



Trusts

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I. INTRODUCTION

A. TRUST DEFINED

A trust is a fiduciary relationship in which a trustee holds legal title to specific property under a fiduciary duty to manage, invest, safeguard, and administer the trust assets and income for the benefit of designated beneficiaries, who hold equitable title. The testator or grantor who creates the trust is called the trustor or settlor.

1. Uniform Trust Code

In Wyoming, express trusts are governed by the Uniform Trust Code ("UTC"), which provides rules relating to the creation, modification, and termination of trusts; duties and powers of a trustee; relations among co-trustees; and the rights and interests of beneficiaries.

a. Mandatory Rules

In general, the terms of the trust govern the obligations of the trustee and the rights of the beneficiaries. However, the UTC does prescribe certain mandatory rules that cannot be overridden in the terms of the trust. These include:

- i. The requirements for creating a trust;
- ii. The trustee's duty to act in good faith and in accordance with the terms and purposes of the trust and the beneficiaries' interests;
- iii. The requirement that the trust purpose not be unlawful, contrary to public policy, or impossible to achieve;
- iv. The power of a court to modify or terminate a trust;
- v. The effect of a spendthrift provision;
- vi. The trustee's duty to keep qualified beneficiaries informed of trust administration; and
- vii. The rights of third parties, such as bona fide purchasers, engaged in commercial transactions with the trustee.

II. EXPRESS PRIVATE TRUSTS

A. ELEMENTS OF AN EXPRESS TRUST

There are five elements required for an express trust: (i) a **settlor** with capacity to convey, (ii) a clear and unequivocal **present intent** to create a present trust relationship, (iii) a competent **trustee** with duties, (iv) a definite **beneficiary**, and (v) the same person is not the **sole** trustee and sole beneficiary. Additionally, there must be a present and unequivocal disposition in trust of **specific property** then owned by the settlor, and the trust must have a valid **trust purpose**. Consideration is not required for the creation of a trust; in fact, trusts are usually created gratuitously.

1. Settlor Must Have Capacity –Undue Influence

The capacity required to create a revocable or testamentary trust is the same as that required to make a will. To establish that a trust was executed under undue influence, the plaintiff must establish that: (i) the relation between the person charged with exercising undue influence and the settlor afforded the person an opportunity to control the act; (ii) the settlor's condition was such to permit subversion of his freedom of will; (iii) there was activity on the part of the person charged with exercising undue influence; and (iv) such person unduly profited as a beneficiary under the trust. See, *e.g.*, *Retz v. Siebrandt*, 181 P.3d 84 (Wyo. 2008)

2. Present Intention to Create a Trust

a. Manifested by Words, Writing, or Conduct

The settlor's manifestation of intention to create a trust is essential to the existence of an express trust. Except as limited by requirements of the Statute of Wills or Statute of Frauds (applicable to real property), this intention may be manifested by written or spoken words or by conduct, and it need not be manifested in any particular form of language. An oral trust of personal property is valid in all jurisdictions.

b. Must Be Manifested While Settlor Owns Property

The intention to create a trust must have been manifested by the settlor at a time when he owned the trust property and prior to its conveyance to another.

a) Future Interest May Be Trust Res

However, a presently declared trust can have as the trust res a future interest in property (*e.g.*, A can convey "to B for life and then to C as trustee for D"; C has present duties to protect D's equitable future interest).

b) Effect of Promise to Create Trust

If the settlor promises gratuitously to create a trust in the future, a trust arises in the future only if, at that time, the settlor manifests anew his intention to create the trust.

Often this promise will be to hold property in trust when the property is acquired. On the other hand, if the promise is supported by consideration, the trust can arise in the future, when the property is acquired, without any further manifestation of intent.

3. Trustee

Although a trustee is essential to the operation of a trust, once a trust is established it will not fail merely because of the trustee's death, incapacity, resignation, or removal. A successor trustee will be appointed in order to carry out the testator's intention, except in the unusual case where it clearly appears that the trust is to continue only as long as the originally designated trustee continues to serve.

a. Trustee--Compensation and Reimbursement

Wyoming trustees are entitled to **additional** compensation on agreement of all qualified beneficiaries

b. Removal of Trustee

The court may remove a trustee on its own motion or upon request by the settlor, a beneficiary (unless the trust is revocable and the settlor has capacity), or a co-trustee.

