

FLORIDA UNIFORM TRUST CODE

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DAVID M. ENGLISH REPORTER, UNIFORM TRUST CODE

The Uniform Trust Code (“UTC”), which was approved by the Uniform Law Commissioners in 2000, is the first effort by the Uniform Law Commissioners to provide the states with a comprehensive model for codifying their law on trusts. A copy of the UTC, together with over 100 pages of official comments, can be accessed through the Commissioners' website, www.nccusl.org.

The UTC has to date been enacted in eighteen jurisdictions, and it under consideration for enactment in perhaps fifteen other states. Governor Bush signed Florida's enactment of the UTC on 6/14/06 (SB 1170, 2006 Fla. Session Laws Ch. 217). The Florida UTC is effective 7/1/2007. The South is well-represented among UTC enactments. In addition to Florida, the UTC has been enacted to date in Alabama, North Carolina, South Carolina, Tennessee, and Virginia. The Florida UTC will be codified in Chapter 736 of the Florida statutes. To permit easy comparison with other UTC states, the numbering system for the Florida UTC follows the numbering system of the Uniform Act. UTC Section 101 becomes Fla. Stat. Sec. 456.0101, Section 201 becomes Fla. Stat. Sec. 456.0201, and so on.

SB 1170 also retained many existing Florida trust provisions that did not conflict with the UTC. These can be found at the end of the bill. To the extent a particular provision of prior Florida law conflicted with the UTC, the tendency of the Florida drafters was to carry over the Florida variation into the Florida UTC.

GENERAL BACKGROUND

Participants in Drafting Process

The UTC was officially drafted by a committee consisting of Uniform Law Commissioners, who are appointed by the governors or legislatures of their respective states. The function of the Reporter was to carry out the drafting committee's decisions on a day-to-day level and to prepare the various drafts. The drafting committee was assisted by numerous advisors, most of whom attended a majority of the twice annual drafting committee meetings. Groups represented included the American Banker's Association, the American Bar Association and its Section on Real Property Probate and Trust Law (3 advisors), the American College of Trust and Estate Counsel, and the National Academy of Elder Law Attorneys.

The UTC was adapted for Florida by a Subcommittee of the Florida Bar, chaired by Brian Felcoski.

Reasons for Code

The drafting of the UTC was prompted by the much greater use of trusts in recent years. This greater use of the trust, and consequent rise in the number of day-to-day questions involving

trusts, led to a recognition by the Commissioners that the trust law in most states is thin, with many gaps between the often few statutes and reported cases. It also led to a recognition that previous uniform acts relating to trusts, while numerous, are fragmentary. Other than for specialized acts such as the Uniform Prudent Investor and Principal and Income Acts, the primary source of trust law in most states is the Restatement of Trusts and the multivolume treatises by Scott and Bogert, sources that fail to address numerous practical issues and that on others sometimes provide insufficient guidance. The UTC will enable states that enact it to specify their rules on trust law with precision and in a readily available source. Finally, while much of the UTC codifies the common law, the UTC does make some changes.

Related Uniform Acts

There are numerous existing uniform acts on trusts and related subjects, but none provide comprehensive coverage on trust law issues. The most important of these other uniform acts is the 1994 Uniform Prudent Investor Act, enacted in over forty states, including Florida. That Act codifies the Restatement (Third) of Trusts: Prudent Investor Rule (1992). The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries. Given its importance and already widespread acceptance, the UTC does not modify the smaller Uniform Prudent Investor Act. A state enacting the UTC may elect to incorporate the Uniform Prudent Investor Act as UTC Article 9 or to codify it separately. Florida elected to leave its version of the Prudent Investor Act in Chapter 518 of the Florida Statutes.

Relationship to Restatement

Restatements, which are written and approved by a national body of lawyers comprising the members of the American Law Institute, serve a proactive role close to that of uniform acts. A Restatement is more than a document that collects and summarizes in one place the common law on a particular subject. Rather, where the decisions of the courts conflict, a Restatement strives to delineate the better rule. It also tries to fill in gaps in the law, to promote the rule the courts should apply when it encounters an issue for the first time. The hope is that the courts of the different states, by relying on the Restatement as a primary guide for decision, will over time adopt uniform rules of decision.

