

THE TRUSTEE'S DUTY TO INFORM AND REPORT UNDER THE UNIFORM TRUST CODE

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Editors' Synopsis: This Article discusses the purposes of a trustee's duty to inform and report, and summarizes how the duty has been codified in the Uniform Trust Code (UTC). The Article also summarizes how the states that have enacted the UTC have either followed or departed from the official UTC provisions, it analyzes the changes made by those states, and suggests how other states considering adopting the UTC might approach this issue.

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I. INTRODUCTION

The Uniform Trust Code (2000) (“UTC”) codifies a trustee’s duty to inform and report to the trust beneficiaries. By calling attention to the duty to inform and report, the UTC has engendered substantial debate about the scope of the duty and the degree to which a settlor may modify or even eliminate the duty. According to David M. English, the Reporter for the UTC, the extent to which the settlor may waive the disclosure requirements was the most discussed issue both during the drafting of the UTC and after its adoption by the National Conference of Commissioners on

Uniform State Laws ("NCCUSL").¹ The discussion among lawyers and bankers studying the UTC, or reacting to it after its adoption, has made it clear that there remains considerable uncertainty and disagreement about the duty to inform and report, and about the extent to which the duty is or should be mandatory.²

II. PURPOSES OF THE DUTY TO INFORM AND REPORT

To be able to enforce the trustee's duties, the beneficiary of a trust must know of the existence of the trust and be informed about the administration of the trust. If there were no duty to inform and report to the beneficiary, the beneficiary might never become aware of breaches of trust or might be unaware of breaches until it is too late to obtain relief. In addition, providing information to the beneficiary protects the trustee from claims being brought long after events that allegedly constituted a breach, because the statute of limitations or the doctrine of laches will prevent the beneficiary from pursuing stale claims. As a result, the duty to inform and report to the beneficiary is fundamental to the trust relationship.³

Nevertheless, there are those who advocate allowing the settlor to restrict or eliminate the trustee's duty to inform and report. Some settlors worry about the effect that knowledge of the trust and its administration might have on the beneficiaries. Consequently, some lawyers advocate the ability to create a "quiet" trust or even a secret trust.

The tension between the concept that information and reporting is a fundamental duty of the trustee and the desire of some settlors to limit or eliminate information and reporting has led to controversy over the information and reporting provisions in the UTC. The UTC provisions are a compromise between requiring full and complete disclosure and authoriz-

¹ See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 202 (2000).

² See Edward C. Halbach, Jr., *Symposium on Law in the Twentieth Century: Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1914 (2000).

A trustee's duty to provide information to beneficiaries on a reasonable basis has long been recognized as fundamental to the trust relationship. Nevertheless, practice, experience, and litigation in this country clearly demonstrate that there is considerable reluctance, and at least a fair amount of uncertainty, among fiduciaries concerning the applicability and performance of this general duty. *Id.* (footnote omitted).

³ See English, *supra* note 1, at 199.

ing settlors to restrict the amount of information given to beneficiaries.⁴ As discussed in Section IV, a majority of the states that have adopted the UTC have arrived at different compromises than the drafters of the UTC did, and they have modified the UTC information and reporting provisions.

III. DUTY TO INFORM AND REPORT AS CODIFIED IN THE UTC

The UTC codifies two general duties, expressed in broad language, and several specific duties concerning information and reporting to beneficiaries. The UTC imposes some of these duties on all beneficiaries and others only on “qualified beneficiaries.” “Beneficiary” is defined broadly to include beneficiaries with present or future interests, whether those interests are vested or contingent.⁵ This definition is similar to the broad definition of beneficiary in the Uniform Probate Code (“UPC”).⁶ In addition, a person who holds a power of appointment over trust property, in a capacity other than that of trustee, is a beneficiary under the UTC.⁷

“Qualified beneficiary” [an important term used throughout the UTC] means a beneficiary who, on the date the beneficiary’s qualification is determined:

- (A) is a distributee or permissible distributee of trust income or principal;
- (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or
- (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.⁸

⁴ *See id.* at 203.

⁵ *See* UNIF. TRUST CODE § 103(3) (2000). Prior to a 2004 amendment to the UTC that resulted in renumbering the subsections of UTC § 103, the definition of “beneficiary” was in UTC § 103(2).

⁶ UNIF. PROBATE CODE § 1-201(3) (2004) (“Beneficiary,” as it relates to a trust beneficiary includes a person who has any present or future interest, vested or contingent. . .”).

⁷ UNIF. TRUST CODE § 103(3).

⁸ *See id.* § 103(13). Prior to a 2004 amendment to the UTC that resulted in renumbering the subsections of UTC § 103, the definition of “qualified beneficiary” was in UTC § 103(12).

The first and third categories of qualified beneficiaries are the current beneficiaries and the presumptive remainder beneficiaries. The second category includes those beneficiaries who would be next in line if the interests of the current beneficiaries, but not the trust, terminated. For example, in a trust for the benefit of *A* for life, then for the benefit of *B* for life, remainder to *A*'s then living descendants per stirpes, *A* is in the first category of qualified beneficiary, *B* is in the second category, and *A*'s descendants, who would take the remainder if the trust terminated on the date the qualified beneficiaries are being determined, are in the third category of qualified beneficiary.

Although "nonqualified beneficiary" is not a defined term in the UTC, the UTC text and comments occasionally use "nonqualified beneficiary" to refer to beneficiaries who are not qualified beneficiaries.⁹

The UTC restricts certain, but not all, of the trustee's duties to inform and report to the qualified beneficiaries because of "the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust"¹⁰ But certain duties to respond to a request for information run to all beneficiaries, both qualified and nonqualified. The UPC has no concept of qualified beneficiary, and the duty to inform and report under the UPC runs to the broadly defined class of beneficiaries.¹¹ Therefore, a UPC state that enacts the UTC will be narrowing the beneficiaries to whom the duty to inform and report runs.

The UTC limits the persons to whom the duty to inform and report is owed in the case of a revocable trust and a trust over which a beneficiary holds a power of withdrawal. In a revocable trust, the trustee owes duties exclusively to the settlor.¹² This rule applies while the trust is revocable and the settlor has capacity to revoke the trust. The drafters bracketed the qualification that the settlor must have capacity to revoke the trust to indicate that adopting jurisdictions may choose to delete the qualification. Specifically, an adopting jurisdiction may decide that the trustee's duties, including the duty to inform and report, run only to the settlor while the trust is revocable, even if the settlor lacks capacity to revoke the trust. The

⁹ See *id.* §§ 704 cmt., 813(c).

¹⁰ *Id.* § 103 cmt. See English, *supra* note 1, at 200 (limiting most disclosure requirements to qualified beneficiaries is intended to "reliev[e] the trustee of the undue burden of having to identify and notify those holding truly remote interests.>").

¹¹ UNIF. PROBATE CODE § 7-103.

¹² See UNIF. TRUST CODE § 603(a).

drafters bracketed the language regarding the settlor's capacity to revoke the trust, because it may be difficult to determine whether a settlor has become incapacitated, and some jurisdictions may decide that the rule for a revocable trust should be the same as the rule in the case of the will.¹³ Devisees named in the will of a living person have no right to know the contents of the will until the testator's death, even if the testator becomes incapacitated. Because a revocable living trust is a will substitute, the UTC generally treats a revocable trust as the functional equivalent of a will.¹⁴ Therefore, a jurisdiction that adopts the UTC may decide that the trustee's duties, including the duty to inform and report, should run only to the settlor while the trust remains revocable, even if the settlor becomes incapacitated.

