

IN THE  
**Supreme Court of Pennsylvania**  
No. 15 EAP 2016

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**In re: Trust Under Agreement  
of Edward Winslow Taylor**

Appeal of Elise W. Carr, *et al.*

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*On appeal from the judgment of the Superior Court of Pennsylvania dated  
September 18, 2015, at docket no. 2701 EDA 2014*

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**BRIEF FOR *AMICUS CURIAE* PENNSYLVANIA BANKERS  
ASSOCIATION IN SUPPORT OF REVERSAL**

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Raymond P. Pepe  
David R. Fine  
K&L GATES LLP  
Market Square Plaza  
17 North Second St., 18th Fl.  
Harrisburg, PA 17101  
(717) 231-4500

*Counsel for the Pennsylvania Bankers Association*

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## I. Interest of *Amicus*

The Pennsylvania Bankers Association (the “Bankers Association”) is a voluntary, nonprofit membership association made up of 146 federally chartered and state chartered banks, savings associations and their affiliates that do business in Pennsylvania. The Bankers Association supports the diverse needs of its membership through volunteer participation, industry advocacy, education and membership services. The Bankers Association also serves as an advocate in matters of federal, state and local public policy on behalf of its membership.<sup>1</sup>

The Bankers Association and its members have a strong interest in the proper interpretation and implementation of the Uniform Trust Act as codified in Pennsylvania law. Indeed, as discussed more fully below, the Bankers Association was materially involved in the General Assembly’s consideration of the provisions at issue in this case.

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<sup>1</sup> In accordance with Pennsylvania Rule of Appellate Procedure 531, the Bankers Association certifies that no party’s counsel authored this brief in whole or in part and no party contributed financially to the preparation and submission of this brief.

The Bankers Association's members are very commonly named as institutional trustees, serve as corporate fiduciaries and in the aggregate manage billions of dollars in trust assets. They are dedicated to discharging fully their fiduciary duties with the independence and focus on settlor intent required of them by law.

## **II. Introduction**

There is a theme that runs through the various Pennsylvania enactments controlling the removal of trustees: unless the settlor expressly provides otherwise, a trustee cannot be removed at the whim of a beneficiary lest the trustee lose the independence to meet its duty to follow the terms and intent of the trust. If the settlor includes no provision allowing the beneficiaries unilaterally to remove the trustee, the beneficiaries must have cause and seek court approval so that a judge can be sure the removal is consistent with the trust's purposes and proper administration.

The Uniform Trust Act (the "UTA") as enacted in Pennsylvania is clear and consistent with this history. The Bankers Association anticipates that, in its merits brief, Appellant Wells Fargo Bank, N.A. ("Wells Fargo"), will carefully (and correctly) analyze the statutory-

construction issues that form the first basis for reversing the Superior Court's judgment. Simply stated, Section 7766<sup>2</sup> provides the exclusive means and criteria to remove a trustee, and the Superior Court's reliance on Section 7740.1<sup>3</sup> misapplied basic principles of statutory construction: statutes must be read as a whole to give effect to all of their provisions and specific provisions of statutes control over more general provisions.<sup>4</sup>

The Bankers Association recognizes this Court's preference that *amicus curiae* briefs not repeat the parties' arguments.<sup>5</sup> With that admonition in mind, the Bankers Association will focus its discussion on Pennsylvania's previous fiduciary statutes, Pennsylvania's adoption of the UTA and the policy reasons that underlie Pennsylvania's consistent approach to trustee removal.

The plain language of the statute should resolve this case. The Bankers Association's discussion below supports and gives added dimension to the statutory-construction analysis.

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<sup>2</sup> 20 Pa.C.S. § 7766.

<sup>3</sup> 20 Pa.C.S. § 7740.1.

<sup>4</sup> See 1 Pa.C.S. §§ 1922 and 1933.

<sup>5</sup> See 2016 Amendment to Official Note to Pa.R.A.P. 531.

As the dissenting judge wrote, the Superior Court majority was mistaken in its analysis. The UTA does not permit the beneficiaries in this case to circumvent the specific requirements for removing the trustee by resort to the general provision for modifying the trust. This Court should reverse the judgment of the Superior Court.