The Restatement (Second) of Trusts was approved by the American Law Institute in 1957. Beginning in the late 1980s, work on the Restatement Third began, a project that is not yet completed. The UTC was drafted in close coordination with this revision of the Restatement of Trusts. A significant portion of the UTC provisions are consistent with the Restatement (Second) or (Third) of Trusts.

Restatements are not statutes. Until accepted by the courts of a particular state, the courts are free to, and often will, adopt a different rule. By contrast, uniform acts, when enacted, become mandatory rules of law that can be relied on and are easily accessible to all of a state's citizens, whether or not they are in front of the courts. The UTC will thus serve an important educational function. Legal practitioners in many states for the first time will be able actually to

determine their state's law on trusts. Furthermore, there are numerous practical issues that are best addressed by specific legislation, such as the UTC, instead of by a more discretionary guideline such as a Restatement.

The Restatement of Trusts has been cited numerous times by the Florida courts. Absent a specific Florida statute, it is a principal source to which the Florida courts turn when presented with trust law questions. Because much of the UTC is consistent with the Restatement, most of this prior case law will remain relevant.

Relationship to Common Law

The UTC is supplemented by the common law of trusts, including principles of equity. Fla. Stat. Sec. 736.0106. The statutory text of the UTC is also supplemented by its comments, which, like the comments to any uniform act, may be relied on as a guide for interpretation.

OVERVIEW AND SIGNIFICANT ISSUES

Scope of Coverage

The UTC states the law relating to express trusts. These are trusts created by settlors who during lifetime transfer property to a trustee or declare themselves as trustee of their own property, or by testators who at death create trusts in their wills. Following its creation, the trustee will then hold the property for the benefit of beneficiaries. This is to be distinguished from what are known as resulting or constructive trusts, which are remedial devices imposed by the courts.

Organization

The breadth of the Florida UTC is indicated by its organization. The Florida UTC is organized into thirteen articles. Article 1, in addition to providing definitions, addresses topics such as the ability of a trust instrument to override the Code's provisions (Fla. Stat. Sec. 736.0105), the validity of choice of law provisions and the law to govern in the absence of such a provision (Fla. Stat. Sec. 736.0107), and the procedure for transferring the principal place of administration to another jurisdiction. Fla. Stat. Sec. 736.0108. Article 2 addresses selected topics involving judicial proceedings concerning trusts.

Most of the topics addressed in Articles 3 through 7 are discussed in detail below. Article 3 deals with the important topic of representation of beneficiaries, including virtual representation and representation by fiduciaries, specifying circumstances when another person, such as a guardian, may receive notice or give consent on a beneficiary's behalf.

Article 4, which is the first article of the UTC devoted to the substantive law of trusts, prescribes the requirements for creating, modifying and terminating trusts. The provisions on the creation of trusts (Fla. Stat. Sec. 736.401 to 736.409) largely track traditional doctrine; those relating to modification and termination (Fla. Stat. Sec. 736.410 to 736.417) liberalize the prevailing law. Article 5 covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries. Article 6 collects the special rules relating to revocable trusts, including the standard of capacity (Fl. Stat. Sec. 736.0601), the procedure for revocation or modification (Fl.

Stat. Sec. 736.0602), and the statute of limitations on contests. Fla. Stat. Sec. 736.0604.

Article 7 turns to the office of trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on trustee acceptance (Fla. Stat. Sec. 736.0701), the rights and obligations of cotrustees (Fla. Stat. Sec. 736.0703), the procedure for resignation (Fla. Stat. Sec. 736.0705), the grounds for removal (Fla. Stat. Sec. 736.0706), the methods for appointing successors (Fla. Stat. Sec. 736.0704), and trustee compensation. Fla. Stat. Sec. 736.0708.

Article 8 lists the duties and powers of the trustee. Similar to prior Florida law, Fla. Stat. Sec. 736.0816 contains a detailed listing of trustee powers. Statutory powers allay concerns by third parties as to whether the trustee has the authority to engage in a particular transaction. The specified duties of the trustee, like the duty to act with prudence (Fla. Stat. Sec. 736.0804), were drafted where relevant to conform to the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on this by also specifying the trustee's duties regarding distributions to beneficiaries.