During the period in which a power of withdrawal may be exercised, the holder of the power is treated as if he or she were the settlor of a revocable trust, to the extent of the property subject to the power.¹⁵ For example, in the case of a marital deduction trust over which the spouse-beneficiary has an unlimited inter vivos power of withdrawal, the trustee's duty to inform and report will run only to the spouse-beneficiary.

A. General Duty to Inform and Report

The UTC imposes on the trustee the affirmative obligation to "keep the qualified beneficiaries . . . reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."¹⁶ This duty requires the trustee to undertake actively to report to the beneficiaries. The second general duty is passive and requires that "[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust."¹⁷ The passive duty is not limited to qualified beneficiaries. Any beneficiary, even one with a remote contingent interest, may request information about the administration of the trust, and the trustee must provide that information unless to do so would be unreasonable

¹³ See AMENDMENTS TO THE UNIF. TRUST CODE (2000), Annual Meeting Draft with Preliminary Comments, § 603 Preliminary Comment, July 30-Aug. 6, 2004, available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

¹⁴ See UNIF. TRUST CODE § 601 (for example, the capacity to create, amend, or revoke a revocable trust is the same as the capacity required to make a will).

¹⁵ See *id.* § 603(b).

¹⁶ *Id.* § 813(a).

¹⁷ *Id.*

under the circumstances.¹⁸ Under a corollary provision, whenever the UTC requires notice to the qualified beneficiaries, the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.¹⁹

The comment to section 813 says that providing a beneficiary with a copy of the annual report required under section 813(c)²⁰ ordinarily satisfies a trustee's affirmative duty to keep the beneficiaries reasonably informed, and that a trustee is not ordinarily obligated to furnish information to a beneficiary in the absence of a specific request.²¹ However, a trustee may be required to give the beneficiaries advance notice of a non-routine transaction that significantly affects the trust estate and the beneficiaries' interests.²²

B. Specific Duties to Inform and Report

1. *Duty to Furnish a Copy of the Trust Instrument*

The UTC provides that a trustee must promptly furnish a copy of the trust instrument to any beneficiary who requests a copy.²³ Note that this duty is not limited to qualified beneficiaries. As pointed out by the comment, this duty is broader than the corresponding duty under the UPC, which requires the trustee to provide the beneficiary only with those "terms of the trust which describe or affect [the beneficiary's] interest"²⁴ The drafters of the UTC rejected the UPC's more restrictive approach because "the trustee's version of what is material may differ markedly from what the beneficiary might find relevant."²⁵ Courts that have considered this question have agreed with the UTC's approach.²⁶

¹⁸ This position is consistent with common law. See *In re Trusteeship under Will of Gold*, 342 N.W.2d 332 (Minn. 1984); see also AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 173 (4th ed. 1987).

¹⁹ See UNIF. TRUST CODE § 110(a).

²⁰ See *supra* text accompanying notes 35-38.

²¹ See UNIF. TRUST CODE § 813 cmt. (citing RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959)).

²² See *id.* (citing *In re Estate of Green*, 431 N.W.2d 492 (Mich. App. 1988) and *Allard v. Pacific Nat'l Bank*, 663 P.2d 104 (Wash. 1983)); see also ROBERT WHITMAN & DAVID M. ENGLISH, *FIDUCIARY ACCOUNTING AND TRUST ADMINISTRATION GUIDE* 247 (ALI-ABA 2002).

²³ UNIF. TRUST CODE § 813(b)(1).

²⁴ UNIF. PROBATE CODE § 7-303(b) (2004).

²⁵ English, *supra* note 1, at 202.

²⁶ See *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358, 362 (S.C. Ct. App. 1997) (requiring trustees to disclose entire amended and restated trust agreement, not just specific clauses that the trustees determined were relevant to the beneficiaries' interests, but not

2. *Duty to Notify Qualified Beneficiaries of Acceptance of Trusteeship, Trustee's Identity, Trust's Existence, Settlor's Identity, and Right to a Copy of Trust Instrument and to Reports*

Within sixty days after accepting a trusteeship, the trustee must notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number.²⁷ In addition, within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or that a formerly revocable trust has become irrevocable, the trustee must notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report.²⁸ These duties to inform will overlap in some cases, such as when the settlor's death results in the appointment of a successor trustee.²⁹ The duty to inform the beneficiary of the existence of the trust is similar to, but more specific than, the duty to inform under the UPC,³⁰ and is consistent with common law.³¹ Unlike most of the UTC, which applies to all trusts whether created before or after the effective date of the UTC,³² these specific duties to inform are prospective only. These duties apply to trustees who accept the trusteeship after the effective date of the UTC, to irrevocable trusts created after the effective date of the UTC, and to revocable trusts that become irrevocable after the effective date of the UTC.³³

prior trust documents that had been revoked); *Fletcher v. Fletcher*, 480 S.E.2d 488, 492 (Va. 1997) (entitling beneficiary to entire trust document to assure that the trustees were discharging their duty of impartiality).

²⁷ UNIF. TRUST CODE § 813(b)(2).

²⁸ *Id.* § 813(b)(3).

²⁹ *Id.* § 813 cmt.

³⁰ UNIF. PROBATE CODE § 7-303(a)

Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

³¹ See *McNeil v. McNeil*, 798 A.2d 503, 510 (Del. 2002) ("A trustee has a duty to furnish information to a beneficiary upon reasonable request. Furthermore, even in the absence of a request for information, a trustee must communicate essential facts, such as the existence of the basic terms of the trust.").

³² UNIF. TRUST CODE § 1106(a)(1).

³³ *Id.* § 813(e).

3. *Duty to Notify Qualified Beneficiaries of Change in Trustee's Compensation*

The trustee must notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.³⁴

4. *Duty to Provide Periodic Reports*

The trustee must send reports "to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it"³⁵ The reports must be sent at least annually and at the termination of the trust. In addition, if the trusteeship has a vacancy and no cotrustee remains in office, the former trustee must send a report to the qualified beneficiaries. The UTC uses the term "report" rather than "accounting" to make clear that the report need not be in any particular format and need not follow any particular formalities.³⁶ The report must, however, include "the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values."³⁷ Thus, it may be sufficient to provide the beneficiaries with copies of the trust's tax returns and account statements, if those documents include the required information and are clear and complete.³⁸

5. *Waiver*

A beneficiary may waive the right to reports or other information that the trustee would otherwise be required to give the beneficiary, and may withdraw a previous waiver as to future reports and other information.³⁹ A waiver by a beneficiary does not relieve the trustee from liability for matters that the report or other information would have disclosed.⁴⁰ Moreover, if the report would have disclosed a potential claim against the trustee, the statute of limitations will not begin to run⁴¹ against a beneficiary who does

³⁴ *Id.* § 813(b)(4).

³⁵ *Id.* § 813(c).

³⁶ *Id.* § 813 cmt.; English, *supra* note 1, at 201 n. 239. *See also* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1125 n. 107 (2004) (pointing out that the term "accounting" is used to refer to five different doctrines or remedies).

³⁷ UNIF. TRUST CODE § 813(c).

³⁸ *Id.* § 813 cmt.; WHITMAN & ENGLISH, *supra* note 22, at 250.

³⁹ UNIF. TRUST CODE § 813(d).

⁴⁰ *Id.* § 813 cmt.