1) Grounds for Removal of Trustee

Basically, a court may remove a trustee if his continuation in office would be detrimental to the trust (taking into consideration both the settlor's intent and the interests of the beneficiaries). There are numerous grounds upon which a trustee may be removed, including the following:

- (i) Commission of a serious **breach of trust**;

- (ii) ***Lack of cooperation*** among co-trustees that substantially impairs trust administration;
- (iii) ***Unfitness, unwillingness, or persistent failure*** to administer the trust; or
- (iv) ***Substantial change of circumstances*** so that removal is in the best interest of ***all beneficiaries***.

c. Resignation

Once a trustee has accepted appointment, he can resign by either: (i) giving 30 days' notice to the qualified beneficiaries, settlor (if living), and co-trustees; or (iii) obtaining court approval.

4. Beneficiaries

A beneficiary is ***necessary to the validity*** of every trust except charitable trusts (which can be enforced by the state attorney general although the beneficiaries are indefinite) and so-called honorary trusts (*e.g.*, trusts for animals or to maintain graves). A private trust requires that there be ***definite beneficiaries*** (or at least that the beneficiaries will be ascertainable within the period when all interests must vest under the Rule Against Perpetuities).

a. Qualified Beneficiary

A qualified beneficiary is a beneficiary who ***is currently entitled to mandatory distributions*** of income or principal from the trust or has a ***vested remainder interest in the residuary*** of the trust that is not subject to divestment. Wyo. Stat. §4-10-103(a)(xv)(A)—effective July 1, 2013. Alternative definitions will be included in statute for situations where there is no qualified beneficiary under this new definition. This definition is very important in terms of who is entitled to notice of certain actions proposed by the trustee. Only qualified beneficiaries can demand and receive information regarding the extent or holdings of the trust, unless the trust provides otherwise.

b. Definiteness of Beneficiaries Under Private Trust

1) Unascertained Beneficiaries

Beneficiaries need not be identified at the time a trust is created, but they must be **susceptible** of identification by the time their interests are to come into enjoyment.

a) Unborn Beneficiaries

An unborn beneficiary may be described in the instrument, and the trust will be valid even as to his interest.

2) Class Gifts

A private trust may exist for the benefit of members of a class.

a) Trustee May Be Given Power of Selection

The UTC departs from the common law by providing that a settlor may empower the trustee to select the beneficiaries from an indefinite class.

c. Resulting Trust Remedy Where Express Trust Invalid

If a trust fails for lack of a beneficiary, a resulting trust in favor of the settlor or his successors is presumed.

d. Charitable Trusts Need Not Have Definite Beneficiaries

The requirement of definite beneficiaries does not apply to charitable trusts, where the charitable purpose may be quite broad and the beneficiaries left for the determination of the trustee (*e.g.*, "scholarships for needy students").

5. Trust Property

a. No Res-No Trust

Where there is no trust property, the trust fails because the trustee has no property to manage.

b. Property May Be of Any Type

The property may be real or personal, tangible or intangible, legal or equitable, and it may be either a present interest or a future interest, whether vested or contingent.

6. Trust Purposes

Trusts may be created for any purpose that is not deemed illegal, contrary to public policy, or impossible to achieve.

a. Rule Against Perpetuities

Historically, the Rule Against Perpetuities prohibited dynasty trusts, *i.e.*, long-term trusts created for the benefit of a settlor's descendants that have certain tax advantages. However, in Wyoming, the Rule Against Perpetuities does not apply to a trust created after July 1, 2003, if: (i) the instrument states that the Rule does not apply and that the trust shall terminate no later than 1,000 years after the trust's creation; and (ii) the trust is governed by the laws of Wyoming and the trustee maintains a place of business in, administers the trust in, or is a resident of Wyoming. Real property, not including a mineral interest or an interest in a corporation, limited liability company, partnership, business trust, or other entity, cannot be opted out of the Rule.

7. Trust Advisor

A trust advisor is the settlor of a trust or another party appointed in the trust instrument. Trust advisors are fiduciaries who have the power to:

- (a) Perform a specific duty or function that would normally be performed by the trustee, co-trustee, or trust protector (see 8., *infra*);
- (b) Advise the trustee or co-trustee on matters concerning any beneficiary;
- (c) Direct, consent, or disapprove a trustee's or co-trustee's action or inaction relating to investments of trust assets;
- (d) Direct the acquisition, transfer, or retention of any trust investment; and
- (e) Direct, consent, or disapprove a trustee's or co-trustee's action or inaction in making distributions to the beneficiaries.