Article 9 provides a place for a state to codify its version of the Uniform Prudent Investor Act. Florida elected to keep this other Act separate from the UTC.

Article 10 addresses liability of trustees and trustee dealings with persons other than beneficiaries. With respect to the rights of beneficiaries, the article

- lists the remedies for breach of trust (Fla. Stat. Sec. 736.1001);
- specifies how money damages are to be determined (Fla. Stat. Sec. 736.1002);
- provides that the court, in judicial proceedings relating to the administration of the trust, may award attorney's fees against the trustee, the trust, or even a beneficiary, as justice and equity may require (Fla. Stat. Sec. 736.1004);
- retains Florida's existing provisions on trustee and attorney compensation (Fla. Stat. Sec. 736.1005 to 736.1007);
- specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust (Fla. Stat. Sec. 736.1008) and a provision on enforcing exculpatory clauses. Fla. Stat. Sec. 736.1011.

With respect to transactions by trustees with third persons, the UTC encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust was involved. Addressed are personal liability of the trustee for contract or tort and the rights of bona fide purchasers. Fla. Stat. Sec. 736.1013 to 736.1016. To protect the privacy of the trust, a procedure is provided whereby a trustee may verify authority by means of a certificate instead of by providing the third person with a copy of the trust instrument. Fla. Stat. Sec. 736.1017.

Articles 11 and 12 are not part of the national UTC, but were added by the Florida committee. Article 11 specifies numerous rules of construction applicable to trusts. Included are the effect of a divorce, the validity of a no contest clause, and rules on distribution of shares of

deceased beneficiaries. Article 12 carries over numerous provisions of prior law relating to private foundations and split-interest charitable trusts.

Article 13 deals with the application of the UTC to existing trusts. The intent is to give the UTC the widest possible application, consistent with limitations placed on it by the United States Constitution. Consequently, the UTC generally applies not only to trusts created on or after the effective date, but also to trusts already in existence. Fla. Stat. Sec. 736.1303.

Study Process

In preparing the UTC for enactment, the Florida Bar UTC Subcommittee engaged in a several year study process. States normally enact major uniform laws only following a lengthy study process. Among the issues a study committee must address include making decisions about optional provisions and the extent to which unique or ingrained features of prior law should be carried forward into the new enactment. Furthermore, policy issues on which the Uniform Law Commissioners had divided votes will sometimes result in divided votes the other way when the Act moves to the states.

Nearly all of the modifications made in the Florida enactment fit within one of these categories. The Florida modifications are notable in the number of provisions of prior law carried forward into the Florida UTC.

Significant Provisions

The UTC, as enacted in Florida and elsewhere, does not make sweeping changes in the common law of trusts, but neither does it woodenly copy the previous judge-made law. The Florida UTC makes significant strides. What follows is a description of the more important changes made by the UTC in the rules prevailing in many states. These are also the issues receiving the most discussion in the states considering the UTC for enactment. The following nine issues are addressed:

- Default Rules (Fla. Stat. Sec. 736.0105);
- Principal Place of Administration (Fla. Stat. Sec. 736.0108);
- Representation and Settlements (Fla. Stat. Sec. 736.0111 and Article 3);
- Trust Modification and Termination (Fla. Stat. Sec. 736.0410 to 736.417);
- Cy Pres (Fla. Stat. Sec. 736.0413);
- Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5);
- Revocable Trusts (Article 6);
- Trustee Removal (Fla. Stat. Sec. 736.0706); and
- Duty to Keep the Beneficiaries Informed (Fla. Stat. Sec. 736.0813).

Default Rules (Fla. Stat. Sec. 736.0105)

Much of American trust law consists of rules subject to override by the terms of the trust. The UTC is no exception. Nearly all of the Code's provisions are subject to override in the terms of the trust. But prior to the UTC, neither the Restatement, treatise writers, nor state legislatures had attempted to describe the principles of law that are *not* subject to the settlor's control. The UTC collects these principles in Section 105. Included are:

- the requirements for creating a trust;
- the rights of third parties in their dealings with the trustee;
- the power of the court to take certain actions, such as to remove a trustee;
- the power of the court to modify or terminate a trust on the grounds specified in the Code;
- a trustee's obligation to act in good faith, and in accordance with the purposes of the trust and to administer the trust in the interests of the beneficiaries; and
- the trustee's duty to keep certain adult beneficiaries of an irrevocable trust informed of matters relating to the trust's administration.