⁴¹ *See supra* text accompanying notes 55-58.

not receive the report because it was waived.⁴²

C. Default and Mandatory Aspects of the Duty to Inform and Report

Most of trust law consists of default rules. In general, the settlor of a trust is free to change the default rules in the trust document.⁴³ However, some rules of trust law are so fundamental that they are mandatory and may not be varied or waived by the settlor.⁴⁴ One innovation of the UTC is that it codifies, in section 105, the general principle that the provisions of the UTC are default rules that may be modified or waived by the settlor. The mandatory rules that are specified in section 105(b) are an exception to this general principle.⁴⁵

Under the UTIC, the only mandatory rules relating to a trustee's duty to inform and report to the beneficiaries are: (1) "the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports[,⁴⁶ and (2)] the duty under Section 813(a) to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust"⁴⁷ Thus, the settlor may, by the terms of the trust, modify or waive the duty to provide a beneficiary—upon request—with a copy of the trust instrument⁴⁸ and the requirement that the trustee provide annual reports to the qualified beneficiaries.⁴⁹ The settlor may also waive the duty to advise a beneficiary under

⁴² UNIF. TRUST CODE § 1005 cmt.

⁴³ See 2 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.").

⁴⁴ Langbein, *supra* note 36, at 1105.

⁴⁵ English, *supra* note 1, at 155 (Noting that "prior to the UTC, neither the *Restatement*, nor 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.").

⁴⁶ UNIF. TRUST CODE § 105(b)(8) (Supp. 2004).

⁴⁷ *Id.* § 105(b)(9).

⁴⁸ See *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358, 362 (N.C. Ct. App. 1997) (requiring trustees to disclose trust agreement absent an explicit provision in the trust to the contrary).

⁴⁹ UNIF. TRUST CODE § 105, cmt. The comment notes, however, that furnishing of a copy of the trust instrument and annual reports may be required in a particular case if that information is requested by a beneficiary and is reasonably related to the trust's ad-

the age of twenty-five of the existence of the trust, the identity of the trustee, and the beneficiary's right to request trustee's reports. However, if a beneficiary under the age of twenty-five learns of the trust and requests information, the trustee must respond.⁵⁰ Moreover, the UTC does not attempt to codify every aspect of trust law, and specifically provides that the common law of trusts and principles of equity supplement the UTC.⁵¹ Therefore, a purported waiver by the settlor of any aspect of the duty to inform and report is subject to the common law principal that a beneficiary is always entitled to information about the trust that is reasonably necessary to allow the beneficiary to enforce the trust.⁵²

Because the information and reporting provisions have been controversial in states considering the UTC, and because a majority of the adopting states have made changes to these provisions in a nonuniform way, NCCUSL amended the UTC in 2004 to bracket the subsections of section 105 that make some aspects of the duty to inform and report mandatory provisions.⁵³ In addition, the drafters added the word "qualified," in brackets, before "beneficiary" in section 105(b)(9), to indicate that an enacting jurisdiction may choose to make the duty to respond to a request for information mandatory, but only as to a request from a qualified beneficiary. According to preliminary comments to the modified section 105, the intent of the bracketing is to indicate that uniformity in these provisions is not expected, not that NCCUSL recommends deletion of the provisions.⁵⁴ The final comments to the amended section 105 are expected to include additional discussion of the policy factors.

ministration.

⁵⁰ *Id.* §§ 105(b)(9), cmt.

⁵¹ *Id.* § 106.

⁵² *Briggs v. Crowley*, 224 N.E.2d 417, 421 (Mass. 1967); *In re Estate of Lang*, 302 N.Y.S.2d 954, 957 (N.Y. Sur. Ct. 1969) (entitling beneficiaries of testamentary trust to accounting; in *terrorem* clause in will purporting to negate benefits for any beneficiary who questioned the administration of the trust held void as against public policy); *Hollenbeck v. Hanna*, 802 S.W.2d 412, 414 (Tex. App. 1991); RESTATEMENT (SECOND) OF TRUSTS § 173, cmt. c (1959) (Regardless of terms of the trust purporting to limit the information to be given to the beneficiary, "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust."); WHITMAN & ENGLISH, *supra* note 22, at 96.

⁵³ AMENDMENTS TO THE UNIF. TRUST CODE (2000), adopted at the NCCUSL 2004 annual meeting, July 30-Aug. 6, 2004, available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

⁵⁴ *Id.*

D. Statute of Limitations

The UTC protects trustees by providing that an action for breach of trust may not be commenced more than one year after the trustee provided a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the one year time limitation.⁵⁵ Adequate disclosure means that the report provides sufficient information so that the beneficiary either knows of the potential claim or should inquire about it.⁵⁶ In the absence of a report that adequately discloses a claim, a five year statute of limitations applies, which does not begin to run until the trustee is removed, resigns, or dies; the beneficiary's interest in the trust terminates; or the trust itself terminates.⁵⁷ The UTC approach is much more protective of trustees who give periodic reports than the approach taken by the UPC, under which the statute of limitations runs only when the trustee provides a final account or other statement that discloses a potential claim and shows the termination of the trust relationship between the trustee and the beneficiary.⁵⁸

IV. CONFORMITY TO AND DEVIATION FROM THE OFFICIAL UTC PROVISIONS IN ADOPTING JURISDICTIONS

At the time this Article was written, the UTC had been adopted in ten jurisdictions: the District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, and Wyoming. Of these states, only Nebraska⁵⁹ and New Mexico⁶⁰ adopted section 813 of the UTC (which specifies the duties to inform and report) without change. All of the other enacting jurisdictions modified section 813, and most of the jurisdictions made changes to other sections that affect the duty to inform and report.

A. Modification of the General Duty to Inform and Report Under UTC Section 813(a)

Section 813(a) of the UTC imposes the general duty to keep the qual-

⁵⁵ UNIF. TRUST CODE § 1005(a) (Supp. 2004).

⁵⁶ *Id.* § 1005(b) (Supp. 2004).

⁵⁷ *Id.* § 1005(c) (Supp. 2004). If the trusteeship terminates because the trustee dies, a claim against the trustee's estate may be barred by the applicable nonclaim statute sooner than it would be barred by the UTC statute of limitations. *Id.* § 1005 cmt.

⁵⁸ UNIF. PROBATE CODE § 7-307 (2004).

⁵⁹ See NEB. REV. STAT. § 30-3878 (2004).

⁶⁰ See N.M. STAT. ANN. § 46A-8-813 (Michie 2004).

ified beneficiaries informed about the administration of the trust and to respond to a request for information received from any beneficiary. Kansas,⁶¹ Maine,⁶² New Hampshire,⁶³ and Wyoming⁶⁴ all limit the duty to respond to a request for information to a request from a qualified beneficiary. Utah included the same limitation and made both the duty to keep qualified beneficiaries informed and the duty to respond to a request for information subject to contrary provisions in the terms of the trust.⁶⁵

B. Modifications of the Duties to Provide a Copy of the Trust Instrument, Inform Beneficiaries of the Acceptance of the Trusteeship and of the Creation of an Irrevocable Trust or that a Revocable Trust Has Become Irrevocable, and Notify the Beneficiaries of a Change in Trustee Compensation

Utah made all of the specific duties under UTC section 813(b) subject to being overridden by the terms of the trust.⁶⁶

Tennessee, in lieu of section 813(b), requires “the trustee of an irrevocable or non-grantor trust [to send a notice to the] current [beneficiaries and to] each vested ultimate beneficiary of a remainder interest”⁶⁷ The notice is to be sent within sixty days after acceptance and funding of the trust, excluding nominal funding or the depositing of insurance policies on the life of a living person; on termination of the interest of an income beneficiary, the notice is to be sent to the successor income beneficiaries.⁶⁸ The notice may either include a complete copy of the trust instrument or an abstract containing specified information.⁶⁹ The duty to provide this notice does not apply if the settlor directs otherwise in a writing delivered to the trustee.⁷⁰

In the District of Columbia⁷¹ and Wyoming,⁷² the duty to provide a copy of the trust instrument applies only to a qualified beneficiary.

