, 449 U.S. 994, 48 L.Ed.2d 291.

2. Block transactions

Testamentary trustee who inherited stock from his wife and who received an equal share as trustee for the benefit of his

daughter was not legally obliged, once he decided to purchase additional stock for himself, to purchase one-half thereof for the trust since it was not *per se* improper to disturb the equal interests of trust and trustee. *Bank of Nevada v. Speirs*, 1079, 603 P.2d 1074, 96 Nev. 870, certiorari denied 101 S.Ct. 631, 449 U.S. 994, 48 L.Ed.2d 291.

Testamentary trustee who inherited stock from his wife and received an equal share in trust for the benefit of his daughter committed no wrongdoing in discharge of his duties as trustee by taking advice of investment expert in purchasing Iowa farms for the trust rather than purchasing additional shares of the stock, which would have required the trust to borrow substantial sums of money. 1d

§ 15. [Withdrawals from Mingled Trust Funds]

Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the

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mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal.

Library References

Trusts 224, 274(1).
C.J.S. Trusts §§ 262, 270, 330.

§ 16. [Unenforceable Oral Trust Created by Deed]

1. When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the Statute of Frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the Statute of Frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

2. Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable.

Action in Adopting Jurisdictions

Variations from Official Text:

Nevada. Omit this section.

North Carolina. Omit this section.

South Dakota. Section 18 of the Uniform Act is contained in sections 66-4-17 and 66-4-18 of the South Dakota Act.

Library References

Trusts 226.
C.J.S. Trusts § 340.

§ 17. [Power of Settlor]

The settlor of any trust affected by this Act may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise

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be imposed upon him by this Act; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this Act; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Act; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by Sections 3, 4 and 5 of this Act.

Action in Adopting Jurisdictions

Variations from Official Text:

North Carolina. Omits "his trustee from any or all of the duties, restrictions, and".

Library References

Trusts 6-58, 158.
C.J.S. Trusts 69 87, 201, 202.

Notes of Decisions

Generally 1
Deferred compensation trust 6
Negligence 5
Pleading 9
Power of alienation 4
Ratification of acts 8
Revocation of trust 7
Self-dealing 2
Selling from one trust to another trust 3

1. Generally

Testator, who in effect provided, with regard to testamentary trust, that it was his desire that his brother be retained as manager of steel corporation, that trustee was to give due consideration to such intent before employing a manager other than brother, but that testator recognized that changing conditions might warrant employment of a different manager, intended to bestow a benefit on brother: such benefit created an enforceable right in brother and imposed a correlative obligation on trustee. *Ederty Nat Bank & Trust Co. of Oklahoma City v. Albright*, Okl.App.1976, 638 P.2d 620.

Trustor may relieve a trustee of all duties, restrictions, and liabilities imposed by law except for loan of trust funds, deposit of trust funds within the corporate trustee, and trustee's buying or selling from or to itself. *Corpus Christi Nat. Bank v. Genke*, Tex.Civ.App.1977, 551 S.W.2d 621, error refused n.r.e.

2. Self-dealing

In circumstances where possibility of conflict between trust and trustee is created by test will distributing equal interest in investment company to them, an absolute limitation against self-dealing on part of the trustee is modified, and the trustee will not be penalized when he has acted in good faith and in a manner he believes was for best interest of the trust. *Bank of Nevada v. Speira*, 1979, 608 P.2d 1074, 95 Nev. 870, certiorari denied 101 S.Ct. 631, 449 U.S. 894, 66 L.Ed.2d 291.

3. Selling from one trust to another trust

Notwithstanding prohibition of statute against trustee selling property from one trust to another trust of which it is trustee, where trust instrument gave trustee full power to dispose of the trust estate on such terms as may be deemed advisable and gave trustee authority to make loans or investments without any restrictions, and at its sole judgment and discretion, such article was not violated by fact that trustee bank transferred certain notes from one trust of which it was trustee to another trust which it also served as trustee. *Burnett v. First Nat. Bank of Waco, Texas*, Tex.Civ.App. 1976, 636 S.W.2d 600, error refused n.r.e.

4. Power of alienation

A settlor may not create a spendthrift trust for his own benefit and restrict his power of alienation of his beneficial inter-

est. *Glass v. Carpenter*, Tex.Civ.App.1980, 330 S.W.2d 630.

A settlor may create a trust in favor of some third party and prohibit assignment by such party of beneficial interest in the trust, but the rule is otherwise in cases where settlor creates a trust and makes himself the beneficiary thereof. *Id.*

5. Negligence

Under terms of will which provided that no trustee would be liable for any mistake or error of judgment or negligence but would only be liable for dishonesty, receiver beneficiaries of the trust could not recover from corporate trustee for its alleged negligence and gross negligence in the handling of estate properties. *Corpus Christi Nat. Bank v. Gerden*, Tex.Civ.App.1977, 551 S.W.2d 621, error refused n.r.e.

Exculpatory clause of will which absolved trustee from liability for mistake or error of judgment or negligence was not void as against public policy as it did not authorize self-dealing. *Id.*

6. Deferred compensation trust

Where deferred compensation trust instrument provided that, upon termination of trust, rights of each participant would immediately be fully vested and trustees would deliver to each of the participants his interest in the trust, where resolution adopted at board of directors meeting gave no reason for termination of trust, where there was no indication in record that participant's discharge was based upon misconduct, and where trustees' charge of dishonesty first arose nearly three months after participant's discharge and termination of trust, trustees had no authority to make determination of forfeiture for bad faith conduct after termination. *Matter of Home-Slale Production Co. Deferred Compensation Trust*, Okl.1979, 638 P.2d 1198.

7. Revocation of trust

Unless a power of revocation is specifically provided for in trust, revocation will not be permitted. *Nicoles v. Turzyn*, 1981, 624 P.2d 699, 97 Nev. 93.

Power to revoke a trust may be evidenced by implication from terms of the agreement. *Id.*

Although Trust B was not made specifically revocable under trust agreement as was Trust A, the specific limitations upon power of surviving trustor plus the specific

limitations upon invasion of corpus for benefit of surviving spouse as well as terms for ultimate distribution of trust corpus suggested that Trust B was intended to be irrevocable by surviving spouse rather than revocable by implication. *Id.*

Unrestricted power to modify beneficiaries of inter vivos trust includes power to revoke the trust, since trustor can substitute herself as beneficiary and terminate the trust under anti-beneficiary rule; therefore, trustor, who had created inter vivos trust, designated a trustee, granted to herself life interest in the income, and reserved right to change beneficiaries and trustee, and who removed trustee and revoked the trust after underlying loans were made to borrower from the trust funds, was proper party to prosecute action against borrower to recover amounts due upon two promissory notes. *Sol He Lee v. Hicks*, 1980, 611 P.2d 211, 95 Nev. 452.

Absent an agreement to contrary, right to revoke a revocable trust is a purely personal right of settlor and thus could not vest in guardian of incompetent settlor of trust. *Weatherly v. Byrd*, Tex.1978, 666 S.W.2d 292.

8. Ratification of acts

Under statute which specifically empowers trustor and beneficiaries to relieve the trustee or trustees of liability for their acts in such capacity, where cotrustor and co-beneficiary of revocable trust by written instructions ratified and confirmed trust company's acts as trustee and absolved company of any liability for acts performed as trustee of revocable trust, any liability which trustee might have incurred for failing to make a conditional trustee of certain property was absolved. *Newman v. Morris*, Okl.1977, 674 P.2d 616.

9. Pleading

Counterclaim, which testator's brother filed in action by trustee of testamentary trust for judicial determination that trustee could terminate brother's employment as manager of steel corporation and could dispose of corporation stock and in which it was alleged that trustee wrongfully terminated brother's employment without just cause against express last wishes of testator and that trustee wanted to fire brother or sell stock either to decrease trustee's

burdens or to placate testator's widow, stated cause of action. *Liberty Nat. Bank &*

Trust Co. of Oklahoma City v. Albright, Okl.App.1976, 628 P.2d 620.

§ 18. (Power of Beneficiary)

Any beneficiary of a trust affected by this Act may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this Act, except as to the duties, restrictions, and liabilities imposed by Sections 3, 4 and 5 of this Act. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this Act.

Library References

Trusts §-270, 343.
C.J.S. Trusts §§ 247, 429.

