DRAFTING UNDER THE UNIFORM
TRUST CODE (WITH SAMPLE PROVISIONS)

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DRAFTING TAKES ON NEW SIGNIFICANCE AS THE RULES OF THE UTC TAKE HOLD IN THE STATES.

WHEN THIS ARTICLE WAS SUBMITTED, THE UNIFORM TRUST CODE (2000) ("UTC") HAD BEEN ENACTED IN 19 JURISDICTIONS (IN ORDER BY DATE OF ENACTMENT: KANSAS, NEBRASKA, WYOMING, NEW MEXICO, DISTRICT OF COLUMBIA, UTAH, MAINE, TENNESSEE, NEW HAMPSHIRE, MISSOURI, ARKANSAS, VIRGINIA, SOUTH CAROLINA, OREGON, NORTH CAROLINA AND, RECENTLY, ALABAMA, FLORIDA, OHIO AND PENNSYLVANIA). AND, SINCE IT IS BEING STUDIED IN NUMEROUS OTHER STATES, IT SEEMS LIKELY THAT HALF OF THE STATES WILL HAVE SOME VERSION OF THE UTC IN PLACE WITHIN A FEW YEARS, MAKING IT HARD TO IGNORE.


THE UTC'S RULES • MOST OF THE UTC PROVISIONS CREATE DEFAULT RULES THAT APPLY UNLESS THE GOVERNING TRUST DOCUMENT CHANGES THEM. THE UTC ALSO CONTAINS 14 MANDATORY RULES THAT CANNOT BE VARIED OR CHANGED BY THE TRUST DOCUMENT. DEFAULT RULES CREATE DRAFTING
opportunities and choices such as how to override them, whether they should be overridden, and whether they should be relied upon without reference, or actually reinforced in the trust. Mandatory rules create equally important drafting opportunities and compliance requirements, although they cannot be varied.

MANDATORY RULES • THE UTC MANDATORY RULES ARE IN SECTION 105 AND ARE:

• THE REQUIREMENTS FOR CREATING A TRUST. §105(b)(1).
• THE POWER OF THE COURT TO REMOVE A TRUSTEE, MODIFY OR TERMINATE THE TRUST ON THE GROUNDS SPECIFIED IN THE CODE, AND TO ADJUST OR SPECIFY A TRUSTEE’S COMPENSATION. §105(b)(4), (6), (7) AND (13).
• THE EFFECT OF A SPENDTHRIFT PROVISION AND THE RIGHTS OF CERTAIN CREDITORS AND ASSIGNEES TO REACH A TRUST AS PROVIDED IN UTC ARTICLE 5. §105(b)(5).
• THE RIGHTS OF THIRD PARTIES IN DEALING WITH THE TRUSTEE. §105(b)(11).
• AT THE OPTION OF THE ENACTING STATE, THE TRUSTEE’S DUTY TO INFORM “QUALIFIED” BENEFICIARIES 25 AND OVER OF CERTAIN MATTERS RELATING TO THE ADMINISTRATION OF AN IRREVOCABLE TRUST AND TO RESPOND TO THE REQUEST OF ANY BENEFICIARY FOR INFORMATION ABOUT THE TRUST. §105(b)(8) AND (9). AFTER THE NOTICE PROVISIONS PROVED CONTROVERSIAL, NCCUSL IN 2004 MADE THEM ALL OPTIONAL BY PLACING THEM IN BRACKETS. AS DISCUSSED BELOW, HOWEVER, THERE ARE IMPORTANT POLICY CONSIDERATIONS BEHIND THE NOTICE PROVISIONS THAT DRAFTERS MUST CONSIDER BEFORE OVERRIDE THEM IN TRUST DOCUMENTS IN STATES THAT HAVE MADE THEM DEFAULT AND NOT MANDATORY, OR HAVE DELETED THEM ALTOGETHER.
• THE POWER OF A COURT TO REQUIRE, DISPENSE WITH, MODIFY, OR TERMINATE A BOND. §105(b)(6).
• THE EFFECT OF AN EXCULPATORY TERM. §105(b)(10).
• THE PERIOD OF LIMITATION FOR COMMENCING A JUDICIAL PROCEEDING. §105(b)(12).
• THE POWER OF A COURT TO TAKE SUCH ACTION AND EXERCISE SUCH JURISDICTION AS NECESSARY IN THE INTEREST OF JUSTICE. §105(b)(13).
• THE SUBJECT MATTER JURISDICTION OF THE COURT AND VENUE FOR COMMENCING A PROCEEDING. §105(b)(14).