⁶¹ See KAN. STAT. ANN. § 58a-813(a) (2004).

⁶² ME. REV. STAT. ANN. § 813.1 (2004).

⁶³ N.H. REV. STAT. ANN. § 564-B:8-813 (2004).

⁶⁴ WYO. STAT. ANN. § 4-10-813(a) (2003).

⁶⁵ See UTAH CODE ANN. § 75-7-811(1) (2004).

⁶⁶ *Id.* § 75-78-811(2).

⁶⁷ TENN. CODE ANN. § 35-15-813(b) (Supp. 2001).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ D.C. CODE ANN. § 58a-813(b)(1) (2001).

⁷² WYO. STAT. ANN. § 4-10-813(b)(1) (Michie 2003).

C. Modifications of the Duty to Provide Reports

A number of states have modified UTC section 813(c) and many of the modifications relate to the beneficiaries who must be given the trustee's reports. Under the uniform language, reports are to be provided to distributees and permissible distributees and to other qualified or nonqualified beneficiaries who request reports. The District of Columbia limits the duty to provide annual reports to distributees and permissible distributees, but on termination of the trust, other qualified beneficiaries may request the final report.⁷³ Upon a vacancy in the trusteeship when no cotrustee remains in office, the District of Columbia, like the UTC, requires the former trustee to send its report to all qualified beneficiaries.⁷⁴ Upon a vacancy in the trusteeship or termination of the trust, the District of Columbia statute provides that nonqualified beneficiaries are also entitled to the trustee's report, unless the qualified beneficiaries waived preparation of the report.⁷⁵

Kansas,⁷⁶ Maine,⁷⁷ New Hampshire,⁷⁸ and Wyoming⁷⁹ limit the duty to provide reports to distributees and permissible distributees and to other qualified beneficiaries who request the reports. Accordingly, nonqualified beneficiaries are not entitled to reports.

The enacting jurisdictions also vary in their requirements as to what information the trustee's reports must contain. The UTC calls for "a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values."⁸⁰ In Kansas, the report must also include, "[I]f requested, the trust's association of investment management and research compliant rate of return."⁸¹ In Maine, the report must, if feasible, include not only the market value of the trust assets but also their tax bases.⁸² Furthermore, a Wyoming trustee's report must include not only a listing of receipts and disbursements, but also the alloca-

⁷³ D.C. CODE ANN. §§ 19-1308.13(c)(1), (2) (2001).

⁷⁴ *Id.* § 19-1308.13(c)(3).

⁷⁵ *Id.* § 19-1308.13(c)(4).

⁷⁶ KAN. STAT. ANN. § 58a-813(c) (2004).

⁷⁷ ME. REV. STAT. ANN. tit. 18-B, § 813.3 (2004).

⁷⁸ N.H. REV. STAT. ANN. § 564-B:8-813(c) (2004).

⁷⁹ WYO. STAT. ANN. § 4-10-813(c) (Michie 2003).

⁸⁰ UNIF. TRUST CODE § 813(c) (Supp. 2004).

⁸¹ KAN. STAT. ANN. § 58a-813(c) (2004).

⁸² ME. REV. STAT. ANN. tit. 18-B § 813.3 (2004).

tion between income and principal of receipts, disbursements, trustee compensation, and administration expenses.⁸³

The notice to beneficiaries required under the Tennessee statute apparently replaces any requirement to provide reports.⁸⁴ If as part of the notice, the trustee provides an abstract of the trust, instead of a copy of the trust instrument, the abstract must include an estimate of the value of the trust at the date of the notice and, in the case of an income beneficiary, an estimate of the income that may be distributable to the beneficiary. No other information about the trust assets, receipts, or disbursements must be included in the notice.⁸⁵ If the trustee provides a complete copy of the trust instrument rather than an abstract, apparently no information need be given to the beneficiaries about the trust assets, receipts, or disbursements, except as may be required under the general duty to keep the qualified beneficiaries reasonably informed about the administration of the trust and to respond to a beneficiary's requests for information.⁸⁶

D. Modifications As to Which Beneficiaries Are Entitled to Information

Under the Kansas modification of UTC section 813, all of the notice requirements apply only to the surviving spouse (presumably this means the surviving spouse of the settlor, although the statute does not expressly say so) if the spouse is or may be entitled to receive income or principal distributions from, or holds any power of appointment over, the trust, and where any of the qualified beneficiaries are issue of the surviving spouse.⁸⁷ Kansas also modified the definition of "qualified beneficiary" to mean only distributees and those who would be distributees if the trust terminated on the date qualification is determined.⁸⁸ David English concluded that, by eliminating the words "permissible distributee," the apparent intent was to exclude discretionary beneficiaries from the term "qualified beneficiary,"⁸⁹ which could have somewhat puzzling effects regarding which beneficiaries are entitled to receive information. For example, a current discretionary beneficiary would be entitled to receive the trustee's reports but not any other information about the trust, while a presumptive remainder ben-

⁸³ WYO. STAT. ANN. § 4-10-813(c) (Michie 2003).

⁸⁴ See *supra* text accompanying footnotes 67-70.

⁸⁵ TENN. CODE ANN. § 35-15-813(b) (2004).

⁸⁶ *Id.*

⁸⁷ KAN. STAT. ANN. § 58a-813(e) (Supp. 2004).

⁸⁸ *Id.* § 58a-103(12).

⁸⁹ See David M. English, *The Kansas Uniform Trust Code*, 51 KAN. L. REV. 311, 319 (2003).

eficiary would be entitled to any information about the trust that the beneficiary reasonably requested.⁹⁰ However, it seems plausible that the term “distributee” in the Kansas definition of “qualified beneficiary” may be interpreted to include both mandatory and discretionary beneficiaries.

Maine, Utah, and Wyoming also modified the definition of “qualified beneficiary.” Under the Maine statute, “qualified beneficiary” does not include a contingent distributee or permissible distributee of trust income or principal “whose interest in the trust is not reasonably expected to vest.”⁹¹ The Utah definition of “qualified beneficiary” includes the current mandatory and permissible distributees, and the presumptive remainder beneficiaries, but excludes the UTC’s intermediate class of successor beneficiaries who would become distributees or permissible distributees if the interests of the current beneficiaries, but not the trust, terminated.⁹² In Wyoming, “qualified beneficiary” is limited to a beneficiary who is currently entitled to distributions of income or principal, or who has a vested remainder interest in the trust.⁹³

Under UTC section 110(a), whenever the trustee is required to give notice to the qualified beneficiaries, the trustee must also give the notice to any nonqualified beneficiary who has requested it.⁹⁴ Section 110(a) reinforces UTC section 813(a), which requires the trustee to respond to a reasonable request for information from any beneficiary, not just a qualified beneficiary.⁹⁵ Kansas, Tennessee, and Utah, which made the duty to inform and report a waivable duty, deleted section 110(a). Maine and Missouri, which limited the duty to respond to a request for information to a request from a qualified beneficiary, also deleted section 110(a). Wyoming limited the duty to respond to a request for information to a request from a qualified beneficiary, but retained UTC section 110(a) in a modified form. Under the Wyoming statute, the trustee must give notice to a nonqualified beneficiary who has requested it, but only if the trustee has the written consent of the settlor.⁹⁶

⁹⁰ See *id.* at 342.

⁹¹ ME. REV. STAT. ANN. tit. 18-B § 103.12 (Supp. 2004).