8. Trust Protector

A trust protector is any disinterested party appointed in the trust instrument or by the court. Trust protectors are fiduciaries who have the power to:

- (a) Modify or amend the trust instrument to achieve a favorable tax status;
- (b) Modify or amend the trust instrument to take advantage of changes in laws restricting the terms of the trust, distribution of trust property, or administration of the trust;
- (c) Appoint a successor trust protector;
- (d) Review and approve the trustee's accountings;
- (e) Change the governing law or principal place of administration of the trust;
- (f) Remove and replace any trustee, co-trustee, successor trustee, or trust advisor for the reasons stated in the trust instrument;
- (g) Interpret terms of the trust instrument at the trustee's request;
- (h) Advise the trustee or co-trustee on matters concerning any beneficiary;
- (i) Direct, consent, or disapprove a trustee's or co-trustee's action or inaction in making distributions to the beneficiaries;
- (j) Increase or decrease any beneficiary's interest, grant a power of appointment to one or more beneficiaries, or terminate or amend any power of appointment granted by the trust; and
- (k) Elect for the trust to become a qualified spendthrift trust

B. CREATION OF EXPRESS TRUSTS

A trust is generally created in three ways:

- (1) An ***inter vivos trust*** may be created by a ***declaration of trust*** by a property ***owner***, stating that he holds the property as trustee in trust;
- (2) ***An inter vivos trust*** (sometimes called a "living trust") is also created by ***transfer*** of property by the settlor during his lifetime; and
- (3) A ***testamentary trust*** is created by ***will***.

Trusts can also be created by the exercise of a power of appointment or by a promise enforceable under contract law.

In Wyoming, a trust may also be created by the court or by an agent under a power of attorney.

1. Inter Vivos Trusts

a. Present Declaration or Present Transfer of Trust Required

- 1) Declaration of Trust**
- 2) Transfer of Property**
- 3) Delivery Required**
- 4) Must Manifest Intent When Trust Res Exists**

b. Formal Requirements-Statute of Frauds

- 1) Exception-Writing Required for Trusts of Land**

2. Testamentary Trusts

a. Formalities

To create a trust by will, the intention to create a trust and the other essentials of the trust (identification of the beneficiaries, the trust property, and the trust purposes) must be ascertainable in one of the ways permissible under the applicable Statute of Wills.

III. CHARITABLE AND HONORARY TRUSTS

A. DISTINCTIVE RULES APPLY TO CHARITABLE TRUSTS

Charitable trusts, because of their substantial benefit to society, are granted some special exemptions from the rules that apply to private trusts. In general, charitable trusts are liberally construed.

- 1. Must Have Indefinite Beneficiaries**
- 2. Cy Pres Doctrine Applicable**
- 3. May Be Perpetual**

B. TRUST MUST BE FOR CHARITABLE PURPOSES

The purpose of a charitable trust must be one that is considered to ***benefit the public***.

1. General Terms Acceptable

The charitable purpose may be expressed in very general terms.

2. Effect of Gift Controlling Factor

It is the ***effect*** of the gift to the public or a portion thereof, ***not the motive*** of the settlor, that controls.

3. Mixed Trust

Where the beneficiaries of a single trust are both charitable and noncharitable, the trust is a "mixed trust," and the special ***rules for charitable trusts do not apply***.

C. INDEFINITE BENEFICIARIES

The rule requiring a private trust to have definite beneficiaries does not apply to charitable trusts; beneficiaries of a charitable trust must be indefinite.

D. ENFORCING CHARITABLE TRUSTS

Suit to enforce a charitable trust can be brought by the settlor, a qualified beneficiary, or the state's attorney general.

E. RULE AGAINST PERPETUITIES DOES NOT APPLY

F. CY PRES

Because a trust for charitable purposes may be perpetual, it often happens that the specific charitable purpose indicated by the settlor is accomplished or becomes impracticable, unlawful, impossible to achieve, or wasteful. In such a case, the court may direct that the trust property be applied to another charitable purpose as close as possible to the original one, rather than permit the trust to fail and become a resulting trust.

G. HONORARY TRUSTS

Examples are trusts for maintenance of a cemetery plot and trusts for pets.

1. Wyoming's UTC Does Not Limit Honorary Trusts to 21

Wyoming does not limit the duration of an honorary trust to the "lives in being plus 21 years" perpetuities period.