Notes of Decisions

Assignment of interest 1
Conditions of beneficiary, rights of 5
Parties 6
Ratification of acts 4
Renunciation of interest 2
Termination of trust 3

1. Assignment of Interest

Where beneficiary of interest in testamentary trust and life insurer, to which beneficiary assigned his interest, represented to regulatory agencies of several states that the trust interest stood available to make good the debts of insurer, the beneficiary, on insolvency of insurer, was not entitled to reformation of the assignment, which allegedly was to the insurer alone without any right to convey such interest to a third party, under theory of mutual mistake. *Moody v. Moody Nat. Bank of Galveston*, Tex.Civ.App.1976, 622 S.W.2d 710, error refused n.r.e.

Absence of words of inheritance did not preclude assignee of beneficiary's interest in testamentary trust from assigning to another the assigned interest. *Id.*

Although spendthrift testamentary trust required permission of the trustee before named beneficiary could assign his interest, such restriction was intended to protect the beneficiaries and once a valid assignment was effected, effects of the restrictive provision on the interest assigned were exhausted and assignee could freely assign the interest without consent of the trustee; restrictions of alienation were personal to the beneficiary and were not such as would run with title to the asset. *Id.*

Where secondary beneficiary under trust had received no benefits from trust prior to her renouncing all interest to the corpus or income of trust, she had made a valid, clear and timely renunciation of trust. *Id.*

2. Renunciation of Interest

Beneficiary of trust who has not, by words of conduct, manifested his acceptance of beneficial interest may disclaim such interest. *Aberg v. First Nat. Bank in Dallas*, Tex.Civ.App.1970, 460 S.W.2d 408, error refused n.r.e.

Where testatrix' cash bequest to each of her daughters and bequest of income interest for life in trust were separate, distinct and independent gifts, both gifts were beneficial and neither involved burdensome features, the renunciation of the trust gift by two of daughters did not result in loss of hardship to any other devisees or legatees and testatrix' will did not condition acceptance of one gift upon full acceptance of both gifts, daughters' renunciation of income interests from the trust was timely, valid, enforceable and legally binding. *First City Nat. Bank of Houston v. Toombs*, Tex.Civ.App.1968, 481 S.W.2d 404, error refused n.r.e.

3. Termination of trust

Sole beneficiary of a trust which did not qualify as a spendthrift trust had a right to termination of the trust and termination would not be denied for fear of frustrating settlor's intent, when net result of such refusal would be to continue trust for sole benefit of trustee. *Ambrose v. First National Bank of Nevada*, 1971, 482 P.2d 828, 87 Nev. 814.

Sole beneficiary not under an incapacity may compel trust termination before period fixed for its duration has expired, if continuance of the trust is not necessary to carry out a material purpose. *Id.*

4. Ratification of acts

Under statutes which specifically empower trustees and beneficiaries to relieve their trustee or trustees of liability for their acts in such capacity, where cotrustor and co-beneficiary of revocable trust by written instructions ratified and confirmed trust company's acts as trustee and absolved

company of any liability for acts performed as trustee of revocable trust, any liability which trustee might have incurred for failing to make a conditional transfer of certain property was absolved. *Newman v. Morris*, Okl.1977, 874 P.2d 816.

5. Creditors of beneficiary, rights of

Judgment creditor would have vested interest in trust estate of which judgment debtor was beneficiary although judgment creditor had no immediate right to demand distribution. *Little v. Deaton*, Tex.Civ.App.1967, 416 S.W.2d 828.

6. Parties

Where suit is brought to cancel trust instrument, beneficiaries are considered to be adequately represented by trustee if their interests are not in conflict and beneficiaries are proper, but not necessary and indispensable, parties in case. *Mason v. Mason*, Tex.Civ.App.1967, 368 S.W.2d 662.

§ 19. (Power of the Court)

A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this Act, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this Act.

Library References

Trusts §-270.
C.J.S. Trusts § 247.

Notes of Decisions

Generally 1
Admissibility of evidence 12
Appointment or removal of trustee 6
Compensation of trustee 7
Deviation from terms of trust 3
Discretion of court 2
Invasion of corpus 5
Jurisdiction 9
Liquidation of trust 8
Parties 11
Purchase of property from trust 4
Removal of trustee 6
Res judicata 13
Revocation 14
Venue 10

1. Generally

Trustee's exercise of discretion is not subject to court control except to prevent abuse of that discretion. *Humanno Soc. of Carmon City, Bldg. v. First Nat'l Bank*, 1976, 558 P.2d 963, 92 Nev. 474.

2. Discretion of court

Court is not permitted to substitute its judgment and discretion for that of trustees so long as they act within proper limits. *Humanno Soc. of Carmon City, Bldg. v. First Nat'l Bank*, 1976, 558 P.2d 963, 92 Nev. 474.

Trial court did not abuse discretion in approving trustees' allocation of 25% of residue of testator's estate to certain humane

societies to effectuate testator's wish that benefits be bestowed upon "SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (Local or National)," which "SOCIETY" did not exist by name as national society or single local society. *Id.*

Reviewing court cannot substitute its discretion for that of trustees and can interfere with their exercise of discretionary powers only in cases of fraud, misconduct, or clear abuse of discretion. *Coffey v. William Marsh Rice University, Tex.Civ.App. 1944, 408 S.W.2d 269, ref. n.r.e.*

J. Deviation from terms of trust

Principle that a court will not direct termination prior to time fixed therefor, even though beneficiary desires to terminate, since that would be contrary to purpose of trust settlor would not be arbitrarily applied to deny termination to daughter of settlor where no reason was expressed in the trust instrument for delaying daughter's enjoyment following settlor's death, no provision was made in the trust for daughter's support between ages of 21 and 23, and should daughter die during that period of time she would be denied enjoyment of the corpus. *Ambrase v. First National Bank of Nevada, 1971, 482 P.2d 829, 87 Nev. 114.*

In determining whether trust corpus should be ordered sold in violation of trust agreement against sale, court has no authority or discretion to concern itself solely with needs of trustee and life beneficiary. *Carroll v. Carroll, Tex.Civ.App., 1971, 464 S.W.2d 440, error dismissed.*

Where in view of publicity in county concerning claim by the United States for refund of unpaid payments under cropland adjustment program on farm tract and dispute among beneficiaries of trust there was considerable doubt that farmland would bring more than a small percentage of its true value at contemplated foreclosure sale to satisfy indebtedness to federal land bank or irrigation loans, there were sufficient circumstances to justify appointment of receiver and authorization of private sale of corpus, despite prohibition in trust instrument against sale without written consent and request of each and every named beneficiary. *Id.*

Court of equity has inherent power and authority to order trust land sold even against direct prohibition of sale in trust instrument where to do so would preserve and protect the value of the trust property, if there is imminent danger of the trust corpus wasting or being destroyed or effectually eliminated, and this is especially true where there has been such a change of circumstances since creation of the trust that the corpus is in serious jeopardy. *Id.*

Where alleged incompetent beneficiary of trust participated in proceedings by trustee seeking authority to sell trust corpus, in violation of trust agreement, for purpose of preserving or preventing elimination of entire corpus, alleged incompetent was represented by competent counsel and no suggestion was made that alleged incompetent was non compos mentis until entry of order approving sale and appeal therefrom had been perfected and that no meritorious defenses peculiar to incompetent was presented, district court had jurisdiction to order sale of trust property insofar as it affected interest of alleged non compos mentis beneficiary. *Id.*

Court of equity is possessed of authority to apply rule or doctrine of deviation implied in law of trusts. *Amalgamated Transit Union, Local Division 1838 v. Dallas Public Transit Bd., Tex.Civ.App. 1968, 490 S.W.2d 107, error refused n.r.e., certiorari denied 90 S.Ct. 90, 398 U.S. 832, 24 L.Ed.2d 89.*

Court of equity will order deviation from terms of trust if it appears that compliance with terms of the trust is impossible, illegal, impractical or inexpedient, or that owing to circumstances not known to settlor and not anticipated by him, compliance would defeat or substantially impair accomplishment of purpose of trust. *Id.*

Evidence in suit by university and its duly appointed trustees for determination as to whether trustees might accept as students qualified applicants without regard to color and might charge tuition to those able to pay fully supported court's action in exercising its equitable power to authorize a deviation from terms of trust established by donor so as to allow charging of tuition and acceptance of qualified applicants without regard to color. *Coffey v. William Marsh Rice University, Tex.Civ.App. 1946, 408 S.W.2d 209, error refused n.r.e.*