⁹² See UTAH CODE ANN. § 75-7-103(h) (Supp. 2004); see also *supra* text accompanying note 8.

⁹³ See WYO. STAT. ANN. § 4-10-103(a)(xv) (Michie 2003).

⁹⁴ UNIF. TRUST CODE § 110(a) (Supp. 2004).

⁹⁵ *Id.* § 813(a).

⁹⁶ WYO. STAT. ANN. § 4-10-110(a) (Michie 2003).

E. Other Modifications Affecting the Mechanics of the Duty to Inform and Report

Missouri modified UTC section 813 to require a request for information to be made with respect to a single trust that is sufficiently identified to allow the trustee to locate the trust records;⁹⁷ and to provide that if the trustee is bound by any confidentiality restrictions with respect to an asset of the trust, a beneficiary eligible to receive information about that asset must agree to be bound by the same confidentiality restrictions before receiving information.⁹⁸

F. Modifications of the Mandatory Aspects of the Duty to Inform and Report

Five of the enacting jurisdictions—Maine, Missouri, Nebraska, New Hampshire, and New Mexico—essentially follow the UTC in making two specific duties nonwaivable: (1) the duty to inform beneficiaries of an irrevocable trust who are at least twenty-five years old of the existence of the trust, the identity of the trustee, and the right to request trustee's reports; and (2) the duty to respond to a beneficiary's request for information.⁹⁹ However, Missouri¹⁰⁰ and New Hampshire¹⁰¹ decided to reduce the age from twenty-five to twenty-one. Maine¹⁰² and Missouri,¹⁰³ consistent with a 2004 amendment to UTC section 105(b)(9), limited the duty to respond to a beneficiary's request for information to a duty to respond to a request from a qualified beneficiary, rather than any beneficiary.

Four of the enacting jurisdictions—Kansas, Tennessee, Utah, and Wyoming—deleted the UTC provisions that made these duties nonwaivable.¹⁰⁴ Therefore, from the face of those states' statutes, it appears that the settlor is free to modify or entirely waive the duty to inform and

⁹⁷ *Id.* § 456.8-813.6.

⁹⁸ *Id.* § 456.8-813.7.

⁹⁹ ME. REV. STAT. ANN. tit. 18-B, §§ 105.2.H., I. (Supp. 2004); MO. REV. STAT. §§ 456.1-105.2(8), (9) (2004); NEB. REV. STAT. §§ 30-3805(b)(8), (9) (Supp. 2004); N.H. REV. STAT. ANN. §§ 564-B:1-105(b)(8), (9) (Supp. 2004); N.M. STAT. ANN. §§ 46A-1-105.B(8), (9) (Michie 2004).

¹⁰⁰ MO. REV. STAT. § 456.1-105.2(8) (2004).

¹⁰¹ N.H. REV. STAT. ANN. § 564-B:1-105(b)(8) (Supp. 2004).

¹⁰² ME. REV. STAT. ANN. tit. 18-B, § 105.2.I. (Supp. 2004).

¹⁰³ MO. REV. STAT. § 456.1-105.2(9) (2004).

¹⁰⁴ KAN. STAT. ANN. § 58a-105(b) (Supp. 2004); TENN. CODE ANN. § 35-15-105(b) (Supp. 2004); UTAH CODE ANN. § 75-7-105(2) (Supp. 2004); WYO. STAT. ANN. § 4-10-105(b) (Michie 2003).

report.

The most interesting approach is that taken by the District of Columbia, which enacted the UTC provisions regarding nonwaivable duties and made them subject to a separate subsection that allows the settlor flexibility in waiving notice.¹⁰⁵ Under the separate subsection, the settlor, either in the trust instrument or in a separate writing delivered to the trustee, may waive or modify the duty to inform and report in three ways:¹⁰⁶ (1) the settlor may waive or modify the duty to give notice, information, and reports to beneficiaries during the settlor's lifetime or the lifetime of the settlor's surviving spouse, (2) the settlor may specify an age other than twenty-five as the age at which a beneficiary or class of beneficiaries must be notified, and (3) the settlor may designate a person or persons to act in good faith to protect the interests of beneficiaries and to receive any notice, information, or reports in lieu of providing the notice, information, or reports to the beneficiaries themselves.

G. Modification of the Statute of Limitations

Several states modified the statute of limitations on bringing an action against a trustee. The UTC provides a one year statute for bringing an action after the trustee has sent a report that disclosed a potential claim.¹⁰⁷ Utah decreased the UTC's one-year statute to a six month statute;¹⁰⁸ Wyoming increased the one year statute to a two year statute.¹⁰⁹ In the absence of a report that discloses a potential claim, the UTC imposes a five year statute of limitations, which begins to run when the trust relationship ends.¹¹⁰ Maine increased the five year statute to six years.¹¹¹ Other jurisdictions reduced the five year statute: Nebraska to four years,¹¹² the District of Columbia,¹¹³ New Hampshire,¹¹⁴ Tennessee,¹¹⁵ and Wyoming to

¹⁰⁵ D.C. CODE ANN. §§ 19-1301.05(b)(8), (9) (2001).

¹⁰⁶ *Id.* § 19-1301.05(c).

¹⁰⁷ *See supra* text accompanying notes 55-56.

¹⁰⁸ *See* UTAH CODE ANN. § 75-7-1005(1) (2004).

¹⁰⁹ *See* WYO. STAT. ANN. § 4-10-1005(a) (Michie 2003).

¹¹⁰ *See supra* text accompanying notes 57-58.

¹¹¹ ME. REV. STAT. ANN. tit. 18-B, § 1005.3 (West 1998).

¹¹² NEB. REV. STAT. § 30-3894(c) (2004).

¹¹³ D.C. CODE ANN. § 19-1310.05(c) (2004).

¹¹⁴ N.H. REV. STAT. ANN. § 564-B:10-1005(c) (2004).

¹¹⁵ TENN. CODE ANN. § 35-15-1005(c) (2001).

three years;¹¹⁶ Kansas to two years;¹¹⁷ and Utah to one year.¹¹⁸ New Mexico did not enact the UTC statute of limitations,¹¹⁹ reportedly because the New Mexico Trial Lawyer's Association wanted to make it easier to sue trustees than the UTC would otherwise allow.¹²⁰ New Mexico also repealed its prior statute of limitations for an action against a trustee under New Mexico's version of the UPC.¹²¹ As a result, New Mexico's general six year statute of limitations on contract actions now governs an action for breach of trust in New Mexico.¹²²

V. IMPLICATIONS OF MODIFYING THE DUTY TO INFORM AND REPORT

A. Modifications in the Details of the Duty to Inform and Report

The UTC provisions governing a trustee's duty to inform and report are the least uniform provisions of the UTC as enacted. Many of the changes from the official UTC language are in the details and simply reflect each state's views on issues that are not uniformly addressed in practice. For example, it is not surprising that enacting jurisdictions differ about whether age twenty-five or age twenty-one is the appropriate age under which a settlor may waive the trustee's duty to respond to a request for information from a beneficiary, or about the specific information required in the trustee's reports, or as to whether a remote contingent beneficiary is entitled to information about the trust. Corporate trustees that administer trusts under the laws of several states would probably prefer greater uniformity simply for administrative convenience,¹²³ but besides corporate trustees, no one is likely to be very concerned about these differences in the details from state to state.

¹¹⁶ WYO. STAT. ANN. § 4-10-1005(c) (Michie 2003).

¹¹⁷ KAN. STAT. ANN. § 58a-1005(c) (2004).

¹¹⁸ UTAH CODE ANN. § 75-7-1005(3) (2004).