2. Trust for the Care of an Animal

IV. TRANSFER OF THE BENEFICIARY'S INTEREST

A. INVOLUNTARY TRANSFER-RIGHTS OF CREDITORS

1. Creditors of One with Power to Appoint or Withdraw

Trust property that the holder of a power of appointment is authorized to appoint may not be reached or attached by his creditors or assignees except to the extent that the power holder: (i) is authorized to appoint the property to himself, his creditors, his estate, or the creditors of his estate; and (ii) exercises that power. Similarly, trust property that may be withdrawn by a person holding a power to withdraw may not be reached or attached by that person's creditors or assignees unless and until the power holder withdraws the property from the trust.

B. RESTRAINTS ON ALIENATION—SPENDTHRIFT TRUSTS

A spendthrift trust is one in which, by statute or more often by virtue of the terms of the trust, the beneficiary is unable voluntarily or involuntarily to transfer his interest in the trust.

1. Rights of Creditors

2. Restraint on Involuntary Alienation Only-Invalid

3. Effect of Spendthrift Clause-Assignments Are Unenforceable

4. Exceptions

a. Trust for Settlor

A settlor generally is not allowed to create a spendthrift trust for his own benefit to avoid the claims of his creditors; his creditors can reach his interest under a trust despite a spendthrift clause. But Wyoming has created a self-settled "qualified spendthrift trust" and recently strengthened it, effective July 1, 2013.

b. Exceptions-Claims for Child Support

Although Wyoming recognizes policy exceptions to the enforceability of a spendthrift clause for child support, it does not recognize exceptions for alimony, necessities claims, or claims by the government.

c. Trustee's Failure to Make Timely Distribution

A creditor can reach a mandatory distribution of either income or principal if the trustee has not made the distribution to the beneficiary within a reasonable time after the mandatory distribution date.

5. Qualified Spendthrift Trusts

In Wyoming, a settlor may create a qualified spendthrift trust (commonly referred to as a "self-settled asset protection trust") by transferring property to an irrevocable spendthrift trust that specifically states that it is a qualified spendthrift trust and is to be governed by Wyoming law. The settlor may be a beneficiary, and at least one of the trustees must be a resident individual or a Wyoming corporate fiduciary.

a. Settlor's Creditors May Not Reach Qualified Trust Assets

Even though the settlor may be a beneficiary, creditors may not reach assets in a properly created qualified spendthrift trust to satisfy the settlor's debts.

1) Exception-Child Support

A qualified spendthrift trust is not protected from claims for child support.

2) Exception-Fraudulent Transfers

Creditors can reach qualified trust assets if the transfer of property was a fraudulent transfer under the Wyoming Fraudulent Transfers Act.

b. Interests Settlor May Retain

An irrevocable trust may not be deemed revocable because the settlor has retained interests in: (i) current trust income; (ii) a charitable remainder trust; (iii) up to 5% in a total return unitrust and (iv) a qualified personal residence trust.

c. Powers Settlor May Retain

The following retained powers do not render an irrevocable trust revocable: (i) the power to veto distributions from the trust; (ii) a presently exercisable or testamentary general or special power of appointment ; (iii) the power to appoint and remove trustees, trust advisors, and trust protectors; and (iv) the power to serve as an investment advisor to the trust.

d. Qualified Transfer Affidavit

A qualified transfer (i.e., a transfer, conveyance, or assignment of property to a qualified trustee under a qualified spendthrift trust instrument) requires an affidavit from the settlor stating that:

- (i) The settlor has ***full right, title, and authority to transfer*** the property to the trust;
- (ii) The transfer of property to the trust ***will not render the settlor insolvent***;
- (iii) The settlor ***does not intend to defraud any creditors*** by the transfer;
- (iv) ***No court actions or other proceedings*** are pending against the settlor other than those identified in the affidavit;
- (v) The settlor is ***not in default of any child support*** obligation by more than ***30 days***;
- (vi) The settlor ***does not contemplate filing for bankruptcy***;
- (vii) The property transferred to the trust is ***not derived from any unlawful activity***; and
- (viii) The settlor has and will maintain ***personal liability insurance*** of the lesser of \$1 million or the total value of the property transferred.