The limits on the settlor's ability to waive the duty to keep the beneficiaries informed, which is described in detail below in connection with the discussion of Florida Stat. Sec. 736.0813, is the most discussed provision in the UTC. The other provisions in Section 105 have received little comment and were enacted in Florida without significant change.

Principal Place of Administration (Fla. Stat. Sec. 736.0108)

Determining a trust's principal place of administration is important for a variety of reasons. It may determine which state's income tax applies to the trust. It will establish which court has primary jurisdiction concerning trust administrative matters, or the venue for bringing a judicial proceeding. Locating a principal place of administration in a particular jurisdiction also makes it more likely that the particular jurisdiction's law will govern the trust.

As trust administration has become more complex, determining a trust's principal place of administration has become more difficult. Cotrustees may be located in different states, or a corporate trustee's personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of nontrustees, such as advisors and trust protectors, may play a role in the trust's administration. The Florida definition of "principal place of administration," (Fla. Stat. Sec. 736.0108(2)), which is carried forward from prior Florida law and which looks primarily to the trustee's usual place of business, will answer most but not all cases. In cases where there may be some doubt, it may be helpful to specify the principal place of administration in the terms of the trust. A provision specifying the principal place of administration is valid and controlling if the trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction, or all or part of the trust's administration occurs in the designated place. Fla. Stat. Sec. 736.0108(1).

Whether or not the trust designates a principal place of administration, the UTC also specifies a procedure for transferring the principal place of administration, whether to another state or country. The trustee must first send a notice to the "qualified beneficiaries" at least 60 days prior to the planned date of transfer. Should a qualified beneficiary file a lawsuit objecting to the transfer, the trustee's authority is suspended until the lawsuit is resolved. Should no such objection be filed, the trustee may proceed with the transfer without involvement of the court. Fla. Stat. Sec. 736.0108(5)-(7). "Qualified beneficiary," a term used with some frequency in the UTC, excludes a beneficiary holding a remote remainder interest. Fla. Stat. Sec. 736.0103(13).

Representation and Settlements (Fla. Stat. Sec. 736.0111 and Article 3)

The UTC strives to keep administration of trusts outside of the courts. Numerous actions are allowed solely upon notice to the beneficiaries. These actions include:

- transfer of a trust's principal place of administration to or from another country or American state (Fla. Stat. Sec. 736.0108);
- combination of separate trusts into one or the division of a single trust into two or more separate trusts (Fla. Stat. Sec. 736.0417);
- resignation of a trustee (Fla. Stat. Sec. 736.0705); and
- submission of a trustee's report (Fla. Stat. Sec. 813).

Other actions can be accomplished upon consent of the beneficiaries. These include:

- selection of a successor trustee (Fla. Stat. Sec. 736.0704));
- release of a trustee from potential liability. Fla. Stat. Sec. 736.1012.

But achieving notice to or the consent of all of the beneficiaries is frequently difficult. Trusts commonly last for decades. In an increasing number of American jurisdictions trusts can in theory last in perpetuity. The current beneficiaries of the trust are frequently minors or adults who lack capacity. Future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new, but the UTC addresses the subject in more detail than previous efforts and also makes representation available for actions taken outside of court. The Code provides not only for representation by fiduciaries (guardians, conservators, personal representatives--see Fla. Stat. Sec. 736.0303), but also for what is known as virtual representation, under which an otherwise unrepresented person (such as a child who may not yet be born) may be represented by another beneficiary with a similar beneficial interest with respect to the particular matter or dispute. Fla. Stat. Sec. 736.0304. In addition, the Code authorizes the holder of a power of appointment to represent and bind permissible appointees, takers in default, and others whose interests are subject to the power (Fla. Stat. Sec. 736.0302), and allows a parent to represent and bind a minor or unborn child. Fla. Stat. Sec. 736.0303(5).