### **III. Argument**

#### ***A. Pre-2006 Pennsylvania law regarding removal of trustees.***

To understand how Pennsylvania's current law regarding removal of trustees has developed, it is helpful to consider Pennsylvania's law on the subject as it had evolved at the time the General Assembly adopted the UTA.

Before it adopted the uniform act in 2006, Pennsylvania had a series of statutes that addressed when and how trustees could be removed.

In *Stevenson's Appeal*, 68 Pa. 101 (1871), this Court considered the 1868 iteration of the governing statute, which was denominated "An Act

to authorize the Court of Common Pleas and Orphan's Court of the city of Philadelphia to appoint and remove trustees.”<sup>6</sup>

In *Stevenson*, a married couple sought to remove two trustees who had been appointed under a deed of trust made by the wife before her marriage. The 1868 statute provided the following:

That where any trust now exists or is hereafter created, the cestui que trusts, or a majority of them having the life estate, shall have the right to elect or choose trustees to execute said trust; and upon petition of the cestui que trusts or parties in interest as aforesaid have such life estate, the Court of Common Pleas or Orphan's Court in and for the City of Philadelphia, having jurisdiction, shall remove the acting trustee or trustees, and appoint other or others, as chosen or elected by said parties.<sup>7</sup>

The common pleas court reviewed the language and noted that it could permit two interpretations:

one would oblige us at the mere whim of a cestui que trust, at any time, to appoint a new trustee of his selection; and the other, to make such an appointment when for just cause the former trustee has been removed, dies or resigns.

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<sup>6</sup> Act of April 9, 1868, P.L. 785, No. 726.

<sup>7</sup> *Stevenson*, 68 Pa. at 101 (quoting statute). The phrase “cestui que trust” refers to a person “who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another.” Black’s Law Dictionary (1968). For all relevant purposes, it means the same as “beneficiary” in current parlance.



Surely we cannot adopt the first construction, because it could never have been the intention of the legislature to endanger or destroy trusts altogether. That such a result would follow in practice from such a construction is clear, for the new trustee would be placed under the control of the cestui que trust. If the power of right exists it may of right be exercised at any moment. The trustee appointed to-day, no matter how unexceptionable he may be, can be removed to-morrow on the mere petition of the cestui que trust, and so on from day to day, and week to week, and year to year.<sup>8</sup>

Thus, the common pleas court held that the act should be interpreted to allow removal of the trustee only for cause.<sup>9</sup>

On appeal, this Court affirmed on the basis of the trial court's reasoning.<sup>10</sup>

The Court's decision nearly a century later in *Estate of Fraiman* is to similar effect.<sup>11</sup> There, Charles Fraiman died, and his will called for the creation of a trust into which most of his estate was placed. Yeshiva University, the beneficiary of the income of the trust, sought to remove the trustee. The General Assembly had enacted a series of fiduciary

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<sup>8</sup> 68 Pa. at 102.

<sup>9</sup> *Id.*

<sup>10</sup> 68 Pa. at 3. The Court decided *Stevenson* before the creation of the Superior Court and, accordingly, the appeal was directly to this Court.

<sup>11</sup> 184 A.2d 494 (Pa. 1962).

statutes after *Stevenson*, but this Court's summary of the law as of 1962 demonstrates that Pennsylvania law still required cause for the removal of a trustee.

[T]he 'removal of a trustee is a drastic action, which should only be taken when the estate is actually endangered and intervention is necessary to save trust property,' (*Mathues' Estate*, 322 Pa. 358, 359, 185 A. 768; *Crawford's Estate*, 340 Pa. 187, 190, 16 A.2d 521; *Corr's Estate*, 358 Pa. 591, 598, 58 A.2d 347) and particularly is this true in the case of a trustee selected by a testator, as opposed to a court selected trustee, (*Neafie's Estate*, 199 Pa. 307, 312, 313, 49 A. 129; *Bailey's Estate*, 306 Pa. 334, 337, 159 A. 549; *Corr's Estate, supra*)...<sup>12</sup>

### ***B. Adoption of the UTA.***

In the first decade of this century, Pennsylvania's Joint State Government Commission, acting through its Advisory Committee on Decedent's Estates Laws, recommended to the General Assembly that it adopt the UTA, which the committee prepared and based largely—though not exactly—on the Uniform Trust Code prepared by the

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<sup>12</sup> 184 A.2d at 497. Treatises note that Pennsylvania's statutory approach was consistent with general common law. *See* Bogert, *Trust and Trustees* §§ 519, 520 and 527 (Rev. 2d ed. 1993) (at common law, the trustee could not be removed by unilateral action of the settlor, a co-trustee or the beneficiaries; the trustee could only be removed by court action on cause shown).