6. Purchase of property from trust

This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. *Wachovia Bank & Trust Co. v. Johnston, 1867, 159 S.E.2d 440, 289 N.C. 701.*

5. Invasion of corpus

Language of probate decree, reiterated in district court judgment interpreting testamentary trust, empowered trustee as beneficiary to invade corpus of trust estate and apply proceeds to her own use and benefit without any restriction. *First Nat. Bank & Trust Co. of Muskogee v. Roberts, Okl. 1970, 467 P.2d 482.*

6. Appointment or removal of trustee

Court of equity has jurisdiction when it becomes necessary for the protection and preservation of the trust to appoint or remove a trustee. *Brault v. Bigham, Tex.Civ. App. 1973, 493 S.W.2d 676, ref. n.r.e.*

7. Compensation of trustee

A trustee is to be paid for its work on behalf of the estate, subject to review by court. *City of Austin v. Austin Nat. Bank, Tex.Civ.App. 1912, 488 S.W.2d 316, affirmed in part, reversed in part on other grounds 603 S.W.2d 750.*

8. Liquidation of trust

Where trust had accomplished its purpose, and all parties asked district court to assume superintending power over trust, court had jurisdiction to determine that trustees were rightful and lawful trustees and to direct trustees to make final liquidation of trust. *In re Daniel's Trust, Okl. 1970, 466 P.2d 847.*

9. Jurisdiction

Any matter contained in final decree of county court which has a prospective effect as to a trustee and which purports to control trustee's actions is beyond jurisdiction of the county court in view of statutory jurisdiction of district court. *Landry v. First Nat. Bank & Trust Co. of Tulsa, Okl., 1962, 368 P.2d 987.*

10. Venue

Finding that principal place of business of trust was in certain county so that venue of

action to remove trustees and recover for conversion of trust assets was properly laid in that county was supported by evidence, including evidence that trust company's offices were located in that county as well as trust assets in form of bearer bonds deposited in escrow and bearer bonds put up to secure attorney fees and contract with trust company. *Mayflower Trust Co. v. Nowell, Tex.Civ.App. 1967, 419 S.W.2d 788, error dismissed.*

Venue of suit to remove trustees and recover for alleged conversion of trust assets by trustees and third parties was properly laid in county of residence of two of the party defendants. *Id.*

11. Parties

Where petitioner seeking to remove foundation as trustee of two charitable trusts was chief actor in raising and handling trust funds and was on committee of three charged with distributing assets of larger of the trusts, petitioner and foundation were also in controversy as to terms and conditions under which smaller trust fund was delivered and as to status of such fund, and intervenor claimed such funds as its own in all events, petitioner and intervenor met requirements of statute providing that a claim affecting trust instrument may be brought by any person having interest in administration of trust estate and authorizing removal of trustee on petition of interested person, and thus had standing to litigate subject controversies. *Lokey v. Texas Methodist Foundation, Tex. 1972, 479 S.W.2d 260.*

12. Admissibility of evidence

District court, in action approving trustees' allocation of 25% residue of testator's estate to various humane societies, did not err in refusing to admit evidence relevant to merits of particular humane society's claim at hearing held to determine if trustees had carried out court's directive in preparing plan for allocation and distribution since district court could not usurp trustees' role and independently determine that other organizations such as said particular humane society were also proper and should receive allocations. *Humans Soc. of Carson City, Etc. v. First Nat'l Bank, 1976, 653 P.2d 962, 92 Nev. 474.*

13. Res Judicata

Where trustee brought action in district court for construction of testamentary trust

and all parties to action were parties to subsequent suit by trustee's administrator for determination regarding liability to successor trustee and that earlier judgment was res judicata, and issues in each suit were identical and earlier judgment was never appealed earlier judgment was res judicata. First Nat. Bank & Trust Co. of Muskogee v. Roberts, Okl. 1970, 467 P.2d 482.

Final judgment which was rendered on April 26, 1962 in prior action under Uniform Declaratory Judgment Act and Texas Trust Act and which provided for monthly payments to be made by testamentary trustee to beneficiaries in the future on basis of certain factors which trustee was instructed to consider was res judicata that trust was in existence on April 26, 1962 and

prevented finding in instant action under same statutes and between same parties that trust had terminated on December 24, 1967, which was the 31st birthday of the youngest of the three primary beneficiaries. Brown v. Bahreck, Tex. Civ. App. 1965, 393 S.W.2d 172.

14. Review

Action of trial court to granting petition for receivership and authorizing sale of trust corpus in face of provision of trust instrument prohibiting sale without consent of all same beneficiaries would not be disturbed absent showing of clear abuse of discretion after indulging every reasonable presumption to favor of the court's action. Carroll v. Carroll, Tex. Civ. App. 1971, 464 S.W.2d 446, error dismissed.

§ 20. [Liabilities for Violations of Act]

If a trustee violates any of the provisions of this Act, he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust.

Library References

Trusts § 165 to 167, 321.
C.J.S. Trusts § 231 to 236, 407.

Notes of Decisions

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Removal of trustee 1

1. Removal of trustee

While it was not necessarily breach of duty on part of trustee to crop rent rather than cash rent farm, it was an imprudent and unnecessarily risky venture which, on its face, probably would not produce high net, safe return on investment, thereby supporting removal of trustee. Brown v. Hatt, Okl. App. 1981, 631 P.2d 1346.

Trial court abused its discretion in failing to remove trustee on ground of irreconcilable hostility between trustee and beneficiary. Id.

2. Attorney's fees

Trial court did not have authority to award attorney fees to trustee's attorney

four months after it entered judgment refusing to remove trustee and denying judgment for return of commission charged by trustee for sale of trust assets. Brown v. Hatt, Okl. App. 1981, 631 P.2d 1346.

3. Pleadings

Cross petitions filed by bond holders against trustee for industrial bond issue, alleging that trustee breached its duties under written trust indenture, which required trustee to pay net proceeds of bonds to corporate lessee of facilities being financed with bond proceeds and corporate tenant to pay certain rentals in amount sufficient to pay principal and interest on bonds, in that trustee failed to enforce written lease agreement, carelessly disbursed trust funds, and failed to monitor application of funds after disbursement to insure proper application thereof, stated cause of action against trustee. Mutual State Bank v. Galtner, Okl. App., 1977, 577 P.2d 448.

4. Jurisdiction

Although Oklahoma court had jurisdiction over testamentary trust estate, since such case had been finally and completely closed and trust estate distributed to the trustee, there was no bar to federal district court's acquiring jurisdiction over trust estate in action by beneficiary to recover for alleged violation of fiduciary duty, judgment requiring trustee to convey to beneficiaries undivided mineral and commercial property interest remaining in the trust estate as well as an accounting. Widdowson v. Security Bank & Trust Co. of Lawton, Lawton, Okl., D.C. Okl., 1980, 516 F.Supp. 8.

Exercise of jurisdiction by state court over proceedings with respect to trust estate in connection with issuance of revenue bonds by industrial authority including supervision of the sale of trust assets and the distribution of proceeds thereof, a matter which had not been completed, precluded federal district court's exercise of jurisdiction over suit by certain bond purchasers to surcharge trustee which was in effect an

action to restore a trust res which was in the hands of state court. Stewart Securities Corp. v. Guaranty Trust Co., D.C. Okl., 1976, 394 F.Supp. 1002, motion overruled 71 P.R.D. 32.

Industrial revenue bond purchasers' second cause of action against trustee couched in terms of breach of fiduciary duty was essentially a reiteration of first cause of action to surcharge trustee for mismanagement of estate and would be dismissed on ground that state court's exercise of jurisdiction over trust including supervision of sale of trust assets and the distribution of proceeds to bondholders precluded exercise of jurisdiction by federal district court. Id.

An action against a testamentary trustee to require him to account for his removal, and for the appointment of a successor trustee is transitory in nature and a court of general jurisdiction of the county where the trustee resides has jurisdiction of the action. Pipkin v. Pipkin, Okl. 1984, 893 P.2d 634.

§ 21. [Uniformity of Interpretation]

This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Library References

Statutes § 228.
C.J.S. Statutes § 871 et seq.