The representation provisions of the UTC can be utilized not only for purposes of achieving notice to or the consent of the beneficiaries for the matters detailed above, but also to settle any dispute whether in or out of court. The nonjudicial settlement provision is broad. The parties may enter into a nonjudicial settlement agreement with respect to any matter involving a trust. Fla. Stat. Sec. 736.0111(2). The settlement agreement can contain any term or condition that a court *could* properly approve. Fla. Stat. Sec. 736.0111(3). Among the issues that can be resolved by a nonjudicial settlement agreement are the interpretation or construction of the terms of the trust; approval of a trustee's report or accounting; direction to a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; resignation or appointment of a trustee and determination of a trustee's compensation; transfer of a trust's principal place of administration; and liability of a trustee for an action relating to the trust. Fla. Stat. Sec. 736.0111(4).

Although the representation provisions provide legal practitioners with an added tool that will solve many practical problems, they should not be used without thought. Notice to and the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented. If conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem (termed a representative under the Code) to represent the otherwise unrepresented beneficiary. Under the Code, the appointment of a representative is available whether the matter to be resolved is in or out of court. Furthermore, in making decisions, a representative may consider general family benefit accruing to living members of the individuals' family. Fla. Stat. 736.0305.

Florida, in a nonuniform addition, also authorizes a settlor to specify persons who may receive notices, account, report, or other information on behalf of a beneficiary, in which case the information would be provided to the substitute and not to the beneficiary. The substitute may not be serving as trustee and restrictions apply if the substitute is also a beneficiary of the trust. Fla. Stat. Sec. 736.0306.

Trust Modification and Termination (Fla. Stat. Sec. 736.0410 to 736.0417)

Due to the increasing use in recent years of long-term trusts, there is a need for greater flexibility in the restrictive rules that apply concerning when a trust may be terminated or modified other than as provided in the instrument. The UTC provides for this increased flexibility but without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. The result is a liberalizing nudge in the law but one that is founded on traditional doctrine.

The Florida UTC is consistent with this liberalizing nudge but this process did not begin with Florida's enactment of the UTC but was already evident in prior law. The result is that the Florida UTC mixes concepts from both the UTC and prior Florida law.

Judicial Modification Not Inconsistent With Settlor's Purpose. Copying prior law, Fla. Stat. Sec. 736.04113 grants the court discretion to modify or terminate an irrevocable trust for reasons such as fulfillment of the trust's purpose, lack of a continuing material purpose, or because of circumstances not anticipated by the settlor. In exercising its discretion the court is to consider any spendthrift provision but is not precluded from modifying the trust for that reason.

Judicial Modification for Best Interests. Copying prior law, Fla. Stat. Sec. 736.04115 grants the court discretion to modify an irrevocable trust if such action is in the best interests of the beneficiaries. Any spendthrift provision must be considered by the court but does not preclude action. This provision has a very limited application. It applies only to post-2000 trusts which might continue beyond the former perpetuities limit of 90 years or lives in being plus 21 years.

Nonjudicial Modification. Copying prior law, Fla. Stat. Sec. 736.0412 allows the trustee and qualified beneficiaries to terminate an irrevocable trust following the death of the settlor.

Similar to the previous provision, this section is directed at trusts intended to last for periods longer than the traditional Rule Against Perpetuities.

Uneconomic Trust. Fla. Stat. Sec. 736.0414 authorizes the court to terminate an uneconomical trust of any size, and allows a trustee, without approval of court, to terminate a trust with a value of \$50,000 or less. Before terminating the trust, the court or trustee must conclude that the value of the trust property is insufficient to justify the cost of administration. Upon termination of the trust, the trustee is to distribute the trust property in a manner consistent with the purposes of the trust. In the original UTC, the figure \$50,000 was placed in brackets to signal that states are free to change the amount. Most states enacting the UTC have increased the amount to \$100,000. Florida elected to retain the \$50,000 limit.

Reformation. If a mistake occurs in the creation of the trust, the doctrine of reformation allows a trust to be “reformed” to conform it to the settlor’s original intent. Consistent with the Restatement (Third) of Property: Wills and Other Donative Transfers § 12.1, Fla. Stat. Sec. 736.0415 UTC clarifies that the doctrine of reformation may be applied to testamentary as well as inter vivos trusts. Also, the doctrine may be applied to correct a mistake of fact or law even if the original terms of the trust, as originally but mistakenly created, are unambiguous. The mistake may be one either of expression or inducement, but in any event must be established by clear and convincing evidence.