National Conference of Commissioners on Uniform State Laws. The General Assembly adopted the UTA in 2006.

Section 411 of the Uniform Trust Code describes the mechanism by which a non-charitable, irrevocable trust may be modified or terminated. One means is where all beneficiaries consent “if the court concludes that modification is not inconsistent with a material purpose of the trust.”<sup>13</sup> Pennsylvania adopted this provision with no substantive changes.<sup>14</sup>

The comments to the uniform law offer helpful insight into whether Section 411 (Section 7740.1) may be used to remove a trustee or to set the stage for a later removal of the trustee.

Subsection (b), similar to Restatement Third [of Trusts] but not Restatement Second [of Trusts], allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. *Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees.*<sup>15</sup>

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<sup>13</sup> Uniform Trust Code at § 411(b).

<sup>14</sup> See 20 Pa.C.S. § 7740.1.

<sup>15</sup> Uniform Law Comment to 20 Pa.C.S. § 7740.1. Importantly, when the General Assembly adopted the UTA, it included at the outset a

Section 706 of the Uniform Trust Code, in turn, is entitled “Removal of Trustee.” It notes that the settlor, a co-trustee or a beneficiary may request removal of the trustee—or the court may do so *sua sponte*—only when one of several conditions is met:

- (1) the trustee has committed a serious breach of trust;
- (2) lack of cooperation among co-trustees substantially impairs the administration of the trust;
- (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
- (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

While the Joint State Government Commission followed much of the substance of Section 706, it made changes. Of relevance here, the

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statement indicating that, “[w]here the UTC comments have been substantially retained in this chapter, the UTC comments are applicable to the extent of the similarity.” *See* Prefatory Comment to UTA (reproduced in Purdon’s just before Section 7706).

commission added a fifth means of removing a trustee: “(5) [when] removal is requested by all the qualified beneficiaries.”<sup>16</sup>

After reviewing the Commission’s draft, the Bankers Association submitted a letter with comments. The Bankers Association offered the following with respect to the Commission’s proposed addition of Subsection (5):

This subsection of the section on fiduciary replacement, which is not in the uniform draft, should be deleted. There are better reasons stated in subsections (1)-(4) to replace a trustee whom the settlor has named. Inclusion of this subsection could require a trustee who is not breaching trust to conform to beneficiaries’ wishes in contravention of the settlor’s. If the settlor wishes to give an unrestricted right to remove a trustee, s/he could, and often does. The entire concept of a trust is to provide restrictions on the use of trust assets—often against the wishes of the beneficiaries.<sup>17</sup>

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<sup>16</sup> The Proposed Pennsylvania Uniform Trust Act and Amendments to the Probate, Estates and Fiduciaries Code, Report of the Advisory Committee on Decedents’ Estates Laws (Nov. 2003) available at <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2003-49-TC%20Report%202003.pdf> (last viewed August 2, 2016).

<sup>17</sup> Letter of October 17, 2003, from Daniel J. Reisteter to the Joint State Government Commission’s Task Force on Decedents’ Estates Laws (copy attached to this brief at Tab “A”). The reason the Bankers Association’s letter predates the Joint State Government Commission’s November 2003 draft is that, as is often the case, the commission circulated the draft to some stakeholders before its fuller release.

The Joint State Government Commission apparently found merit in the Bankers Association's comment. In April 2005, the commission issued another report.<sup>18</sup> That report noted the deletion of the proposed Subsection (5):

NOTE: UTC § 706(b)(4) provided that the court could under certain circumstances remove a trustee if removal was requested by all the qualified beneficiaries. The Joint State Government Commission Advisory Committee on Decedents' Estates Laws included that concept in its original § 7766(b)(5), replicated in its November 2003 report. That provision was also included in Senate Bill 978 of 2003 (Printer's No. 1329). However, on March 30, 2004, the Senate Judiciary Committee voted to remove paragraph (5). This version of § 7766(b) does not include paragraph (5).<sup>19</sup>

Thus, the General Assembly had before it a version of Section 7766 that expressly allowed removal of the trustee by the court upon the request of all beneficiaries based upon a consideration of the best interests of the beneficiaries, material purposes of the trust and the availability of a suitable co-trustee or successor, but the General Assembly purposefully removed that provision.