§ 22. [Short Title]

This Act may be cited as the Uniform Trusts Act.

§ 23. [Severability]

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

Library References

Statutes § 84(2).
C.J.S. Statutes § 96 et seq.

§ 24. [Repeal]

All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Library References

Statutes 157.
C.J.S. Statutes 285.

§ 25. [Time of Taking Effect]

This Act shall take effect [] and shall apply only to testamentary trusts created by wills or codicils executed after the effective date of the Act and to non-testamentary trusts created after the effective date of the Act.

Action in Adopting Jurisdictions

Variations from Official Text:

North Carolina. Section reads:

"This Article shall take effect and shall apply in the construction of and operation under

"(1) All agreements containing trust provisions entered into on or after January 1, 1978;

"(2) All wills made by testators who shall die on or after January 1, 1978, and

"(3) All other wills and trust agreements and trust relations insofar as such

terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America."

South Dakota. Section reads: "This chapter shall apply only to testamentary trusts created by wills or codicils executed after July 1, 1943 and to non-testamentary trusts created after July 1, 1943."

Library References

Statutes 250, 261.
C.J.S. Statutes 401, 422.

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Action in Adopting Jurisdiction

relations from Official Text: Oregon. In subd. (c), insert "Except to the extent provided in ORS 129.21K" at the beginning thereof.

South Carolina. Add a subsection as follows: "Unless directed otherwise by the court or by the trust instrument, a successor trustee appointed by the court or by the trust instrument succeeds to all the powers, duties, and discretionary authority given to the predecessor trustee. Upon reasonable request, a successor trustee is entitled to a statement of the accounts of the trust from a

predecessor trustee. A successor trustee may accept the account rendered and shall be under no duty to examine the acts or omissions of the predecessor trustee and shall not be liable for failure to seek redress for any act or omission of the predecessor trustee. The trustee of a testamentary trust may accept the account rendered by a personal representative and shall be under no duty to examine the acts or omissions of the predecessor personal representative and shall not be liable for failure to seek redress for any act or omission of the predecessor personal representative."

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had power of appointment; no trust assets were transferred to trustee as beneficiary, and beneficiaries interest were established by will, rather than arising from or flowing through the trustee. Gillespie v. Seymour, Kan. 1991, 823 P.2d 732, 736 Kan. 128.

Beneficiaries of testamentary trust were bound by decision of trustee, whose trustee possessed what amounted to absolute power of appointment. Gillespie v. Seymour, Kan. 1991, 823 P.2d 732, 736 Kan. 128.

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Third Person Protected in Dealing with Trustee

Action in Adopting Jurisdiction

relations from Official Text: New Hampshire. Restatement reads:

"L. With respect to a third person dealing with a trustee or appointing a trustee in the conduct of a transaction, the existence of trust powers and their exercise by a trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has the power to act or is properly exercising the power, and a third person, without actual knowledge that the trustee is acting in excess of his powers or in violation of his duties, is

fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

"L. The filing by a trustee of a written certificate signed by the trustee, filed and recorded as hereinafter set forth and in substantially the following form shall be sufficient evidence and notice to all third parties that the trustee acted lawfully and the trustee's execution here

the contrary, shall be obligated to further inquire as to the power or authority of the trustee to convey or to assent to the application of any trust assets paid or delivered to the trustee.

"The undersigned trustee(s) as Trustee(s) under the Trust created by _____ as grantor under trust agreement dated _____ and hereto have full and absolute power in said trust agreement to convey any interest in real estate and improvements thereon held in said trust and no purchaser or third party shall be bound to inquire whether the trustee has said power or is properly exercising



Trustee

"111. A similar certificate filed by any successor to the trustee named in an original or any subsequent certificate shall have the same effect as the original certificate. Such a certificate, in writing, executed with the formalities required for a deed of real property by the trustee or trustees of the trust and recorded in the registry of deeds in the county in which the real estate and improvements to be shall conclusively establish the power of the trustee to convey said real estate and improvements as set forth above."

Law Review and Journal Commentaries

Examining the mystery behind the unusually and inexplicably broad provisions of § 7 of the Uniform Trusts

Power Act: A call for clarification. Peter T. Wundt, 88 Mo.L.Rev. 25 (1991).

Notes of Decisions

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2. Lease
Lease which was allowed in exercise option to renew lease by trustee long after time when option was properly exercised could reasonably think trustee's conduct was

Application of Act

Action in Adopting Jurisdiction

Restatement provisions from Official Text:
Hawaii. Section reads: "Except as specifically provided in this trust, the provisions of this chapter shall apply to any trust with a situs in Hawaii whenever established."
Montucky. Substitutes "shall apply" for "apply", and "and" for "and/or".

Mississippi. Section now reads: "Except as specifically provided in the trust, the provisions of this article apply to any trust established before or after June 30, 1990, and to any trust asset acquired by the trustee before or after said date; provided, however, the provisions of sections 91-9-107(A)(2) shall not apply to any trust instrument dated before such date."

1937 ACT

Table of Jurisdictions Wherein Act Has Been Adopted

Jurisdiction	Laws	Effective Date	Statutory Citation
Louisiana	1964, No. 338	7-29-1964	LSA-R.S. 9:1725; 9:2062; 9:2063; 9:2065; 9:2084 to 9:2086; 9:2112; 9:2114; 9:2122; 9:2124 to 9:2126; 9:2196; 9:2207; 9:2208.
Nevada	1941, c. 136	6-1-1941	N.R.S. 163.010 to 163.210.
New Mexico	1951, c. 193	3-16-1951	NMSA 1978, §§ 46-2-1 to 46-2-19.
North Carolina	1939, c. 197	7-1-1939	G.S. §§ 36A-60 to 36A-84.
Oklahoma	1941, p. 250	8-21-1941	60 Okl.StAnn. §§ 175.1 to 175.23.
South Dakota	1943, c. 308	2-10-1943	SDCL 55-4-1 to 55-4-37.
Virgin Islands	1957, No. 160	9-1-1957	15 V.I.C. §§ 1091 to 1111.

Date of approval.

General Statutory Note

North Carolina. Section 36A-68, set out in general statutory note in main volume, here reads:

"§ 36A-68. Funds held by a bank corporation exercising fiduciary powers involving investment or distribution.

"(a) Funds held in a fiduciary capacity by a bank, trust company, savings and loan association, or other corporation authorized to exercise the powers of a fiduciary, making investment or distribution shall not be held entrusted or substituted any longer than is reasonable for a proper management of the account. A corporation acting in a fiduciary capacity has complied with this requirement if such funds involving investment or distribution in excess of one thousand dollars (\$1,000) has invested or distributed within 90 days of receipt or accumulation thereof.

"(b) Funds held in a fiduciary capacity by a bank, trust company, savings or distribution company, unless prohibited by the instrument creating the fiduciary relationship, be posted to the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 162-84 as being eligible for the investment of the depositing funds of a State of North Carolina equal to market value of such posted funds, or readily marketable commercial bonds having not less than a recognized 'A' rating equal to one rated and applying five percent (5%) of the funds so posted.

The securities so deposited or securities substituted thereon as collateral to the trust department, the commercial or savings or other department (as well as the pool of cash in the commercial or savings or other department by the trust department) shall be held pursuant to the provisions of G.S. 162-84(4).

If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not insured under the provisions of that corporation.

"(c) Funds held in a fiduciary capacity by a corporate trustee involving investment or distribution may, unless prohibited by the instrument creating the fiduciary relationship, be invested in short-term, trust-quality invest-

ment vehicles through the medium of a collective investment fund or portfolio.

"(d) In addition to any other compensation to which it may be entitled under G.S. 36A-82-2, 82-69, 84-12, 85A-1802, or under any other authority, by corporation acting in a fiduciary capacity shall be allowed to charge a fee for the temporary investment of funds held awaiting distribution or distribution, which fee may be calculated upon the amount of such funds actually invested and upon the income produced thereby. The fee authorized by this subsection shall not exceed three percent (3%) of the income produced by such investment. A corporation acting in a fiduciary capacity has complied with its duty to discharge fees and expenses in connection with the investment of fiduciary funds involving investment or distribution if the corporation's periodic statements set forth the method of computing such fees.