Modification to Achieve Settlor’s Tax Objectives. Consistent with Restatement (Third) of Property: Wills and Other Donative Transfers § 12.2, Fla. Stat. 736.0416 expands the court’s ability to modify a trust to achieve the settlor’s tax objectives. The court may modify the trust in any manner not contrary to the settlor’s probable intention. The court may also give the modification retroactive effect. Such broad authority is appropriate because the settlor’s objective--to achieve tax savings of a particular type--is usually abundantly clear. The other sections of Article 4, where applicable, can also be used to secure modifications for tax reasons.

Combination and Division of Trusts. Consistent with the statutes in many other states, Fla. Stat. Sec. 736.0417 authorizes a trustee to divide a trust or combine trusts without approval of court. While the trust or trusts that result need not have identical provisions, the consolidation or division cannot impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust. Before combining trusts or dividing a trust, the trustee must send notice of the proposed action to the qualified beneficiaries.

Cy Pres (Fla. Stat. Sec. 736.0413)

Charitable trusts must have a charitable purpose, a concept that was firmly established by the Statute of Charitable Uses of 1601 and that has evolved over the centuries as society has changed. Doctrine also has evolved regarding what is to be done upon failure of a charitable purpose. The court will apply what is known as *cy pres* to reform the gift to better carry out the settlor’s charitable purposes. If the settlor’s charitable purpose is deemed specific rather than general, however, under traditional doctrine the charitable trust has failed and the property must be returned to the settlor or settlor’s successors in interest.

The UTC and its Florida version liberalize the doctrine of *cy pres* in a way believed more likely to carry out the average settlor's intent. First, Fla. Stat. Sec. 736.0413 expands the ability of the court to apply *cy pres*. To enable the court to more efficiently structure the gift to carry out the settlor's charitable purposes, the Code provides that the court may apply *cy pres* not only if the original scheme becomes impossible or unlawful, but also if it becomes impracticable or wasteful. Second, Fla. Stat. Sec. 736.0413 creates a presumption in favor of general charitable intent. In applying *cy pres*, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. The court instead must modify the trust's terms or apply or distribute the trust property in a manner consistent with the settlor's charitable purposes.

Spendthrift Provisions and Rights of Beneficiary's Creditors (Article 5)

Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary's interest and preclude an attachment of the interest by the beneficiary's creditor or assignee. A spendthrift provision provides only limited protection to the beneficiary. The creditor or assignee may pounce upon the trust funds as soon as distribution is made. But even funds retained in trust are not always protected. Numerous exceptions to spendthrift protection are recognized, depending on the type of creditor, the category of beneficiary, or the time when the claim is made.

The provisions of the UTC relating to spendthrift provisions and the rights of a beneficiary's creditors largely track standard American doctrine. A trust is not spendthrift unless the instrument specifically so states, the drafters rejecting the approach that all trusts are spendthrift unless the instrument says otherwise. In addition, a restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary's interest. Fla. Stat. Sec. 736.0502(1).

The drafting committee also concluded that it was undesirable as a matter of policy to allow a settlor to create a trust, retain a beneficial interest, but yet deny the settlor's creditors the right to reach the trust. Consequently, the Code rejects the approach taken in the legislation enacted in Alaska and Delaware and, more recently, in other states, which allow a settlor to retain a beneficial interest immune from claims of the settlor's creditors. Under the Code, a creditor of the settlor can fully reach the settlor's beneficial interest. Fla. Stat. Sec. 736.0505(1)(b).

A key policy issue in drafting the Code was determining which classes of creditors should be exempt from the spendthrift bar. Exception creditors recognized in Fla. Stat. Sec. 736.0503 are alimony and child support claimants, claims by governmental units to the extent a state statute or federal law so provides, and a judgment creditor who has provided services to the beneficiary to reach the beneficiary's interest. Unlike the Restatement of Trusts, the UTC does not create an exception for the providers of a beneficiary's necessary support. Most such claims involve claims of the state for the costs of institutionalized care. The Code's drafters concluded that such issues are best addressed by legislation expressly directed at governmental reimbursement and not indirectly as an exception to spendthrift treatment.