¹¹⁹ New Mexico did not enact UTC § 1005.

¹²⁰ David M. English, *The New Mexico Uniform Trust Code*, 34 N.M. L. REV. 1, 30 (2004).

¹²¹ Compare N.M. STAT. ANN. § 45-7-307 (repealed 2003), with UNIF. PROBATE CODE § 7-307.

¹²² N.M. STAT. ANN. § 37-1-3 (Michie 2004). See also English, *supra* note 120, at 30-31.

¹²³ See Susan S. Locke, *Corporate Trustees Welcome the Adoption of the Ohio Uniform Trust Code*, 15 PROB. L.J. OHIO 64 (2005) ("As a 'uniform' trust code is adopted in the many states in which a corporation is providing fiduciary services, it will become easier to administer trusts.") (footnote omitted).

B. Allowing the Settlor to Waive All Information and Reporting Requirements

At issue is the extent to which enacting jurisdictions have, at least on the face of their statutes, chosen to allow settlors to eliminate entirely the duty to inform and report by not enacting UTC section 105(b)(8) and (9). Those who advocate allowing the settlor to waive all information and reporting requirements appear to base their position on two arguments. The first is that the settlor's intent ought to prevail over the beneficiary's desire or need for information about the trust, in recognition of the settlor's property rights and desire for privacy. The settlor's reluctance to have information disclosed to the beneficiaries may be especially great in a second marriage situation, where the settlor does not want children from a prior marriage or, worse yet, the settlor's former spouse to receive information about the trust.¹²⁴ The second argument is that knowledge of the trust might be harmful to the beneficiaries, and it is appropriate to allow the settlor to limit the amount of information provided to the beneficiaries or even to require that no information be provided to the beneficiaries.

As to the first argument, one commentator said, "It is inconsistent with a respect for private property to prohibit quiet trusts by specifying what trustees must disclose, even if it contradicts a settlor's best judgment."¹²⁵ A reasonable response to the commentator may be that knowledge of the trust and information about the trustee's management of the trust are practical prerequisites to a beneficiary's ability to enforce the trust. There are, of course, a number of situations in which the law of trusts refuses to give effect to the settlor's intent as expressed in the trust instrument on the grounds that the intent is contrary to public policy. Obvious examples are the Rule Against Perpetuities¹²⁶ and the unenforceability of trust terms that attempt unreasonably to restrict a beneficiary's freedom to marry or to obtain a divorce,¹²⁷ or terms that call for waste or destruction of the trust property.¹²⁸ Thus, to say that the settlor has a private property right that allows the settlor to require complete nondisclosure by the terms of the

¹²⁴ See *id.* at 65 (indicating that it is not uncommon for a corporate trustee to be asked to withhold information from beneficiaries not only because the settlor believes that knowledge of the trust would not be in the beneficiary's best interest, but also because the settlor may not want information disclosed to children from a prior marriage).

¹²⁵ Donald D. Kozusko, *In Defense of Quiet Trusts*, TR. & EST. March 2004, at 20, 22.

¹²⁶ *Id.* § 29(b).

¹²⁷ *Id.* § 29 cmt. j.

¹²⁸ RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003).

trust does not sufficiently answer the beneficiary's need for basic information about the trust. The common law allows the settlor to put restrictions on the information to be provided to beneficiaries, but the common law does not permit the settlor to eliminate entirely the trustee's duty to inform and report.¹²⁹ The UTC recognized these common law principles and made most aspects of the duty to inform and report under the UTC waivable; however, the UTC properly made basic duties to inform the beneficiaries of the existence of the trust and to respond to requests for information nonwaivable and mandatory.

The settlor may believe that knowledge of the trust may have a harmful effect on the beneficiaries and that full disclosure of the trust will cause the beneficiaries to grow up feeling dependent, conflicted, or listless. The settlor may also fear that full disclosure of the trust will cause the beneficiary to challenge the trustee's authority.¹³⁰ Some settlors worry that knowledge of trust interests will "demotivate" beneficiaries¹³¹ by "encouraging them to take up a life of ease rather than work and be productive citizens."¹³² Eileen and Jon Gallo quote Andrew Carnegie as having said, "The parent who leaves his son enormous wealth generally deadens the talents and energies of the son and tempts him to lead a less useful and less worthy life than he otherwise would."¹³³ However, the empirical evidence is inconclusive as to whether Carnegie was right.¹³⁴ The Gallos conclude

¹²⁹ RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959) ("Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.").

¹³⁰ Kozusko, *supra* note 125, at 24.

¹³¹ EILEEN GALLO & JON GALLO, SILVER SPOON KIDS 184 (2002).

¹³² Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, PROB. & PROP. March/April 2003, at 18, 20.

¹³³ GALLO & GALLO, *supra* note 131, at 185.

¹³⁴ See, for example, Bruce Bartlett, *Wealth, Mobility, Inheritance And The Estate Tax*, National Center for Policy Analysis, Policy Report No. 235, July 2000, available at <http://www.nepa.org/studies/s235/s235.html> (last visited July 25, 2005) ("Empirical studies have not found the deadening effect of inheritances to be as great as he [Carnegie] presumed. There is a likelihood that those receiving an inheritance will reduce their labor supply, but the effects are small." (footnote omitted)); Jacob Mikow & Darien Berkowitz, *Beyond Andrew Carnegie: Using a Linked Sample of Federal Income and Estate Tax Returns to Examine the Effects of Bequests on Beneficiary Behavior*, Statistics of Income, Internal Revenue Service, October 2000, available at <http://www.irs.gov/pub/irs-soi/estincl.pdf> (last visited July 25, 2005) ("[T]he results presented in this paper do not seem to support earlier findings, which concluded that labor force participation decreased as the bequest level increased.").

that trust funds seem to be an incentive to beneficiaries who are entrepreneurial but might be a disincentive for beneficiaries who work as employees.¹³⁵ The Gallos advocate that settlors disclose the existence of trusts to beneficiaries as young as fifteen years old¹³⁶ and conclude that failing to disclose the existence of a trust is a mistake, because the children eventually will discover the trust and will be confused and upset over why their parents kept the trust a secret.¹³⁷ Keeping a trust secret may even increase the risk of litigation once the trust is discovered.¹³⁸

Another possible reason for withholding information from the trust beneficiaries is a misguided sense that doing so may protect the trustee from claims. For example, a trustee may be reluctant to inform a remainder beneficiary that the trustee is invading principal for the current beneficiary, thinking that providing the information may lead to a complaint from, or even legal action by, the remainder beneficiary.¹³⁹ Withholding information to “protect” the trustee will likely result in a distrustful beneficiary, might actually increase the likelihood of a claim, will prevent the statute of limitations from running, and may ultimately only delay the timing of a claim against the trustee.

The most significant risk posed by a waiver of all information and reporting duties is that doing so may negate the existence of a trust; if the trustee is not accountable to the beneficiary, the settlor may be deemed to have intended that the “trustee” hold the property free of trust.¹⁴⁰ While a settlor may limit the amount of information to be provided to beneficiaries, “A settlor who attempts to create a trust without any accountability in the trustee is contradicting himself.”¹⁴¹ If the settlor intended to create a

¹³⁵ GALLO & GALLO, *supra* note 131, at 186.

¹³⁶ *Id.* at 194.

¹³⁷ *Id.* at 199; see also John H. Lahey, *Open-Architecture Trusts: The Wiser Choice*, TR. & EST., Aug. 2003, at 44, 45 (“Thoughtful families recognize that better trust governance requires informed beneficiaries.”).