Acts section as follows:

"§ 36A-68.1. Investments in securities by banks or trust companies.—Unless the governing instrument, court order, or a statute specifically directs otherwise, a bank or trust company serving as trustee, guardian, agent, or in any other fiduciary capacity may invest in any security authorized by this Chapter even if such fiduciary or an affiliate thereof, as defined in G.S. 36A-60(1), participates or has participated as a member of a syndicate underwriting such security, if:

- "(1) The fiduciary does not purchase the security from itself or its affiliate; and
- "(2) The fiduciary does not purchase the security from another syndicate member or an affiliate, pursuant to an implied or express agreement between the fiduciary or its affiliate and a selling member or its affiliate, to purchase all or part of each other's underwriting commitments."

In section 84A-78, set out in general statutory note in main volume, subsec. (c) now reads:

"Subject to subsection (a) of this section, if two or more trustees own shares of corporate stock or other securities, their votes with respect to voting shall have the following effect:

- "(1) If only one votes, in person or by proxy, his vote binds all;

the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately."

South Dakota. Acts section as follows: "65-4-37. Liability for fiduciary's partnership interest limited.

"If permitted by the trust instrument or will under which a fiduciary serves, or by order of a court having jurisdiction of the estate or trust, a fiduciary may enter

into a partnership, as an interest in a partnership, and his doing may become either a general or a limited partner. If the fiduciary becomes a partner, as to creditors of, or claimants against, the partnership and as to the other members of the partnership, the liability, if any, of the fiduciary for the debts and other liabilities of the partnership, whether arising under contract, tort, or otherwise, are limited to the assets of the trust or estate, or so much thereof as may be necessary to discharge such debts and liabilities."

Jurisdictions Adopting Uniform Act in Manner Precluding Comparative Notes

Not infrequently a jurisdiction will substantially adopt the major provisions of a Uniform Act and, yet, depart from the official text in such a manner that the various instances of substituted, omitted, and added matter cannot be clearly indicated by statutory notes. Where this has occurred for a particular jurisdiction, the General Statutory Notes found near the beginning of the Uniform Act will so state. In such a case, there will not be any notes for that jurisdiction under the headings "Action in Adopting Jurisdictions" and "Variations from Official Text" in the individual sections of the Uniform Act.

UNIFORM TRUSTS ACT
1937 ACT

§ 1. (Definitions).

Action in Adopting Jurisdictions

Variations from Official Text

Nevada. Subsec. (7).

New Mexico. In introductory paragraph, omits "unless the context or subject matter otherwise requires".

Florida. (1) "law requisite"; "trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee, personal representative, guardian, conservator, agent and a trustee of an inter vivos or testamentary trust.

Acts definitions as follows:

"To state depository institution" means a main office or branch of a bank, savings and loan association or credit union authorized to engage in business in New Mexico; and

"division" means the financial institutions division of the regulation and licensing department."

Notes of Decisions

§ 2. Trusts—Generally

Uniform Trusts Act did not apply to action arising from executor's exercise of option to purchase tract of land owned by estate, nothing in language of will expressly created a trust and Uniform Trusts Act applied only to express trusts. Kapp v. Kapp, N.O.1904, 442 B.E.2d 430, 808 So.2d 284, rehearing denied 447 B.E.2d 434, 801 N.C. 788.

§ 3. Constructive trusts

Consolidated Gas & Equipment Co. of America v. Thompson, Tex.(Civ.App.) 1946, 397 S.W.2d 290, (main volume) amended, error granted, reversed 405 S.W.2d 333.

§ 4. (Corporate Trustee Depositing Trust Funds with Self)

Action in Adopting Jurisdictions

Variations from Official Text

Nevada. In subsec. (2) referred to in variation note in main volume, now substituted "consolidation of financial institutions" for "state banking department".

New Mexico. Section now reads:

"A corporate trustee that is subject to regulation by the state or federal authorities may deposit with itself or an affiliated in-state depository institution, for a period of up to one year, trust funds being held temporarily pending investment, distribution or the payment of debts. The corporate trustee shall pay the trust the interest as it is required by statute to pay on uninvested trust funds, or, if there is no statute, the same rate of interest it or the affiliated in-state depository institution pays upon similar non-trust deposits. The corporate trustee shall maintain a separate fund as security for the deposit with itself or an affiliated in-state depository institution consisting of assets

authorised for trust investments, or satisfactory receipts representing the pledge of such securities by the affiliated in-state depository institution, at all times equal in total market value to the amount of the deposits. No security shall be required to the extent that the deposits are insured or given preference by any state or federal law. The separate fund of securities shall be marked as such. Withdrawal from or additions to it may be made, as long as the required value is maintained. The income of securities in the fund shall belong to the corporate trustee. In all statements of the financial condition delivered to the division, the corporate trustee shall show as separate items the amount of trust funds that it has deposited with itself or an affiliated in-state depository institution and the amount of securities that it holds or has been pledged as security for the payment of those deposits.

equal amounts with itself or an affiliated in-state depository institution, if this investment authority is specifically

itself or an affiliated in-state depository institution shall not be secured by assets of the depository institution."

5. [Trustee Buying from or Selling to Self]

Action in Adopting Jurisdictions

variations from Official Text: South Dakota. Section reads: "No trustee, unless expressly authorized by the trust instrument, shall directly or indirectly lease, buy or sell any property (or the net from or to itself or an affiliate; or from or to a trustee, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or

other business associate. Notwithstanding this provision or any statute to the contrary, a trustee may lease, purchase or sell property from or to the trust he represents as trustee if specifically authorized to do so in a decedent's will or the instrument creating the trustee relationship, including the establishment of a trust service office as provided by chapter 61-19."

Notes of Decisions

uty to disclose 3a Impairment of corpus 13b Duty to trust or to beneficiary 13a Knowledge or notice on part of beneficiary - 7a Property not involved in trust relationship 11a

11a. Property not involved in trust relationship - Even if brother had acted as his sister's fiduciary in capacity as co-owner of property, business and property manager, advisor, partner, agent, joint venturer, brother, and confidant and as executor of father's estate, brother's obtaining option to purchase his uncle's interest in land part of which was corpus of trust for brother and sister did not breach any fiduciary duty. Riley v. Rockwell, Nev. 1987, 747 P.2d 903, 103 Nev. 698.

11b. Injury to trust or to beneficiary - Brother, who was express trustee of fractional interest land trust with himself and his sister as beneficiaries, did not enhance his own interest to the detriment and at expense of his sister and trust when he obtained option to purchase uncle's fractional interest in land; there was no showing that trust or sister was injured in any way. Riley v. Rockwell, Nev. 1987, 747 P.2d 903, 103 Nev. 698.

13b. Impairment of corpus - Express trustee-beneficiary of fractional interest land trust did not breach any fiduciary duty to other beneficiary by purchasing or himself another fractional interest in the same property; property was not susceptible to manipulation by any person since it was involved in long term leases and served only as source of income such that greater share in property created only greater share in income, and corpus of trust had not been impaired. Riley v. Rockwell, Nev. 1987, 747 P.2d 903, 103 Nev. 698.

Conflict of interest - Trustee may sell or remove personal interest or right of profusion as trustee if conflict of interest arises under will of Jacobs. N.C.App. 1988, 871 S.E.2d 841, 77 App. 158, review denied 878 S.E.2d 868, 328 N.C.

Holloway v. International Bankers Life Ins. Co. Tex. App. Fort Worth 1982, 864 S.W.2d 189, (main volume) error granted, reversed 868 S.W.2d 467.

6. [Trustee Selling from One Trust to Another Trust]

Action in Adopting Jurisdictions

variations from Official Text: New Mexico. Section now reads: "A trustee may sell assets held by it as fiduciary in one account to itself as fiduciary in another account, if documentation is retained

showing the transaction is beneficial to both accounts, the assets are purchased and sold at fair market value and the transaction is not prohibited by the terms of any governing instrument."

Action in Adopting Jurisdictions

Variations from Official Text: North Carolina. Section now reads: "A trustee owning shares of corporate stock or other securities may vote them in person or by general or limited proxy, and may execute waivers, consents or objections with respect to

such stock or securities, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock or securities, in voting thereon or in not voting thereon."

6 20. [Liabilities for Violations of Act]

Notes of Decisions

1. Removal of trustee - Trust beneficiary may expect and demand trustee's complete loyalty in administration of any trust; should there be any self-interest on trustee's part in administration of trust which would interfere with this duty of complete loyalty, beneficiary may seek trustee's removal. Matter of Will of Jacobs, N.C.App. 1988, 870 S.E.2d 860.