Exemption from a spendthrift bar does not necessarily mean that a beneficiary's creditor will collect. If the trust is discretionary or for support, the creditor cannot usually attach the beneficiary's interest. The UTC increases protection against creditor claims by prohibiting a creditor from forcing a distribution even if the discretion is expressed in the form of a standard of distribution or the discretion was abused. Fla. Stat. 736.0504(2).

Revocable Trusts (Article 6)

The revocable trust is the most common trust created today in the United States. The revocable trust in the United States is today used largely as a substitute for a will. In a desire to avoid the probate process, the settlor will place all of his or her assets into the trust. These assets will then be disposed of at the settlor's death as provided in the trust instrument. Typically, the trust will be self-declared, with a successor trustee stepping in only at the settlor's death or incapacity.

Because the extensive use of revocable trust is a recent phenomenon, beginning decades if not centuries after most traditional trust law was formulated, there are numerous issues involving such trusts that have yet to be adequately addressed in the case law or state statutes. The provisions of the UTC on revocable trusts not only fill in many of these gaps but are also among the Code's most important and innovative provisions. The biggest change is a reversal of the common law presumption that trusts are irrevocable. Reflecting the increasing if not predominant use of the revocable trust, the UTC provides that a trust is revocable absent clarifying language in the terms of the trust. Fla. Stat. Sec. 736.0602(1). Because the Code's presumption of revocability reverses the rule under prior Florida law, the presumption applies only to trust instruments executed on or after the date of enactment. The remainder of Section 602 addresses the procedures for revocation should the terms of the trust fail to include or have an incomplete revocation provision.

The UTC treats treating the revocable trust in most respects as the functional equivalent of a will, at least while the settlor is alive. Following the trend in the case law, the capacity requirement for creating a trust is the same as that for a will. Fla. Stat. Sec. 736.0601. In addition, while the settlor has capacity, the settlor has the same control over the trust that a testator has over a will and the testator's own property. Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and all other rights that the beneficiaries might have are within the settlor's exclusive control. The settlor is authorized to give binding consents on a beneficiary's behalf, and access to the trust document is also within the settlor's control. Fla. Stat. Sec. 736.0602.

Contest of a will is typically barred under one of two alternative statutes. Normally, a contest is barred following some period of time following notice of probate, ranging from two to six months. In addition, many states bar a contest after a specified period of time following the settlor's death, whether or not the will was probated or notice of probate given. The most commonly enacted time limit is three years following the testator's death. *See, e.g.*, UPC §3-108. Most states currently have no limitation period on contest of a revocable trust. Fla. Stat. Sec. 736.0604 provides that a potential contestant must file an action within six months after

being sent a notice and a copy of the trust instrument or within the time allowed by Chapter 95, which will vary depending on the nature of the claim.

Because a revocable trust is usually employed as a will substitute, it is appropriate to subject trust assets at the settlor's death to the claims of the settlor's creditors and other estate-related expenses. Fla. Stat. Sec. 736.05053, which is carried forward from prior law, specifies the procedure for the payment of such claims and expenses.

Trustee Removal (Fla. Stat. Sec. 736.0706)

Trustees in many states may be removed only for breach of trust or other untoward act. This standard gives great weight to the settlor's particular selection of trustee. Because trust instruments typically place weight on a trustee's judgment and exercise of discretion, the particular trustee selected becomes an important term of the trust, a term which should not easily be changed. Fla Stat. Sec. 736.0706(2)(a)-(c) follows traditional doctrine by authorizing a trustee to be removed for acts of misconduct or other disqualification. Acts of misconduct or other disqualification justifying removal of the trustee include serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function. A trustee may also be removed if lack of cooperation among the cotrustees substantially impairs the trust's administration. Removal for serious breach of trust or lack of cooperation among the cotrustees requires no additional findings. Removal for unfitness, unwillingness or persistent failure to effectively administer the trust requires an additional finding by the court that removal would best serve the interests of the beneficiaries. "Interests of the beneficiaries," which is defined in Fla. Stat. Sec. 736.0103, means the beneficial interests as defined in the terms of the trust.