e. Existing Trusts May Become Qualified Spendthrift Trusts

The settlor, trustee, or trust protector of an existing irrevocable trust may elect to treat the trust as a qualified spendthrift trust, with creditor protection relating back to the date of election. The trust must be modified to conform with section 4-10-510 (states that it is a qualified spendthrift trust subject to Wyoming law, qualified trustee, etc.). Assets from a trust previously created in another jurisdiction with similar creditor protection for settlors (e.g., Alaska, Oklahoma) may be transferred to a Wyoming qualified spend-thrift trust, with creditor protection relating back to the date the other trust was originally funded.

f. Compare-Offshore Asset Protection Trusts

Offshore asset protection trusts ("OAPTs") are trusts established in foreign jurisdictions to protect assets from creditors without requiring the settlor to lose control over the assets. Although the Supreme Court of Wyoming declined to address the merits of OAPTs, it noted that while there are legitimate reasons such trusts exist (e.g., estate or tax planning), the use of such trusts to hinder or delay creditors (including former spouses claiming alimony, child support, or a fair division of marital property) may be fraudulent. *Breitenstine v. Breitenstine*, 62 P.3d 587 (Wyo. 2003)

C. DISCRETIONARY TRUSTS

If the trustee has the power to pay income to the beneficiary or accumulate it, or has the power to appoint the income among several beneficiaries in whatever amounts he may choose, the "beneficiary" does not have any "right" to the income until the trustee exercises the power.

V. MODIFICATION AND TERMINATION OF THE TRUST

A. IN GENERAL

A trust will terminate automatically at the expiration of the trust term specified in the instrument. Likewise, a trust will terminate when all of the purposes of the trust have been accomplished or the purposes have become unlawful, contrary to public policy, or impossible to achieve.

B. BY THE SETTLOR

In Wyoming, the subsequent execution of an inconsistent will does not revoke or amend a revocable trust. *In re Estate of Lohrie*, 950 P.2d 1030 (Wyo. 1997)

C. BY THE BENEFICIARIES

A trust may be terminated or modified upon the consent of the settlor (or his agent, conservator, or guardian) and all beneficiaries, even if the modification or termination conflicts with a material purpose of the trust. A trust also may be terminated or modified on the consent of only all beneficiaries (*i.e.*, without the consent of the settlor), but only if no material purpose of the trust would thereby be frustrated. Note that the fulfillment of the settlor's purposes is seen as equivalent to his consent. Furthermore, if the trust purposes are incapable of fulfillment, no material purpose of the trust would be frustrated by termination of the trust.

1. Distribution of Trust Property

If the trust is terminated by consent of the settlor and the beneficiaries, or by agreement of all beneficiaries, then the trustee must distribute the trust property pursuant to the wishes of the beneficiaries.

D. BY THE COURT

If termination or modification is not available because all beneficiaries do not or cannot consent, or because a material purpose of the settlor would be frustrated, the parties may seek modification based on the supervisory function of the court if: (i) the trust could have been modified if all beneficiaries had consented, and (ii) the interests of any nonconsenting beneficiaries will be adequately protected.

1. Unanticipated Circumstances

Generally, the court will permit termination of a trust or modification of its terms if *circumstances unanticipated by the settlor* threaten the purposes of the trust (e.g., the interests of the beneficiaries are endangered). Additionally, the court may modify the trust's terms if continuation of the trust on existing terms is *impracticable or wasteful*. To carry out the settlor's primary intent, which is the welfare of the beneficiaries, the courts may ignore some specific direction of the settlor or may grant the trustee powers specifically prohibited in the trust instrument. If the trust is terminated, it must be distributed in a manner consistent with the trust's purposes.

2. Uneconomic Trust or Tax Purpose

The court can modify or terminate a trust if the value of the trust is insufficient to justify the cost of administration or to achieve the settlor's tax objectives.

3. Reformation

The court can reform the terms of a trust to reflect the settlor's intent if by clear and convincing evidence it is shown that the settlor's intent and the trust's terms were affected by a mistake.

E. BY THE TRUSTEE

1. Uneconomic Trust

In Wyoming, a trustee can terminate a trust if its value is less than \$150,000.

F. BY THE TRUST PROTECTOR

A noncharitable irrevocable trust may be modified or terminated by a trust protector, provided that the terms of the trust authorize a trust protector and grant him such power.

