From the SelectedWorks of John S. Treu

January 2013

The Mandatory Disclosure Provisions of the Uniform Trust Code: Sill Boldly Going Where No Jurisdiction Will Follow - A Practical Tax-Based Solution

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/john_spencer_treu/1

THE MANDATORY DISCLOSURE PROVISIONS OF THE UNIFORM TRUST CODE: STILL BOLDLY GOING WHERE NO JURISDICTION WILL FOLLOW—A PRACTICAL TAX-BASED SOLUTION.

John Spencer Treu, J.D., CPA *

INTRODUCTION

The mandatory disclosure provisions of the *Uniform Trust Code* (UTC) have failed to gain acceptance among adopting jurisdictions because the drafting committee took a reform-based approach that is extreme in terms of attempting to protect beneficiaries' interests over the intent of settlors. As a mandatory provision, the disclosure provisions in the UTC control in all situations even if directly contrary to the plain language of the trust. This is distinguished from the default provisions, which apply wherever the trust instrument is silent as to a particular issue. The UTC, as initially drafted and subsequently amended, proposes substantial mandatory-reporting requirements for trustees of all irrevocable trusts regardless of the settlor's explicitly stated intent to the contrary.

The mandatory-disclosure provisions have been universally rejected by adopting jurisdictions. These jurisdictions have elected to either delete the provisions altogether or modify the provisions to limit their scope. The overriding purpose of any uniform law is to achieve uniformity among the several adopting jurisdictions. This would be particularly helpful in trust law where the common law is sparse in many jurisdictions. The mandatory disclosure provisions of the uniform trust code have failed to achieve uniformity and, as such, have failed to achieve their primary purpose and the most recent version of the mandatory-disclosure

---

* Mr. Treu has practiced as an attorney and C.P.A. in the areas of estate planning, tax, and business law for over five years.

provisions of the UTC acknowledges that uniformity is unlikely to be achieved as to these provisions. However, with a majority of jurisdictions electing to eliminate the mandatory nature of the disclosure provisions and a minority of adopting jurisdictions following a different model, a reasonable amount of uniformity may still be achieved by simply revising the UTC to follow one of these two groups of adopting jurisdictions.

While uniformity is the overriding goal of any uniform law, the merits of the law apart from its propensity for adoption warrant careful consideration and may inform the dialogue as to why the various jurisdictions have deemed the UTC mandatory-disclosure provisions unworthy of adoption. The mandatory provisions have been supported by academics and the UTC drafting committee as a necessary encroachment on the rights of the settlor in order to protect the beneficiaries' rights and, in so doing, protect the intent of the settlor. The argument seems to be that the UTC gives the settlors what they would *really* want if fully informed rather than what they *think* they want. A significant weakness in this logic is that the mandatory-disclosure provisions rely exclusively on the trustee to make the disclosures that will allow the beneficiaries to protect themselves against the malfeasance of that same trustee. A self-reporting regime provides a weak internal control environment and certainly does not provide the type of protection that should merit over-riding the intent of the settlor in all circumstances.

The largest group of UTC adopting jurisdictions simply deleted the mandatory-disclosure provisions altogether, and so the maximum level of uniformity would be achieved if the UTC drafting committee also deleted the mandatory-disclosure provisions in UTC section 105. Although, the drafting committee could achieve a similar result by introducing a simple tax-based disclosure provision stating that the trust instrument cannot override the reporting requirements under the internal revenue code. Such a provision would be appropriate if the drafting committee elects to abandon the current UTC mandatory-disclosure provisions.

Alternatively, if the drafting committee cannot reconcile its desire to promote beneficiaries' rights with a complete deletion of the mandatory disclosure provisions, then the committee could

revise the UTC mandatory disclosure provisions by following the Washington D.C. Model (D.C. Model). The D.C. Model provides for a more robust internal control environment by introducing a disinterested third party as a watchdog to receive disclosures and thereby protect the beneficiaries against trustee malfeasance. Because this model has been followed by other jurisdictions and provides a more robust control environment, adopting the D.C. Model would represent a true compromise between the competing policy concerns. While still favoring reform over uniformity, if the UTC adopted the D.C. Model, it would at least represent a small minority of jurisdictions, as opposed to no jurisdiction at all. Inasmuch as the primary purpose of the UTC is to achieve uniformity among the several states, the UTC drafting committee would be remiss if it failed to adopt either option and left the mandatory-disclosure provisions contained in the current version of the UTC in place.