BENEFICIARY NOTICE • WHATEVER THE LAW ON NOTICE OR VERSION OF THE UTC ENACTED IN A GIVEN STATE, DRAFTERS SHOULD CONSIDER THE FOLLOWING IN DECIDING WHETHER IT IS ADVISABLE OR NECESSARY TO COMPULS THE TRUSTEE TO INFORM AND REPORT TO THE BENEFICIARIES, AND IN WHAT MANNER.

HOW MUCH INFORMATION?

DOES THE SETTLOR WISH TO KEEP THE TRUST A SECRET, OR GIVE THE BENEFICIARY THE RIGHT TO RECEIVE A COPY OF THE ENTIRE TRUST AGREEMENT OR ONLY PORTIONS OF IT THAT APPLY TO THAT PARTICULAR BENEFICIARY? Since mandating disclosure to beneficiaries and therefore forcing
FIDUCIARIES TO KEEP BENEFICIARIES INFORMED PROBABLY MINIMIZES TRUSTEE LIABILITY BY TOLLING APPLICABLE STATUTES OF LIMITATIONS, THE TRUSTEE'S BIAS WOULD BE TOWARD DISCLOSURE. HOWEVER, THERE IS NO DOUBT THAT SOME SETTLORS WILL HAVE VALID AND REAL REASONS TO KEEP TRUST PROVISIONS SECRET FROM THEIR BENEFICIARIES. THE MOST COMMON AND PERHAPS COMPPELLING REASONS FOR THE SECRET TRUST ARE THE DRUG ADDICTED BENEFICIARY OR A SITUATION WHERE THE SETTLOR DOES NOT WISH A YOUNG BENEFICIARY TO LOSE AN INCENTIVE TO WORK.

SOME VERSIONS OF THE UTC HAVE ATTEMPTED TO ACHIEVE BOTH GOALS BY ALLOWING NOTICE AND INFORMATION TO BE GIVEN TO A BENEFICIARY SURROGATE OR PROTECTOR DESIGNATED TO RECEIVE THE INFORMATION, REVIEW IT AND ACT UPON IT IF NEEDED, BUT NOT TO DISCLOSE THE UNDERLYING TRUST INTEREST OR INFORMATION TO THE BENEFICIARY. THIS COMPROMISE APPROACH IS NOT PERFECT, SINCE THE DUTIES AND LIABILITY OF THE DESIGNEE REVIEWING THE NOTICE ARE UNCLEAR. IT WILL LIKELY WORK BEST WHEN THE DESIGNEE IS A FAMILY MEMBER WHOM THE SETTLOR TRUSTS TO ACT APPROPRIATELY.

IRREVOCABLE TRUST CONSEQUENCES AND N

SHOULD THE TRUSTEE BE REQUIRED TO NOTIFY ALL OR SOME BENEFICIARIES WHEN THE SETTLOR CREATES AN IRREVOCABLE TRUST? MANY PRACTITIONERS AND SETTLORS WOULD NOT WANT THE TRUSTEE TO HAVE TO PROVIDE SUCH NOTICE, AT LEAST NOT UPON THE CREATION OF THE TRUST. THIS IS COMMONLY THE CASE WHEN THE SETTLOR FUNDS A TRUST FOR TAX REASONS, AND DOES NOT WANT THE BENEFICIARY TO BECOME RELIANT ON THE TRUST FOR HIS OR HER SUPPORT.