VI. TRUST ADMINISTRATION

A. POWERS OF THE TRUSTEE

1. Sources of Trustee's Power

The trustee can properly exercise only such powers as are expressly or impliedly conferred upon her. These include:

- (a) Powers expressly conferred upon her by the ***terms of the trust***;
- (b) All powers that an ***unmarried individual has over her own property*** unless limited by the trust's terms;
- (c) Those powers that are ***appropriate to achieve the proper investment, management, and distribution of the trust property*** and that are not forbidden by the terms of the trust; and
- (d) Powers conferred upon her by the ***UTC*** unless limited by the terms of the trust. The UTC confers many powers on the trustee, including the power to: collect and hold trust assets; operate a business; acquire an undivided interest in a trust asset; invest trust assets; buy, sell, or encumber trust assets; enter into a lease; vote securities; pay taxes and assessments; insure assets; make distributions; prosecute and defend actions; etc.

2. Joint Powers

Co-trustees who are unable to reach a unanimous decision may act by ***majority*** decision. If a vacancy occurs among the co-trustees, the remaining co-trustees may act for the trust. Likewise, if a co-trustee cannot perform because of, *e.g.*, absence or illness, the remaining co-trustees may act for the trust.

a. Imperative Powers

A power is "imperative" (sometimes called a "mandatory" power) where the trust terms require the performance of a particular act.

b. Discretionary Powers

Most powers are discretionary in the sense that the trustee may or may not perform a particular act, as she determines in her judgment to be

most appropriate. The trustee must exercise a discretionary power in good faith. Exercise of a discretionary power is subject to judicial review to prevent abuse of the trustee's discretion. To the extent that the exercise of such a power involves a **business judgment** rather than a question of law or of interpretation, a court will generally refuse to interfere.

1) Effect of Giving Trustee Absolute Discretion.

Where the terms of the trust provide that the trustee shall have "sole" or "uncontrolled" discretion, the trustee's power is still not wholly immune from review.

B. DUTIES OF THE TRUSTEE

A trustee is subject to a number of duties designed to ensure the security of the trust property and the fairness of its administration.

1. Duty to Administer Trust

- a. Trustee with Special Skills Is Held to Higher Standard**
- b. Loyalty and Impartiality**
- c. Reasonable Cost Reimbursement Permitted**

2. Duty of Loyalty—No Self-Dealing

- a) Cannot Buy or Sell Trust Assets
- b) Cannot Sell Assets from One Trust to Another Trust
- c) Cannot Borrow Trust Funds or Make Loans to Trust
- d) Cannot Use Trust Assets to Secure Personal Loan
- e) Cannot Personally Gain Through Position as Trustee
- f) Corporate Trustee Cannot Invest in Its Own Stock
- g) Self-Employment Can Constitute Form of Prohibited Dealing
 - i. Indirect Self-Dealing—Transactions with Relative, Etc.
 - ii. Good Faith Irrelevant
 - iii. Duty Extends Equally to All Beneficiaries

a. **Beneficiary's Rights in Case of Prohibited Transaction**

A transaction involving trustee self-dealing is voidable by the beneficiary affected by the transaction unless:

- (i) The transaction was ***authorized by the terms of the trust*** or ***approved by the court***;
- (ii) The beneficiary ***failed to bring suit*** within the prescribed time period;
- (iii) The beneficiary ***consented*** to the trustee's conduct, ***ratified*** the transaction, or ***released*** the trustee; or
- (iv) The transaction involves a contract entered into or claim acquired by the trustee ***before she became trustee***.

b. **Transaction Between Trustee and Beneficiary**

A transaction between the trustee and beneficiary is voidable by the beneficiary even if it does not involve trust property if it occurs during the existence of the trust or while the trustee has influence over the beneficiary ***unless*** the transaction was ***fair to the beneficiary***.

c. **Restrictions on Self-Dealing Can Be Waived by Settlor**

d. **Transactions Not Constituting Self-Dealing**

In Wyoming, there is no presumption of a conflict of interest when a trustee: (i) invests in an insurance contract purchased from an insurance agency owned by or affiliated with the trustee; or (ii) places securities through a securities broker that is part of the same company as, owned by, or affiliated with the trustee. [Wyo. Stat. § 4-10-802(k)]

3. **Duty To Report**

In Wyoming, the duty to report and inform extends only to the qualified beneficiaries.