91 N.C.App. 158, review denied 878 S.E.2d 863, 328 N.C. 478.

4. Jurisdiction - Stewart Securities Corp. v. Guaranty Trust Co., W.D.Okla. 1978, 304 F.Supp. 1060, (main volume) motion to vacate overruled 71 F.R.D. 32

NOTHING PAGE OF

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1251
PHONE (907) 269-5100
FAX (907) 276-3697

KEY BANK BUILDING
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE (907) 451-2311
FAX (907) 451-2346

P.O. BOX 110300-DIMOND COURTHOUSE
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3600
FAX (907) 465-6735

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

March 18, 1998

Honorable Joe Ryan
House of Representatives
State Capitol, Room 420
Juneau, Alaska 99801-1182

RE: HB 196/CSHB 196()

Dear Representative Ryan:

In reviewing both HB 196 and the working draft of CSHB 196 I have come across a section which needs correcting. Section 2 of HB 196 (and Section 2 of CSHB 196) makes reference to AS 12.13.401 - 12.13.405. I believe the numbers have been inverted and should actually read AS 13.12.401 - 13.12.405.

I again suggest that the term "Uniform" be changed to "Alaska" in Section 11 at page 14 of HB 196 (Section 12, page 18 of CSHB 196) to avoid any confusion in the future, as previously discussed in my letter of April 17, 1997. I was recently informed by Robert Manley that many of the provisions of Section 11 (Section 12 of CSHB 196) were derived from several uniform acts, not just the Uniform Trusts Act. All the more reason to title it "Alaska Trusts Act."

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: *Mary Ellen Beardsley*
Mary Ellen Beardsley
Assistant Attorney General

MEB/

cc: Arthur H. Peterson, Esq., Dillon & Findley
Chrystal Smith, AGO, Juneau
Deb Behr, AGO, Juneau

National Bank of Alaska



March 25, 1998

Corporate Headquarters
P.O. Box 199600
Anchorage, AK 99510-0600
Phone (907) 522-8888

Joe Ryan, Representative
Alaska State House of Representatives

VIA Fax (907) 465-4588

Dear Representative Ryan:

My name is David L. Dobbs and I am a trust officer with National Bank of Alaska who has over 35 years of direct trust experience in three states, including Alaska.

I was provided with a copy of the memo from Brian Porter to you dated March 23, 1998, indicating his concerns about IIB 196 ("E" version).

I reviewed the Memo in detail and can assure you that all the concerns voiced have long been well resolved in an appropriate manner and should not be a point of contention or need resolution.

There is a great volume of legislation, regulations and the common law of trusts that fully answers the questions raised. One controlling set of regulations is commonly referred to as Reg. 9 and is that section of the regulations of the Comptroller of the Currency that controls and regulates the activities of national bank trust departments.

I respectfully suggest that the concerns raised in Mr. Porter's are not valid and should not impede the passage of the proposed legislation.

If I may be of assistance, I am available during office hours at (907) 265-2959.

Respectfully submitted

A handwritten signature in cursive script, appearing to read "David L. Dobbs".

David L. Dobbs
Vice President &
Trust Officer

§ 24. (Repeal)

All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Library References

Statutes 4-187
C.J.S. Statutes 8 295

§ 25. (Time of Tulative Effect)

This Act shall take effect [] and shall apply only to testamentary trusts created by wills or codicils executed after the effective date of the Act and to non-testamentary trusts created after the effective date of the Act.

Articles in Adopting Jurisdictions

Variations from Official Text

North Carolina. Section reads:
"This Article shall take effect and shall apply in the construction of and operation under"

"(1) All agreements containing trust provisions entered into on or after January 1, 1978

"(2) All wills made by testators who shall die on or after January 1, 1978, and

"(3) All other wills and trust agreements and trust relations hereafter as such

herein do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America."

South Dakota. Section reads: "This chapter shall apply only to testamentary trusts created by wills or codicils executed after July 1, 1943 and to non-testamentary trusts created after May 1, 1943."

Library References

Statutes 4-269, 251
C.J.S. Statutes 19 409, 412

INDEXES TO
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FINANCIAL LAWS

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The majority shall be obligated to further explain as to the power or authority of the trustee to convey or to act in the application of any trust assets paid or delivered to the trustee.

The undersigned hereby as Trustee under the agreement dated... and hereby have full and absolute power to sell, lease, convey, or otherwise dispose of any and all real and personal property owned by the trust in order to carry out the purposes and intent of the trust and to execute and perform the duties of the trustee as herein provided.

Low Rates and Increased Communication

Reading the report below the majority and minority had portions of 87 of the Trust's assets.

Notice of Execution

Proper and should not necessarily have been known of trustee's breach of fiduciary duty by failing to consider rights of other beneficiaries. The beneficiaries of the trust were not notified in accordance with the trust instrument and the trustee's duties under the trust instrument.

Application of Trust Assets

Trust assets were placed in escrow upon the death of the settlor. The trustee was to manage the trust assets for the benefit of the beneficiaries.

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Comptroller of the Currency
Administrator of National Banks

Comptroller's Handbook for Fiduciary Activities

September 1990
Washington, DC 20219

Title 12 — Banks and Banking

Chapter 1 — Bureau of the Comptroller of the Currency,
Department of the TreasuryPart 9 — Fiduciary Powers of National Banks and
Collective Investment Funds

Sec.

- 9.1 Definitions.
- 9.2 Applications.
- 9.3 (Reserved).
- 9.4 Consolidation or merger of two or more national banks.
- 9.5 Adoption of policies and procedures with respect to brokerage placement practices.
- 9.6 (Reserved).
- 9.7 Administration of fiduciary powers
- 9.8 Books and accounts.
- 9.9 Audit of trust department.
- 9.10 Funds awaiting investment or distribution.
- 9.11 Investment of funds held as fiduciary.
- 9.12 Self-dealing.
- 9.13 Custody of investments.
- 9.14 Deposit of securities with state authorities.
- 9.15 Compensation of bank.
- 9.16 Receivership or voluntary liquidation of bank.
- 9.17 Surrender of fiduciary powers
- 9.18 Collective investment.
- 9.19 Forms
- 9.20 Registration of national bank transfer agents
- 9.21 Applications for stays of disciplinary sanctions
- 9.22 Applications for review of final disciplinary sanctions

Authority: Sec. 1, 78 Stat. 666 (12 U.S.C. 92a), and R.S. 5240, as amended (12 U.S.C. 481).

Effective as of April 6, 1963 as amended through December 23, 1982.

§9.1 — Definitions.

For the purpose of this regulation, the term:

(a) "Account" means the trust, estate or other fiduciary relationship which has been established with a bank.

(b) "Fiduciary" means a bank undertaking to act alone or jointly with others primarily for the benefit of another in all matters connected with its undertaking and includes trustee, executor, administrator, registrar of

stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, managing agent and any other similar capacity.

(c) "Fiduciary powers" means the power to act in any fiduciary capacity authorized by the Act of September 28, 1962, 78 Stat. 660, 12 U.S.C. 92a. Under that Act, a national bank may be authorized to act, when not in contravention of local law, as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity which state banks, trust companies, or other corporations which came into competition with the national bank may exercise under local law.

(d) "Fiduciary records" means all matters which are written, transcribed, recorded, received or otherwise come into possession of a bank and are necessary to preserve information concerning the acts and events relevant to the fiduciary activities of a bank.

(e) "Guardian" means the guardian or committee by whatever name employed by local law, of the estate of an infant, an incompetent individual, an absent individual, or a competent individual over whose estate a court has taken jurisdiction, other than under bankruptcy or insolvency laws.

(f) "Investment authority" means the responsibility conferred by action of law or a provision of an appropriate governing instrument to make, select or change investments, review investment decisions made by others, or to provide investment advice or counsel to others.

(g) "Local law" means the law of the state or other jurisdiction governing the fiduciary relationship.

(h) "Managing agent" means the fiduciary relationship assumed by a bank upon the creation of an account which names the bank as agent and confers investment discretion upon the bank.

(i) "State bank" means any bank, trust company, savings bank, or other banking institution, which is not a national bank and the principal office of which is located in the District of Columbia, any state, commonwealth, or territorial possession of the United States.