¹³⁸ Robert Whitman, *Full Disclosure Is Best*, TR. & EST., July 2004, at 59 (“Many beneficiaries [who ultimately learned of a trust that was kept secret] would panic, conclude they had been exploited and hire a litigator.”).

¹³⁹ Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64, 69 n. 6 (“[F]iduciaries may understand their legal obligations, but choose to avoid communication with trust beneficiaries in order to avoid raising awareness about difficult questions.”).

¹⁴⁰ See RESTATEMENT (SECOND) OF TRUSTS § 172 cmt. d (1959); AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 172 (4th ed. 1987).

¹⁴¹ GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 973, at 467 (Rev. 2d ed. 1983).

trust then accountability in court inevitably follows,¹⁴² and the beneficiary's knowledge of the trust, its assets, and the trustee's management is a prerequisite to effective enforcement of the trust. Thus, calling the duty to inform and report a mandatory rule of law does not require that it restrict carrying out the settlor's intent. Rather, by prohibiting complete nondisclosure, the UTC is protecting and serving the settlor's intent, because the settlor likely did not understand that a total waiver of the duty to inform and report calls into question the very existence of the trust.¹⁴³

By deleting the UTC provisions that make the most fundamental aspects of the duty to inform and report nonwaivable, Kansas, Tennessee, Utah, and Wyoming have unwisely invited the drafting of trusts that appear to make the trustee accountable to no one, which likely will result in litigation over whether the settlor really intended to create a trust. As discussed earlier, the common law and principles of equity supplement the UTC, and a purported waiver of a trustee's fiduciary duties may not be effective.¹⁴⁴ If a court determines that a trust exists despite the settlor's purported waiver of the trustee's duty to inform and report, it seems that the waiver cannot be fully effective, because a complete waiver and the resulting lack of accountability by the trustee is inherently inconsistent with the existence of a trust relationship. Thus, a court in a state where the duty to inform and report may be waived may need to choose between determining that no trust exists or that a trust does exist but the trust provision waiving the duty to inform and report is ineffective. In either case, the settlor's apparent intent is thwarted. It is preferable for the statute to specify, as does the UTC, that the most basic aspects of the duty to inform and report are nonwaivable and thereby avoid potential litigation over whether a trust exists at all.

Keeping a trust secret from the current beneficiaries also presents practical hurdles.¹⁴⁵ For example, how is the trustee to make decisions about discretionary distributions without inquiring about the beneficiary's needs and financial situation? And how can the trustee make those inquiries of an adult beneficiary without disclosing the existence of the trust? If any distributions result in distributable net income to the beneficiary, the trustee must provide the beneficiary with a Schedule K-1 containing the information necessary for the beneficiary to prepare a personal income tax

¹⁴² *See id.*

¹⁴³ Langbein, *supra* note 36, at 1126.

¹⁴⁴ *See supra* text accompanying note 51.

¹⁴⁵ *See* Kartiganer & Young, *supra* note 132, at 18.

return.

Finally, waiving notice to the beneficiaries will deprive the trustee of the benefit of the statute of limitations that applies to a trustee who gives periodic reports with full disclosure. When professional fiduciaries become aware of this disadvantage of serving as trustee of a trust in which notice is restricted or prohibited, they likely will (and should) resist the settlor's desire to waive the information and reporting requirements. Also, corporate fiduciaries likely will insist on providing at least basic information to the beneficiaries, even if state law appears to allow the settlor to waive the duty to inform and report.

For these reasons, other states adopting the UTC ought not to follow the path taken by Kansas, Tennessee, Utah, and Wyoming in purporting to allow the settlor to waive entirely the trustee's duty to inform and report.

C. Allowing the Settlor to Waive Information and Reporting Requirements While the Settlor or Certain Beneficiaries are Living

Kansas limits the trustee's duty to inform and report to a duty owed to the surviving spouse if both the spouse and any of the spouse's issue are qualified beneficiaries, or if any of the spouse's issue are qualified beneficiaries and the spouse has a power of appointment over the trust.¹⁴⁶ The Kansas statute will apply to a typical trust created for the benefit of a surviving spouse, with the remainder to ultimately pass to the descendants of the settlor and the settlor's spouse. The settlor and the settlor's spouse may not want their children or other descendants to know about the trust until after the deaths of both spouses. The apparent assumption underlying the statute is that the spouse will, at least in most cases, protect the interests of the descendants.

The District of Columbia took a somewhat similar, but problematic, approach. Under the District of Columbia statute, the settlor, in the trust instrument or in another writing delivered to the trustee, may waive or modify the trustee's duty to inform and report during the settlor's lifetime or the lifetime of the settlor's spouse.¹⁴⁷ Again, the apparent assumption is that the settlor or the settlor's spouse will protect the interests of the beneficiaries. However, unlike the Kansas statute, if the settlor waives notice during the settlor's spouse's lifetime, the District of Columbia statute does not require that the spouse be a trust beneficiary, or that any of the beneficiaries be descendants of the spouse. Therefore, the statute pro-

¹⁴⁶ See KAN. STAT. ANN. § 58a-813(e) (2005).

¹⁴⁷ See D.C. CODE ANN. § 19-1301.05(c)(1) (2001).

vides no assurance that the spouse will actually receive the notices and information that would otherwise have gone to the beneficiaries, and there is no reason to assume that the spouse will protect the beneficiaries' interests. Moreover, the spouse may have no standing to enforce the trust on behalf of the beneficiaries.

A jurisdiction that enacts a provision like the District of Columbia provision, allowing the settlor to waive notice during the lifetime of the settlor's spouse, should: (1) require the trustee to provide to the spouse the notices and information that would otherwise have gone to the beneficiaries, (2) consider limiting the right to waive to situations in which the spouse likely has an incentive to protect the beneficiaries' interests, such as when the spouse is an ancestor of one or more beneficiaries, and (3) expressly give the spouse standing to enforce the trust on behalf of the beneficiaries.

There is also a problem with allowing a settlor to waive or modify notice during the settlor's lifetime. The unstated apparent assumption is, again, that the settlor will protect the beneficiaries' interests. However, under the common law rule, the settlor does not have standing to enforce the trust.¹⁴⁸ If the settlor is not also a beneficiary, which is the usual case in an irrevocable trust, the trustee will have no duty to inform and report to the settlor. Even if the settlor receives information that reveals a potential claim for breach of trust, the settlor may pass that information on to the beneficiaries but has no independent ability to seek redress on behalf of the beneficiaries. Because the settlor created the trust, it is reasonable to assume that the settlor will have an interest in seeing that the trustee properly carries out the trust. However, a jurisdiction that enacts a provision allowing the settlor to waive the trustee's duty to inform and report during the settlor's lifetime, such as the District of Columbia, should: (1) require the trustee to provide the settlor with the notices and information that otherwise would have been provided to the beneficiaries, and (2) consider expressly giving the settlor standing to enforce the trust on behalf of the beneficiaries.

Giving the settlor standing to enforce the trust might subject the trust to adverse tax consequences,¹⁴⁹ which may or may not be avoidable.¹⁵⁰

¹⁴⁸ RESTATEMENT (SECOND) OF TRUSTS § 200 (1959). Compare John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 664 (1995) (arguing that the default rule should be that the settlor does have standing to enforce the trust).

¹⁴⁹ See I.R.C. §§ 2036, 2038 (1986).

¹⁵⁰ See Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV.

Resolution of that tax issue is beyond the scope of this Article, but if the settlor is not given standing to enforce the trust because doing so would raise insurmountable tax problems, then allowing the settlor to waive the trustee's duty to inform and report during the settlor's lifetime seems a hollow way to protect trust beneficiaries.