4. **Duty to Separate Trust Property and Keep Records—No Commingling**

5. **Duty to Enforce Claims and Defend Trust from Attack**

6. Duty to Preserve Trust Property and Make It Productive

- a. Collect all claims
- b. Lease land or manage it
- c. Record recordable documents, pay taxes, secure insurance
- d. Invest trust funds

C. INVESTMENTS

1. Uniform Act or Legal List Are Default Rules

No matter which approach to investments a state uses, the trust terms can expand or limit a trustee's powers, including investment powers. Thus, the UPIA or legal list provisions apply only if there is no contrary provision in the trust instrument.

2. Uniform Prudent Investor Act

Wyoming has enacted the Uniform Prudent Investor Act.

a. Standard of Care

Under the UPIA, a trustee must invest and manage trust assets as a prudent investor would, taking into account the purposes, terms, distribution requirements, and other circumstances of the trust. To satisfy this objective standard of prudence, the trustee must exercise reasonable care, skill, and caution.

1) Fiduciaries with Special Skills Held to Higher Standard

2) Loyalty and Impartiality

b. Prudence Evaluated as to Overall Investment Strategy

1) Investment Performance Measured by "Overall Return"

2) Risk/Return Curve

3) Any Type of Investment Permitted

4) Factors Considered in Making Investment Decisions

The following circumstances are relevant and must be considered by the trustee in making investment decisions:

(i) General *economic conditions*;

- (ii) The possible effect of *inflation or deflation*;
- (iii) The expected **tax consequences** of investment decisions or strategies;
- (iv) The role that each investment plays within the **overall trust portfolio**;
- (v) The expected **total return** from income and the appreciation of capital;
- (vi) **Other resources** of the beneficiaries;
- (vii) Needs for **liquidity, regularity of income, and preservation or appreciation of capital**; and
- (viii) An asset's **special relationship** or value to the purposes of the trust or to one or more of the beneficiaries.

5) Diversification of Investment

6) Reviewing Compliance with Act

c. Delegation of Investment and Management Functions Permitted

E. LIABILITIES OF TRUSTEE

1. Remedies for Breach of Trust

Include specific performance, injunction, repayment to trust and suspension of trustee.

2. Damages to Beneficiaries for Breach

a. Liability for Profits in Absence of Breach

If a trustee commits a breach of trust, he is liable to the beneficiaries for the **greater of**: (i) the amount necessary to restore the trust property and distributions to what they would have been absent the breach, or (ii) the trustee's profit from the breach.

b. Statute of Limitations

The beneficiary must bring her action with **one year** after she receives any report disclosing the breach. If she does not receive any such report, she must bring her action with **five years** after the first of the following

to occur: (i) the removal, resignation, or death of the trustee; (ii) termination of her interest; or (iii) termination of the trust.

3. When Trustee Is Not Liable For Breach

- a. Reasonable Reliance
- b. Beneficiary Accepts Breach
- c. Effect of Exculpatory Clauses

An exculpatory clause is one which seeks to lower the standard to be used to evaluate the trustee's actions. An exculpatory clause that attempts to limit the trustee's liability to breaches in **bad faith** or in **reckless disregard** for the rights of beneficiaries or appears in the trust document because of an abuse of a confidential relationship with the settlor, are **void**.

4. Liability of Co-Trustees

A co-trustee is not liable if he did not participate in breach AND did try to prevent the breach or compel its redress.

5. Trustee's Liability to Third Parties

a. Contracts on Behalf of Trust Estate

A third party can sue the trust estate on the contract, proceeding against the trustee in his representative capacity. If trustee did not indicate his capacity as trustee, he can be personally liable.

b. Tort

A third party can sue the trust for tortious conduct, as well as the trustee personally, if he was at fault, but not by virtue of *respondeat superior*.

F. LIABILITY OF THIRD PARTIES TO THE TRUST

3. Participation in Breach of Trust

A third party who **knowingly** participates in a breach of trust by the trustee is liable for the resulting loss to the trust estate.

G. ALLOCATION OF RECEIPT AND EXPENSES BETWEEN INCOME AND PRINCIPAL ACCOUNTS

1. Uniform Principal and Income Act

Wyoming has enacted the uniform Principal and Income Act. The Act, which applies to all trusts and estates unless the governing instrument provides otherwise, gives the trustee or personal representative an adjustment power to reallocate investment portfolio return. This adjustment power authorizes the trustee to characterize items such as capital gains, stock dividends, etc., as income if the trustee deems it appropriate or necessary to carry out the trust purposes, *e.g.*, where the income component of a portfolio's total return is too small (or too large) because of the investment decisions made by the trustee.