FINANCIAL INFORMATION

TO WHOM SHOULD THE TRUSTEE BE REQUIRED TO PROVIDE FINANCIAL INFORMATION, HOW OFTEN, AND AT WHAT LEVEL OF DETAIL OR WHAT TYPE OF ACCOUNTING? THIS IS A PARTICULARLY CONTROVERSIAL TOPIC IN THE CONTEXT OF THE TYPICAL ESTATE REDUCTION OR "CREDIT SHELTER" TRUST WHICH BENEFITS BOTH THE SURVIVING SPOUSE AND ULTIMATELY THE SETTLOR'S CHILDREN. MANY PRACTITIONERS AND SETTLORS WISH ONLY TO REQUIRE TRUSTEES TO PROVIDE REPORTS TO THE SURVIVING SPOUSE DURING HER LIFETIME. HOWEVER, IN SOME SITUATIONS, SUCH AS SECOND MARRIAGES, THE SETTLOR MAY WANT THE REMAINDER BENEFICIARIES TO RECEIVE ANNUAL REPORTS. IN ANY CASE, THE TRUST AGREEMENT SHOULD SPECIFY WHETHER THE TRUSTEE'S DUTY TO PROVIDE ACCOUNTS AND REPORTS SHOULD BE LIMITED TO THE SURVIVING SPOUSE, IF THAT IS DESIRED. OTHERWISE, WHEN THE CHILDREN AND GRANDCHILDREN ARE ALSO TRUST BENEFICIARIES, THE TRUSTEE'S REPORTING OBLIGATION WILL LIKELY RUN TO THEM.

sole,' or 'uncontrolled,' the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Although the trustee's duty under these sections to act in good faith, in accordance with the trust's terms and purposes and in the interest of the beneficiaries, is mandatory under section 105(b)(2), under the UTC the settlor can override any otherwise applicable duties of loyalty in the trust. Section 802 cmt. Thus, section 802 contains the default duties of loyalty that may be waived in the trust instrument, and should be considered when drafting.

TRUSTEE SELF-DEALING

For example, the trust may authorize the trustee to engage in self-dealing to avoid a breach of section 802(b)'s prohibition on trustee transactions involving trust property, when such acts are anticipated. Section 802(b)(1) specifically authorizes such waivers by the settlor which would be necessary, for example, when the settlor wishes his or her trust to continue to hold large blocks of stock in a company (which might be publicly traded), and wants a family member to continue to run the business and to serve as trustee. Many of the decisions the trustee will have to make in order to run the company (hiring and firing officers, fending off hostile takeovers, etc.) involve self-dealing. Drafters must obviously consider whether such waivers are appropriate to begin with, and then separately if they should extend to successor trustees. The authorizing powers provision could even include a broad provision authorizing the trustees to, for example, "[e]xercise with respect to the retention, continuance and disposition of such business all the rights and powers which I would have were I to make the decision at the time of such exercise."

In this manner, the settlor can negate section 802(b)'s default imposition of the common-law, "no further inquiry" rule, which makes all of the trustee's unauthorized transactions that involve trust property for the trustee's personal benefit voidable, regardless of their fairness or the trustee's good faith.

TRANSACTIONS WITH TRUSTEE RELATIVES OR AFFILIATES

Section 802(c) applies a lower standard than the common law, "no further inquiry" rule to transactions with the trustee's relatives or affiliates. Section 802(a) applies it to those that do not concern trust property but are between the trustee and beneficiary; and section 802(f) applies the lower standard to those involving trustee affiliated mutual funds. Section 802(h) likewise allows numerous transactions, if fair to the beneficiaries, such as payment of reasonable compensation and loans by the trustee. Thus, drafters should review the section 802(h) list and expressly permit useful transactions, such as paying the trustee reasonable compensation, and allowing the trustee to lend money to the trust.