D. Giving the Settlor Unlimited Authority to Change the Age at Which Beneficiaries are Entitled to Information

The UTC allows the settlor to waive the trustee's duty to inform a beneficiary under the age of twenty-five of the existence of the trust, the identity of the trustee, and the beneficiary's right to request trustee's reports.¹⁵¹ Missouri and New Hampshire reduced this age to twenty-one. The District of Columbia allows the settlor to "specify[] a different age at which a beneficiary or class of beneficiaries must be notified."¹⁵² Certainly there is room for disagreement about the minimum age at which beneficiaries should be notified, but by placing no restrictions on the settlor's ability to change the age, the District of Columbia effectively allows the settlor to waive the notification requirement forever, simply by using an unreasonably old age.

E. Allowing the Settlor to Designate a Surrogate to Receive Information on Behalf of the Beneficiaries

The District of Columbia version of the UTC allows the settlor to designate a third party to receive information and notices on behalf of the beneficiaries. The District of Columbia approach is an interesting attempt at a compromise between a settlor's desire to limit information provided to the beneficiary and the beneficiary's need to have the information necessary to enforce the trust. Other states that adopt the UTC may use this approach.¹⁵³ Unfortunately, the District of Columbia enactment raises a number of unanswered questions, the most fundamental of which are: (1) whether the surrogate designated by the settlor to receive information and notices on behalf of the beneficiaries is a fiduciary, and (2) what

621, 667 n. 239 (2004) (citing correspondence between the author and Professor Joel Dobris, raising the question whether settlor standing to enforce fiduciary duties could be "narrowly crafted" to avoid constituting a "string" under I.R.C. §§ 2036 and 2038).

¹⁵¹ UNIF. TRUST CODE § 105(b)(8) (Supp. 2004).

¹⁵² D.C. CODE ANN. § 19-1301.05(c)(2).

¹⁵³ See Locke, *supra* note 123, at 65 n. 9 (indicating that Ohio is contemplating adopting the UTC with a surrogate notice provision similar to that adopted in the District of Columbia).

standard of care applies to the surrogate. The statute provides only that the surrogate is “to act in good faith to protect the interests of beneficiaries”¹⁵⁴ One commentator has suggested that the surrogate provision does nothing but “substitute one fiduciary for another.”¹⁵⁵ On the other hand, David English has said that the good faith standard is a “very low test.”¹⁵⁶ Even if the surrogate is a fiduciary, if the good faith language in the statute expresses the upper limit of the surrogate’s standard of care, then it appears that the statute gives little protection to the beneficiaries.

Curiously, the District of Columbia neither deleted nor modified UTC section 110(a), which provides that the trustee must give notice to a nonqualified beneficiary who has requested it whenever the trustee must give notice to the qualified beneficiaries. If the settlor has designated a surrogate to receive notices on behalf of the beneficiaries, and a nonqualified beneficiary sends the trustee a request for notice, must the trustee give notice to the nonqualified beneficiary or to the surrogate on behalf of the nonqualified beneficiary? Presumably, the legislature intended the latter, but it would have been helpful for the statutory language to have addressed this issue expressly.

Another unanswered question under the District of Columbia version of the UTC is whether sending a report that discloses a potential claim against the trustee to a surrogate is sufficient to start the running of the statute of limitations under UTC section 1005(a).¹⁵⁷ Under section 1005(a), the statute begins to run if the report is sent to the beneficiary or a representative of the beneficiary. The drafters of the District of Columbia statute may have intended that the surrogate be treated as a representative of the beneficiary for this purpose, but “[t]he representative referred to in [section 1005(a)] is the person who may represent and bind a beneficiary” under UTC Article 3,¹⁵⁸ which deals expressly with representation. The surrogate to receive notice may not be a representative of the beneficiary in the UTC sense. The surrogate possibly will be treated as the beneficiary’s agent and, thus, as the beneficiary’s representative so long as no conflict of interest exists between the surrogate and the beneficiary.¹⁵⁹

¹⁵⁴ D.C. CODE ANN. § 19-1301.05(c)(3) (2001).

¹⁵⁵ *Legislative Update 2004*, UTC NOTES, Summer, 2004, at 3, available at http://www.utcproject.org/utc/uploads/utcnnotes_Jul04_print.pdf.

¹⁵⁶ David English, *UTC Questions Answered*, UTC NOTES, Summer, 2004, at 16, available at http://www.utcproject.org/utc/uploads/utcnnotes_Jul04_print.pdf.

¹⁵⁷ D.C. CODE ANN. § 19-1310.05(a) (2001).

¹⁵⁸ See UNIF. TRUST CODE § 1005 cmt. (Supp. 2004).

¹⁵⁹ See *id.* § 303(3); D.C. CODE ANN. § 19-1303.03(3) (2001).

However, if a conflict of interest exists between the surrogate and the beneficiary—for example, if the settlor designates a current beneficiary as the surrogate to receive notice for a remainder beneficiary—the surrogate may not represent the beneficiary under UTC Article 3 and, therefore, notice to the surrogate will not start the running of the statute of limitations. Moreover, it may be tempting for the settlor of a District of Columbia trust to designate one surrogate to receive notices on behalf of all beneficiaries. Because UTC section 303 prohibits representation when a conflict of interest exists among those represented, notice to a surrogate who represents both current and remainder beneficiaries will not start the running of the statute.¹⁶⁰

Another troubling aspect of the District of Columbia surrogate notice provision is that it does not give the surrogate any standing or authority to enforce the trust on behalf of the beneficiaries. If notice or information provided to the surrogate discloses a potential claim against the trustee for breach of trust, what is the surrogate to do? The statute gives the surrogate no express authority to pursue action against the trustee to redress a breach of trust. Presumably, the surrogate should notify the beneficiary of the potential breach and let the beneficiary decide whether to pursue action against the trustee, but passing the notice through the surrogate's filter may effectively prevent the beneficiary from pursuing a claim. If the surrogate, through ignorance, lack of sophistication, or simple mistake, fails to notify the beneficiary of a potential claim, the beneficiary may never learn of the claim or may learn of the claim only after the statute of limitations has run.¹⁶¹ Additionally, it appears that the beneficiary would have no recourse against the surrogate for failing to inform the beneficiary of the claim unless the beneficiary can show that the surrogate did not act in good faith.

VI. CONCLUSION

The provisions of the UTC that codify the trustee's duty to inform and report are among the most controversial portions of the UTC and, as a result, have become the least uniform among jurisdictions that have enacted the UTC. Many of the changes made by the enacting jurisdictions are minor, and the lack of uniformity among those provisions is of little

¹⁶⁰ D.C. CODE ANN. § 19-1303.03 (2001).

¹⁶¹ Even if the trustee's notice to the surrogate does not start the running of the one year statute of limitations under section 19-1310.05(a) of the District of Columbia's Code, the claim may be barred by the three year statute of limitations under section 19-1310.05(c).

practical consequence. However, the jurisdictions that have chosen to make the duty to inform and report a waivable duty have, at best, erected barriers to a beneficiary's ability to enforce the trust, and at worst, invited the drafting of trust agreements that will not be upheld as creating valid trusts. Those states ought to reinstate the fundamental aspects of the duty to inform and report as nonwaivable duties, and other states that enact the UTC ought to retain the nonwaivable aspects of the duty. The District of Columbia's innovative approach may well be imitated in other enacting jurisdictions, but jurisdictions that adopt the District of Columbia approach should craft their statutes to clarify unanswered questions under the District of Columbia statute and to ensure that the alternative notice provisions will effectively protect the interests of trust beneficiaries.