a. Duty of Fairness to All Beneficiaries

b. Adjustment Power

c. Factors to Be Considered

- (i) The *nature, purpose, and expected duration* of the trust;
- (ii) The *intent* of the settlor;
- (iii) The identity and circumstances of the *beneficiaries*;
- (iv) The needs for *liquidity, regularity of income, and preservation and appreciation of capital*;
- (v) The nature of the trust's *assets*;
- (vi) The *net amount allocated to income* under the other sections of this Act and the increase or decrease in the *value of the principal assets*;
- (vii) Whether and to what extent the trust gives or denies the trustee the power to *invade principal or accumulate income*;
- (viii) The actual and anticipated effect of *economic conditions* on principal and income and effects of *inflation and deflation*; and
- (ix) The *anticipated tax consequences* of an adjustment.

d. Adjustment Not Permitted If Result Would Be Adverse Tax Consequences

2. Allocation of Receipts

The Act sets out detailed rules as to how certain receipts and expenses are to be allocated between the income and principal accounts (subject to the trustee's adjustment power).

3. Allocation of Expenses

4. Conversion of "Income" Trust to Total Return Unitrust

In today's investment world, where many corporate stocks do not pay dividends and savings accounts earn interest in the 2% to 3% range, payment of a trust's "income" to the primary beneficiary may not provide substantial economic support. Also, an "income only" trust can produce tensions between the income beneficiary (who wants investments in high-yield fixed-dollar investments, such as corporate bonds) and the remaindermen (who would like to see investments that have substantial potential for appreciation, without regard to their income). To address these concerns, a trustee may convert such a trust into a total return unitrust. Under a total return unitrust, instead of receiving the trust's income, the beneficiary receives an amount equal to 3% to 5% of the value of the trust principal, valued annually. This enables the trustee to make investment decisions without being concerned about the investments' projected "income."

VII. WILL SUBSTITUTES

A. IN GENERAL

B. REVOCABLE INTER VIVOS TRUSTS

The reason why the revocable trust is not a will, and does not have to comply with the Statute of Wills, is that an *interests passes* to the beneficiary *during the settlor's life*; it merely becomes *possessory* on the settlor's death. The interest can be revoked or divested during the settlor's life, but it passes subject to revocation.

a. Where Trustee Gives Usual Powers

1. Advantages of Revocable Trust

a. Management of Assets

b. Planning for Incapacity—Avoidance of Guardianship

c. Avoidance of Probate

d. Secrecy

e. Choice of Law

the property to the person held to be the trustee, or he has supplied the consideration for a transaction through which the other person, the "trustee," acquired title to the property. Thus, the person who holds title did not give consideration. From this fact, equity presumes that he was not intended to have the benefits of ownership and that he should be a trustee for the person who did furnish the consideration or conveyed title to him.

C. CONSTRUCTIVE TRUSTS-WHEN WILL THEY BE IMPLIED?

A constructive trust is not really a trust at all. Rather, "constructive trust" is the name given to a flexible equitable remedy imposed by a court to prevent an unjust enrichment of one person at the expense of another as the result of wrongful conduct, such as fraud, undue influence, or breach of a fiduciary duty. The constructive trustee's only duty is to convey the property to the person who would have owned it but for the wrongful conduct. This permits the wronged party to receive the very property of which he was deprived. This remedy is especially important where property has increased in value since it was wrongfully acquired.

MISCELLANEOUS

- A.** Clearly, a practitioner should carefully review the entire Wyoming UTC before venturing into trust work, not only because the law is considerably different than many other jurisdictions, but because the Wyoming legislature, at the request of Wyoming estate planners, have tinkered with the UTC considerably, particularly in the asset protection realm.
- B.** For the same reason, it is prudent to be cautious when researching the UTC because enough changes have been made in Wyoming (and other states), that blind reliance on the uniform act is dangerous.
- C.** There is relatively little Wyoming case law in the trust area, and most of it has now been superceded or codified by the Wyoming UTC. As a result, older case law should be used sparingly and carefully. The Wyoming UTC is beginning to be interpreted by the Wyoming Supreme Court, so more authority will exist soon.
- D.** In a legislative quirk, the Wyoming UTC was not made retroactive, so many trusts created prior to July 1, 2003 are not subject to it unless specific statutory provisions are followed to opt-in to the Wyoming UTC. By the same token, it is possible for clients to essentially opt-out of the statute to a great extent.