(j) "Trust department" means that group or groups of officers and employees of a bank organized under the supervision of officers or employees to whom are designated by the board of directors the performance of the fiduciary responsibilities of the bank, whether or not the group or groups are so named.

(k) "Bank" shall include two or more banks which are members of the same affiliated group with respect to any fund established pursuant to §9.18 of this part, of which any of such affiliated banks is trustee, or two or more of such affiliated banks are co-trustees.

(l) "Custodian under a Uniform Gifts to Minors Act" means an account established pursuant to a state law which is substantially similar to the Uniform Gifts to Minors Act as published by the American Law Institute and with respect to which the bank operating such account has established to the satisfaction of the Secretary of the Treasury that it has duties and responsibilities similar to duties and responsibilities of a trustee or guardian.

§ 9.2 — Applications.

A national bank desiring to exercise fiduciary powers shall file an application with the Comptroller of the Currency pursuant to 12 CFR 5.26, but an application to exercise fiduciary powers by a national bank limited to trust powers shall be filed pursuant to 12 CFR 5.22.

§ 9.3 — (Reserved).

§ 9.4 — Consolidation or merger of two or more national banks.

Where two or more national banks consolidate or merge, and any one of such banks has, prior to such consolidation or merger, received a permit from the Board of Governors of the Federal Reserve System or the Comptroller of the Currency to exercise fiduciary powers which is in force at the time of the consolidation or merger, the rights existing under such permit pass to the resulting bank, and the resulting bank may exercise such fiduciary powers in the same manner and to the same extent as the bank to which such permit was originally issued; and no new application to continue to exercise such powers is necessary. However, where the name or charter number of the resulting bank differs from that of the bank to which the right to exercise fiduciary powers was originally granted, in order that the records of the resulting bank may be complete and that it have convenient evidence of its right to exercise fiduciary powers, the Comptroller of the Currency will issue a certificate to that bank showing its right to exercise the fiduciary powers theretofore granted to any of the national banks participating in the consolidation or merger.

§ 9.5 — Adoption of policies and procedures with respect to brokerage placement practices.

Each national bank exercising investment discretion (as defined in 12 CFR 12.2(c)) with respect to an account shall adopt and follow written policies and procedures intended to ensure that its brokerage placement practices comply with all applicable laws and regulations. Among other relevant matters, such written policies and procedures should address, where appropriate, (i) the selection of persons to effect securities transactions and the evaluation of the reasonableness of any brokerage commissions paid to such persons (including the factors considered in those determinations), (ii) any acquisition of services or products, including research services, in return for brokerage commissions; (iii) the allocation of research or other

services among accounts, including those which did not generate commissions to pay for such research or other services; and (iv) the need, in appropriate instances, to make disclosures concerning such policies and procedures to prospective and existing customers.

§ 9.6 — (Reserved).

§ 9.7 — Administration of fiduciary powers.

(a)(1) The board of directors is responsible for the proper exercise of fiduciary powers by the bank. All matters pertinent thereto, including the determination of policies, the investment and disposition of property held in a fiduciary capacity, and the direction and review of the actions of all officers, employees, and committees utilized by the bank in the exercise of its fiduciary powers, are the responsibility of the board. In discharging this responsibility, the board of directors may assign, by action duly entered in the minutes, the administration of such of the bank's fiduciary powers as it may consider proper to assign to such director(s) officer(s), employee(s) or committee(s) as it may designate.

(2) No fiduciary account shall be accepted without the prior approval of the board, or of the director(s), officer(s), or committee(s) to whom the board may have designated the performance of that responsibility. A written record shall be made of such acceptances and of the relinquishment or closing out of all fiduciary accounts. Upon the acceptance of an account for which the bank has investment responsibilities, a prompt review of the assets shall be made. The board shall also ensure that at least once during every calendar year thereafter, and within 15 months of the last review, all the assets held in or for each fiduciary account, where the bank has investment responsibilities are reviewed to determine the advisability of retaining or disposing of such assets.

(b) All officers and employees taking part in the operation of the trust department shall be adequately bonded.

(c) Every national bank exercising fiduciary powers shall designate, employ or retain legal counsel who shall be readily available to pass upon fiduciary matters and to advise the bank and its trust department.

(d) The trust department may utilize personnel and facilities of other departments of the bank, and other departments of the bank may utilize personnel and facilities of the trust department only to the extent not prohibited by law. Every national bank exercising fiduciary powers shall adopt written policies and procedures to ensure that the Federal securities laws are complied with in connection with any decision or recommendation to purchase or sell any security. Such policies and procedures, in particular, shall ensure that national bank trust departments shall not use material inside information in connection with any decision or recommendation to purchase or sell any security.

§ 9.8 — Books and accounts.

(a) Every national bank exercising fiduciary powers shall keep its fiduciary records separate and distinct from other records of the bank. All fiduciary records shall be so kept and retained for such time as to enable the bank to furnish such information or reports with respect thereto as may be required by the Comptroller of the Currency. The fiduciary records shall contain full information relative to each account.

(b) Every such national bank shall keep an adequate record of all pending litigation to which it is a party in connection with its exercise of fiduciary powers.

(c) Solely for purposes of examination by the Comptroller of the Currency, a national bank shall retain the records required by this Part for a period of 3 years from the date of termination of the fiduciary account relationship to which the records relate or of litigation relating to such account, unless applicable law specifically prescribes a different period.

§ 9.9 — Audit of trust department.

A committee of directors, exclusive of any active officers of the bank, shall at least once during each calendar year and within 15 months of the last such audit, make suitable audits of the trust department or cause suitable audits to be made by auditors responsible only to the board of directors and at such time shall ascertain whether the department has been administered in accordance with law, this regulation and sound fiduciary principles. The board of directors may elect, in lieu of such periodic audits, to adopt an adequate continuous audit system. A report of the audits and examination required under this section, together with the action taken thereon, shall be noted in the minutes of the board of directors.

§ 9.10 — Funds awaiting investment or distribution.

(a) Funds held by a national bank in a fiduciary capacity which are awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. Each national bank exercising fiduciary powers shall adopt and follow written policies and procedures intended to ensure that the maximum rate of return available for trust-quality, short-term investments is obtained upon funds so held, consistent with the requirements of the governing instrument and local law. Such policies and procedures shall take into consideration all relevant factors, including but not limited to the anticipated return that could be obtained while the cash remains uninvested or undistributed, the cost of investing such funds, and the anticipated need for the funds.

(b) Funds held in trust by a national bank, including ~~managing agency accounts, awaiting investment or distribution may, unless prohibited by the instrument creating the trust, be deposited in the~~ ~~commercial or savings or other department of the bank,~~ provided that it shall first act as collateral under control of the trust department as collateral security:

(1) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest, or

(2) Readily marketable securities of the classes in which state banks exercising fiduciary powers are authorized or permitted to invest trust funds under the laws of the state in which such national bank is located; or

(3) Other readily marketable securities that qualify as investment securities pursuant to the Investment Securities Regulation of the Comptroller of the Currency, 12 CFR, Chapter 1, Part 1.

The securities so deposited or securities substituted therefore as collateral shall at all times be at least equal in face value to the amount of trust funds so deposited, but such security shall not be required to the extent that the funds so deposited are insured by the Federal Deposit Insurance Corporation. The requirements of this section are met when qualifying assets of the bank are pledged to secure a deposit in compliance with local law, and no duplicate pledge shall be required in such case.

§ 9.11 — Investment of funds held as fiduciary.

§ 9.11 — Investment of funds held as fiduciary.

(a) Funds held by a national bank in a fiduciary capacity shall be invested in accordance with the instrument establishing the fiduciary relationship and local law. When such instrument does not specify the character or class of investments to be made and does not vest in the bank, its directors or its officers a discretion in the matter, funds held pursuant to such instrument shall be invested in any investment in which corporate fiduciaries may invest under local law.

(b) If, under local law, corporate fiduciaries appointed by a court are permitted to exercise a discretion in investments, or if a national bank acting as fiduciary under appointment by a court is vested with a discretion in investments by an order of such court, funds of such accounts may be invested in investments which are permitted by local law. Otherwise, a national bank acting as fiduciary under appointment by a court must make all investments of funds in such accounts under an order of that court. Such orders in either case shall be preserved with the fiduciary records of the bank.