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<sup>18</sup> The Proposed Pennsylvania Uniform Trust Act and Amendments to the Probate, Estates and Fiduciaries Code, Report of the Advisory Committee on Decedents' Estates Laws (April 2005) available at <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2005-41-utc%204%202005.pdf> (last viewed on August 2, 2016).

<sup>19</sup> *Id.*

The General Assembly’s deletion of the proposed subsection at the suggestion of the Bankers Association is unsurprising. As noted above, for more than 100 years, Pennsylvania law required cause to remove a trustee.

The draft of the UTC provided by the National Conference of Commissioners on Uniform State Laws was consistent with this history. It made clear that the modification provision (Section 411) could not be used to remove a trustee and that the removal provision (Section 706) is the “exclusive provision on removal of trustees.” Section 706, in turn, only allowed removal of the trustee when one of four conditions was met. When the Pennsylvania Joint State Law Commission sought to add to Section 706 a provision allowing the beneficiaries to unanimously remove the trustee regardless of whether there was cause, the General Assembly removed it. Considering that history, those comments and the subsequently adopted statute together, it is clear that the General Assembly did not intend for beneficiaries to be able to remove a trustee without cause.<sup>20</sup>

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<sup>20</sup> In *In re McKinney*, 67 A.3d 824 (Pa. Super. 2013), the Superior Court read Section 7766(b)(4) as allowing a sort of “no-fault” removal of

There is a final point. In the majority opinion, the Superior Court in this case asserted that there is some meaningful difference between a present effort to remove a trustee and a modification of the trust document to allow for a future removal of the trustee. The distinction is without merit. As demonstrated above, the General Assembly made clear that it did not want beneficiaries to have the ability to remove trustees without cause and without judicial review. An action by the beneficiaries in contravention of that legislative intent—whether by a present action to remove the trustee without cause or by a present action creating in the beneficiaries the later ability to remove the trustee without cause—is impermissible. There is no basis to believe that the General Assembly would have regarded the distinction as meaningful.

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the trustee (although it noted that Sections 7766(b)(1)-(3) require a finding of fault). The Bankers Association takes no position in this brief on the correctness of the Superior Court’s holding in *McKinney*, but the issue is in any event immaterial here. Even if Section 7766(b)(4) does not require a showing of fault on the trustee’s part, it—like the preceding three subsections—nonetheless requires that a court find that specific circumstances exist before the trustee may be removed. For efficiency, the Bankers Association will in this brief use the term “cause” as shorthand for satisfaction of one of the elements of Section 7766(b).



### ***C. Policy Considerations.***

It is helpful to step back to consider the policies that have animated Pennsylvania's trust law for well more than a century.

Trusts must be administered with two goals in mind: to give effect to the settlor's intent as manifested in the trust document and to benefit the beneficiaries.<sup>21</sup> One of the principal reasons a settlor creates a trust is that the settlor recognizes that the beneficiaries might not agree with the settlor regarding how the trust assets should be administered. Were it otherwise, the settlor could simply make an outright distribution to the beneficiaries and forego the creation and implementation of a trust in the first instance.

When a settlor establishes a trust and appoints a trustee, the trustee is a fiduciary charged with being the "voice of reason" with respect to the administration of the trust. The trustee has a focused mission: to make decisions independently and in accordance with the settlor's intention. An independent trustee is shielded from the sorts of

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<sup>21</sup> See *In re Cannistra's Estate*, 121 A.2d 157, 159 (Pa. 1956); *In re Neafie's Estate*, 49 A. 129, 130-31 (Pa. 1901).

influences that might cause beneficiaries to make decisions that are not in their own interests as articulated by the settlor.

Of course, a settlor could always include in the trust document a provision allowing the beneficiaries to choose of their own volition and without court approval to remove the trustee. Some settlors include such provisions, but others expressly intend that beneficiaries *not* have such authority. That is true in older documents, and it is true in more modern documents as well. The intent of the settlor should be carried out in either case. Pennsylvania law both before and after adoption of the UTA has recognized that, given that allowing the beneficiaries to remove a trustee without cause and court approval would impinge on the trustee's independence, the settlor must expressly set out in the trust document his or her intention to allow such a unilateral removal. Otherwise, the settlor must be understood to have intended for there to be removal only for cause as expressed in the statute.