But the drafters of the UTC also concluded that in situations where the personal link between the settlor and trustee has been broken, the emphasis should turn to whether the particular trustee is appropriate to the trust, not whether the trustee has committed particular acts of misconduct or is totally unfit. Consequently, Fla. Stat. Sec. 736.0706(2)(d) also allows the court to consider whether there has been a substantial change of circumstances since the trust's creation which may obviate the reason for the trustee's selection. However, in no case may the court remove the trustee unless it also concludes that the selection of the particular trustee was not a material purpose of the trust, that removal of the trustee would best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

Duty to Keep the Beneficiaries Informed (Fla. Stat. Sec. 736.0813)

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee, for only by being informed can the beneficiaries know of and enforce their interests. Fla. Stat. Sec. 736.0813 of the Code codifies this common law obligation but at the same time adds detail and makes application of the duty more precise. The UTC imposes both a general obligation on the trustee to keep the qualified beneficiaries reasonably informed of administration (Fla. Stat. Sec. 736.0813(1)) as well as several specific notice requirements. Fla. Stat. Sec. 736.0813(1)(a)-(e). By limiting disclosure to qualified beneficiaries, the beneficiaries most likely to receive distributions, the Code hopefully will increase trustee accountability, while at the same time relieving the trustee from the undue

burden of having to identify and notify those holding truly remote interests.

A trustee is required to notify the qualified beneficiaries of the trustee's acceptance of office. Fla. Stat. Sec. 736.0813(1)(a). Regular reporting by the trustee is required. Unless the beneficiary has waived the requirement (Fla. Stat. Sec. 736.0813(2)), the trustee must furnish the qualified beneficiaries with a trust accounting at least annually, the required contents of which are specified in Fla. Stat. Sec. 736.08135. The trustee must also respond to the request of a qualified beneficiary for relevant information concerning trust assets and the particulars of administration. Fla. Stat. Sec. 736.0813(1)(e). This includes a requirement that the trustee provide a beneficiary upon request with a copy of the trust instrument. Fla. Stat. Sec. 736.0813(1)(c). The drafting committee rejected the more limited approach of letting the trustee decide which provisions are material to the beneficiary's interest; the trustee's version of what is material may differ markedly from what the beneficiary might find relevant. Requiring disclosure of the entire instrument upon demand is consistent with recent case law. *See Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C. Ct. App.1997); *Fletcher v. Fletcher* 480 S.E.2d 488 (Va. 1997). However, like most provisions of the Code, the requirement that the beneficiary be furnished with a copy of the entire trust instrument upon request may be waived in the terms of the trust.

The most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the above disclosure requirements. The dispute has since spilled over into the states, with the states enacting a variety of different approaches. The different approaches are described in detail in Kevin D. Millard, *The Trustee's Duty to Inform and report Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373 (2005). Realizing that consensus was impossible, in 2004 the drafters of the national UTC placed its provisions in brackets, signaling to the states that uniformity was not expected.

The Florida UTC permits a settlor to waive the general obligation to keep the qualified beneficiaries informed of trust administration. Florida also allows the settlor to waive some but not all of the specific notice requirements. Not waivable is the trustee's obligation to notify the qualified beneficiaries of the existence of the trust; to account to and to provide a complete copy of the trust instrument to qualified beneficiaries upon request; and the obligation to respond to the request of a qualified beneficiary for relevant information concerning trust assets and the particulars of administration. Fla. Stat. Sec. 736.105(2)(r)-(t).

Florida, however, provides a significant alternative that should satisfy the desires of certain settlors for nondisclosure to particular beneficiaries. As discussed previously, the Florida UTC allows a settlor to designate a substitute to receive notices, accountings, reports and other disclosures that would otherwise be made directly to a beneficiary. Fla. Stat. Sec. 736.0306.

The waiver issue brings into direct conflict the goal of effectuating settlor intent with the goal of making certain the beneficiaries have sufficient information to enforce their interests. The result is a compromise of which some on both sides of the issue will not be satisfied. Restricting a settlor's ability to limit disclosure is not a new concept (*see* Restatement (Second)

of Trusts § 173 cmt. c (1959)), but reducing the matter to the form of a statute brings the issue into much sharper relief.