(c) The collective investment of funds received or held by a national bank as fiduciary is governed by § 9.18.

(d) As a part of each examination of the trust department of a national bank and as provided by the *Comptroller's Handbook for National Trust Examiners*, the Comptroller of the Currency will examine the investments held by such bank as fiduciary, including the investment of funds under the provisions of § 9.18, in order to determine whether such investments are in accordance with law, this regulation and sound fiduciary principles.

S B

3 5 5

**SENATE COMMITTEE REPORT
First Committee of Referral**

DATE: 4/14/98

FURTHER: Judiciary

Date of 5-Day Notice: 4-16-98
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 4-22-98

Labor and Commerce Committee considered

SENATE BILL NO. 355

"An Act relating to the provision of electric utility service."

and recommends:

- be replaced with _____ CS SB 355 (14C)
- adopt previous _____ CS _____
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to the _____ Committee

- Senate Bill: same title
- new title
- House Bill:**
- same title
- technical title
- new: SCR# _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
		<i>Jim Kelly</i>	✓		
		<i>Jim Kelly</i>	✓		
CHAIR: <i>Loren D. Benar</i>	✓	CHAIR:			

NEW FISCAL NOTE(S):

Department Date Zero Fiscal

PREVIOUS FISCAL NOTE(S):*

Department Date Zero Fiscal

APPROPRIATION -- no fiscal note

*include fiscal notes accompanying Governor's bill



Official Business

Alaska State Legislature

SENATE

State Capitol
Juneau, AK 99801-1182

Senate Labor & Commerce Committee

SPONSOR STATEMENT

SENATE BILL 355

Competitive Retail Sales For Electric Power

The Legislature sets broad regulatory policy and has never prohibited retail customer choice of electric service providers. This legislation establishes that in the distribution service territories of large electric utilities of high density, customer choice must be allowed without delay.

In other industries that have been exposed to greater competition customers have benefited. From this experience consumers already know that they want a choice of electric service providers. Recent poll results indicate overwhelming support of customer choice in Anchorage. Competition at the wholesale level has already been a huge success, lowering electric rates in Fairbanks and offsetting costs in southcentral Alaska as well. It is time to bring these benefits directly to retail consumers.

As drafted, the legislation will apply initially only to Anchorage customers. The two major electric power providers in Anchorage are Municipal Light and Power (ML&P) and Chugach Electric Association (CEA). Action now will accelerate the process of providing benefits to customers and the local Anchorage economy. Experience from this limited competition will prepare other Alaska utilities to compete and survive when "outside" utilities enter the Alaska market. If we want to support the local utilities, we need to unshackle them so they can fight for their survival by learning to compete.

APUC oversight and anti-trust laws will prevent monopolies. The APUC will be able to designate providers of last resort, sort out whether there are any stranded investments to be recovered and handle technical issues related to access as they may arise.



Official Business

Alaska State Legislature

SENATE

State Capitol
Juneau, AK 99801-1182

Senate Labor & Commerce Committee

Memo

TO: Terry Cramer, Legal Counsel
Legislative Research and Legal Services
via fax X 2029 two pages

FROM: Annette Kreitzer, Aide to
Senate Labor & Commerce Committee
PH: X 3844

DATE: April 22, 1998

RE: Final CS for SB 355 (L&C)

The Senate Labor & Commerce Committee adopted the attached amendment #1 (page 1, lines 4-11) and moved the bill from committee as a CS. Please prepare a final CS for SB 355 for delivery to Senator Leman's office.

Please call me if you have any questions about this amendment. To be clear, there was an amendment to the amendment on lines 2-3, deleting the words **[BEFORE FULL RETAIL COMPETITION]**.

Machine moved
no objection

AMENDMENT #1 /

OFFERED IN THE SENATE

BY SENATOR LEMAN

TO: SB 355

Page 1, Lines 4-11:

Delete all material and insert:

“(g) To facilitate the establishment of pilot programs before full retail competition, electric utilities, power marketers, resellers and aggregators may request the commission to issue orders necessary to enable the providing entity the use of the transmission and distribution facilities of a certificated electric utility for the provision of retail electric service if the electric utility has more than 30 customers for each mile of distribution line. The commission shall issue the orders requested within 30 days after receiving the request. A request under this subsection may include a request for interim refundable tariffs for distribution access services.

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. CS SB 355 (L&C)

Revision Date (Note if correction) _____	Dept. Affected <u>Commerce</u>
Title <u>Provision of electric service</u>	BRU <u>APUC</u>
	Component <u>APUC</u>
Sponsor <u>S. Labor & Commerce</u>	
Requester <u>(S) JUD</u>	Component Serial No. <u>364</u>

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	62.3	62.3	62.3	62.3	62.3	62.3
Travel	0.5	0.5	0.5	0.5	0.5	0.5
Contractual	21.2	21.2	21.2	21.2	21.2	21.2
Supplies	0.9	0.9	0.9	0.9	0.9	0.9
Equipment	0.2	0.2	0.2	0.2	0.2	0.2
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	85.1	85.1	85.1	85.1	85.1	85.1

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	85.1	85.1	85.1	85.1	85.1	85.1
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)	85.1	85.1	85.1	85.1	85.1	85.1
TOTAL	85.1	85.1	85.1	85.1	85.1	85.1

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time	1	1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would require the Commission to issue orders within 30 days of a request by an electric utility, power marketer, reseller or aggregators to use the transmission and distribution facilities of a certificated electric utility to provide retail electric service. The 30-day turnaround would require the Commission to waive the 30-day statutory notice period required by AS 42.05. 411. A Utility Finance Analyst II, Range 19 would be required to analyze these filings, along with the follow-up analysis of whether the interim rates were just and reasonable.

It is unclear from the language of the bill whether the Commission retains the authority to approve or disapprove these requests within 30 days, or whether they are required to be approved. Both interpretations were expressed at the April 21, 1998 hearing on the bill.

Prepared by <u>Robert A. Lohr</u>	Phone <u>276-6222</u>
Division <u>Alaska Public Utilities Commission</u>	Date <u>4/29/98</u>
Approved by Commissioner <u>[Signature]</u>	Date <u>4/30/98</u>
Agency _____	

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information, call the Governor's Legislative Office

FISCAL NOTE

STATE OF ALASKA
1998 LEGISLATIVE SESSION

BILL NO. SB 355

Revision Date (Note if correction) _____	Dept. Affected <u>Commerce</u>
Title <u>Provision of electric service</u>	BRU <u>APUC</u>
	Component <u>APUC</u>
Sponsor <u>S. Labor & Commerce</u>	
Requester <u>S. Labor & Commerce</u>	Component Serial No. <u>364</u>

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	79.1	79.1	79.1	79.1	79.1	79.1
Travel	0.6	0.6	0.6	0.6	0.6	0.6
Contractual	27.0	27.0	27.0	27.0	27.0	27.0
Supplies	1.1	1.1	1.1	1.1	1.1	1.1
Equipment	0.2	0.2	0.2	0.2	0.2	0.2
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	108.0	108.0	108.0	108.0	108.0	108.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	108.0	108.0	108.0	108.0	108.0	108.0
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)	108.0	108.0	108.0	108.0	108.0	108.0
TOTAL	108.0	108.0	108.0	108.0	108.0	108.0

Estimate of any current year (FY98) cost: _____

POSITIONS

Full-time	1	1	1	1	1	1
Part-time	1	1	1	1	1	1
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would require the Commission to issue orders within 10 days of a request by a certificated electric utility. There is no precedent for expecting decisions this quickly. Even in competitive markets such as long distance telecommunications, the deadline for action on a utility filing is 30 days, and the Commission has the option to reject the application if it is incomplete, or to suspend the filing for further investigation. The ten-day turnaround would not allow for public notice of the filings required by AS 42.05.411.

A Utility Finance Analyst II, Range 19 and part-time Administrative Clerk (Range 8) would be required to handle the fast turnaround required for these filings, along with the follow-up analysis of whether the interim rates were just and reasonable. The Commission would be required to schedule special meetings to handle these filings, because regularly scheduled meetings would not meet the statutory deadline.

Division <u>Alaska Public Utilities Commission</u>	Date <u>4/20/98</u>
Approved by Commissioner <u>[Signature]</u>	Date <u>4/21/98</u>
Agency <u>[Signature]</u>	

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