When the UTA was under consideration, the Bankers Association emphasized to the Joint State Government Commission and the General Assembly the need for trustee independence and the corresponding need to maintain Pennsylvania's requirement that

trustees only be removed when a court finds that one or more statutorily prescribed reasons exists.<sup>22</sup> The commission and the General Assembly signaled their agreement when they removed the proposed Section 7766(b)(5).

The Bankers Association's members—financial institutions both large and small—are often appointed as institutional trustees. They take seriously their duties under the UTA and the controlling trust agreements. They have significant concerns that the Superior Court's holding in this case places them in a particularly difficult position. This Court recognized that sort of predicament 115 years ago.

The duties of a trustee are frequently onerous, especially so in large estates, and their performance is sometimes necessarily attended with a disagreement between the trustee and the cestui que trust. When this occurs and the trustee has acted within the authority imposed upon him by the trust, he should be sustained by the court. He is not to be deprived of his office simply because the cestui que trust would have acted differently and, possibly, more in his own interest

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<sup>22</sup> Letter of October 17, 2003, from Daniel J. Reisteter to the Joint State Government Commission's Task Force on Decedents' Estates Laws.

than for the protection and success of the trust estate.<sup>23</sup> The concerns the Court recognized in *Neafie's Estate* are just as real today as they were in 1901 because they go to the heart of trust law. A settlor creates a trust in order that the beneficiaries receive the benefits of the trust in the manner the settlor intends. The trustee is charged with carrying forward the settlor's intentions—sometimes confronted by a beneficiary's contrary position or some other external factor—and the trustee must be able to follow the settlor's intention objectively and in accordance with its fiduciary duties.

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For more than 100 years, Pennsylvania law has rejected the holding the Superior Court espoused in this case, and for good reason. As demonstrated in this brief, in enacting the UTA, the General Assembly did not depart from that Pennsylvania's well-established law that—in the absence of an express provision in the trust agreement to the contrary—a trustee may only be removed if a judge has found that one or more of the statutorily prescribed criteria has been met. The text

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<sup>23</sup> *In re Neafie's Estate*, 49 A. 129, 130-31 (Pa. 1901).

of the statute demonstrates as much, and history and public policy underscore that interpretation.

#### **IV. Conclusion**

The Court should reverse the decision of the Superior Court and hold that, under the UTA, unless the settlor expressly provides otherwise in the trust document, beneficiaries may not remove a trustee without a judicial determination that cause—as defined in Section 7766—exists for that removal.

Respectfully submitted,

**K&L GATES LLP**

/s/ David R. Fine  
Raymond P. Pepe  
David R. Fine  
Market Square Plaza  
17 North Second St., 18th Fl.  
Harrisburg, PA 17101  
(717) 231-4500  
*Counsel for the Pennsylvania Bankers  
Association*

August 15, 2016

**CERTIFICATION OF WORD COUNT**

I certify that this brief includes 3,571 words as calculated with the word-counting feature of Microsoft Word and including the parts of the brief specified in Pennsylvania Rule of Appellate Procedure 2135(a).

/s/ David R. Fine

**PROOF OF SERVICE**

I certify that, on August 15, 2016, I served two copies of the attached document on the following by U.S. Mail, postage-prepaid:

James F. Mannion, Esq.  
MANNION PRIOR, LLP  
840 First Ave., Suite 100  
King of Prussia, PA 19406-4063  
*Counsel for Appellees*

Ralph Wellington, Esq.  
SCHNADER HARRISON SEGAL & LEWIS LLP  
1600 Market St., Suite 3600  
Philadelphia, PA 19103  
*Counsel for Appellant Wells Fargo Bank, N.A.*

/s/ David R. Fine

# **Tab A**





**DANIEL J. REISTETER**  
Vice President – Government Relations  
(717) 255-6933  
Fax (717) 233-5937  
[dreisteter@pabanker.com](mailto:dreisteter@pabanker.com)

October 17, 2003

**TO: The Honorable Members of the Joint State Government  
Commission's Task Force on Decedents' Estates Laws**

**RE: Proposed Pennsylvania Uniform Trust Act**

The Pennsylvania Bankers Association is the statewide trade association representing state and nationally-chartered banks, bank and trust companies, savings banks, savings associations and trust companies and their affiliates in the Commonwealth. Many of PBA's members hold trust powers, serve as corporate fiduciaries and in the aggregate manage billions of dollars of trust assets.

PBA deeply appreciates the work of the Joint State Government Commission and its Decedents' Estates Laws Advisory Committee in drafting revisions to Pennsylvania law to reflect the National Conference of Commissioners of Uniform State Laws' Uniform Trust Code. The drafters of the Act before you for consideration on Monday, October 20 at Noon have labored long and hard, and deserve our thanks. PBA was also grateful for the opportunity to offer its comments to the draft during its several revisions.

We have a few comments remaining to offer to the Task Force which are summarized briefly below. We respectfully request that our comments be reflected in the legislation to be introduced.

It is merely our effort to encourage the Task Force to make a few modifications to the draft presented by the Advisory Committee. PBA's concerns stem from the fact that our members face intense competition from institutions in other states that tout their states' trust laws as being more favorable to settlers. Unless corrected, this disparity among state statutes will reduce tax revenues to the Commonwealth.

If you have any questions about PBA's comments, we would be glad to arrange an in-depth discussion with our trust banking experts.

**7705 (b) (8): Trust instrument controls; mandatory rules**

A settlor should be able to override the mandatory notice provisions of the Act, at least as to those not currently receiving benefits.

**7710.1 (d)(7): Nonjudicial settlement agreements**

Add "or the extent to which a power may be exercised."

**7710.2: Rules of construction**

Omit the Latin "*inter vivos*" in favor of "lifetime."

**7745 (b) (1) Creditor's claim against settlor and 7753 (b): Trustee's duties; powers of withdrawal**

The word "absolute" should be added to modify "power".

**7763 (c): Cotrustees**

This subsection has been modified from the prior draft to provide that if a trustee is "unavailable" the other trustees may act alone. An absence would be covered under this revision, but it is not clear that an illness would be covered. PBA suggests a further modification to read: "A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable **due to absence, illness or other reason....**"

**7766 (b)(5): Removal of trustee**

This subsection of the section on fiduciary replacement, which is not in the uniform draft, should be deleted. There are better reasons stated in subsections (1)-(4) to replace a trustee whom the settlor has named. Inclusion of this subsection could require a trustee who is not breaching trust to conform to beneficiaries' wishes in contravention of the settlor's. If the settlor wishes to give an unrestricted right to remove a trustee, s/he could, and often does. The entire concept of a trust is to provide restrictions on the use of the trust's assets -often against the wishes of the beneficiaries.

**7772 (h): Duty of loyalty**

The phrase "if fair to the beneficiaries" in 7772 (h) lends itself to uncertainty and second-guessing in the future and as a result may be of

limited use.

**7776: Trustee's skills**

Remove "has special skills or expertise, or". Trust companies bring forth various levels of expertise, typically based on the size of the trust or fee. Unlike an individual trustee who may have special skills, a corporate trustee has several, including its people who work at different trust levels of service and in different states.

**7780.3 Duty to inform and report**

PBA suggests that there be a further modification covering notice in the event a current beneficiary does not have legal capacity. If a current beneficiary lacks legal capacity, notice should be given to their then-living parents who have legal capacity or if none, their children who have legal capacity, and if none of the foregoing, no notice shall be required. In addition, a settlor should be able to modify the Act's notice requirements.

**7782: Damages for breach of trust**

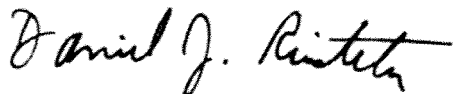
This is a potential minefield. The uniform act provides for higher damages than could be awarded under current PA law. The parallel for that increase should be a shorter "self cleaning" provision (e.g., one or two years) as provided in the uniform act but not reflected in the current draft, which provides a five-year limitation.

**7785: Limitation of action against trustee**

See above comment.

Pennsylvania's "Rule Against Perpetuities" should be made indefinite, like that of New Jersey and Delaware. Large, regional trust companies are able to site trusts in more favorable jurisdictions such as these. Other trust companies cannot. This reduces their competitiveness and that of the Commonwealth generally.

Respectfully yours,



Daniel J. Reisteter