I. THE UNIFORM TRUST CODE GENERALLY AND ITS MANDATORY AND DEFAULT DISCLOSURE PROVISIONS

A. The Uniform Trust Code Generally

The Uniform Trust Code was crafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to address the problems arising from the growing use of trusts combined with a sparse body of trust law in many states.[1] The UTC seeks to remedy this problem by providing a somewhat comprehensive trust code available for adoption in U.S. jurisdictions. NCCUSL drafted the UTC in close coordination with the *Restatement (Third) of Trusts*[2] and the *California Trust Code*, which the drafting committee used as its initial model.[3] Other states with comprehensive trust statutes prior to the initial passage of the UTC—including Georgia, Indiana and Texas—were referenced during the drafting process as well, but none of these

---

[1] UNIF. TRUST CODE, prefatory n. (amended 2010).
[2] *Id.*
[3] *Id.*

states have adopted the UTC yet.[4] The UTC was originally published in 2000 and subsequently revised in 2001, 2003, 2004, 2005, and 2010.

The key purpose of the UTC, or any uniform law for that matter, is to achieve uniformity thereby allowing courts to fill in gaps by considering case law from other uniform code-adopting states. Each UTC section is followed by a comment similar to the Restatements. These comments are particularly helpful for interpreting code provisions in states where the code is the same or similar to the UTC. One UTC section provides that "consideration must be given to the need to promote uniformity of the law with respect to its subject matter among [s]tates that enact it."[5] Indeed, the principal purpose of NCCUSL is the promotion of uniformity of laws among the states.[6] As with all such uniform codes, each state legislature is free to adopt or reject any portion of the code and, as of the publication of this article, twenty-five jurisdictions adopted the UTC.[7] These twenty-five jurisdictions include: Alabama, Arizona, Arkansas, the District of Colombia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.[8] These states adopted virtually the entire UTC while

---

[4] *Compare* UNIF. TRUST CODE (amended 2010) *with* CAL. PROB. CODE §§ 15000-19403 (West 1991); GA. CODE ANN. §§ 53-12-1 to -455 (2011); IND. CODE ANN. §§ 30-4-1-1 to -7-10 (LexisNexis 2008); TEX. PROP. CODE ANN. §§ 111.001-123.006 (West 2007).

[5] UNIF. TRUST CODE § 1101 (amended 2010).

[6] *See* CONST. TO NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, art. I, § 1.2, *available at* http://www.uniformlaws.org/Narrative.aspx?title=constitution.

[7] *See Trust Code*, UNIF. LAW COMM'N, http://uniformlaws.org/Act.aspx?title=Trust%20Code (last visited Feb. 25, 2013).

[8] ALA. CODE § 19-3B-101 (LexisNexis 2007); ARIZ. REV. STAT. ANN. § 14-10101 (West Supp. 2010); ARK. CODE ANN. § 28-73-1104 (2004); D.C. CODE § 19-1301.01 (LexisNexis 2008); FLA. STAT. § 736.0101 (West 2011); KAN. STAT. ANN. § 58a-101 (Supp. 2010); MASS. GEN. LAWS ch. 203E, § 101 (2012); ME. REV. STAT. ANN. tit. 18-B, § 1103 (2003); MICH. COMP. LAWS ANN. § 700.7101 (West 2009); MO. REV. STAT. § 456.1-101 (West 2007); NEB. REV. STAT. § 30-3801 (2004); N.H. REV. STAT. ANN. § 564-B:1-101 (LexisNexis 2006); N.M. STAT. ANN. § 46A-1-101 (West Supp. 2011); N.C. GEN. STAT. § 36C-1-101 (2005); N.D. CENT. CODE § 59-09-01 (2010); OHIO REV. CODE ANN. § 5801.011 (LexisNexis Supp. 2011); OR. REV. STAT. § 130.910 (2005); 20 PA. CONS. STAT. ANN. § 7701 (West Supp. 2011); S.C. CODE ANN. § 62-7-1106 (2009); TENN.

others, like Rhode Island, have elected to adopt only isolated UTC provisions.[9]

B. Mandatory v. Default Provisions of the Uniform Trust Code.

UTC section 105 explains that the uniform code is generally a set of default rules that can be changed by the terms of the trust, subject to the exceptions specifically set forth in section 105.[10] The terms of the trust are defined in UTC section 103 as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding."[11] This provides a tremendous amount of discretion to the settlor regarding the trust terms that are restricted statutorily only by the mandatory provisions. The provisions in UTC section 105(b) are called mandatory provisions because they supersede anything a settlor includes in a trust to the contrary.[12] The mandatory provisions generally control even if they directly contradict the intent of the settlor and the plain language of the trust.[13] Given the absolute power wielded by the mandatory provisions under the UTC, it is not surprising that certain

---

CODE ANN. § 35-15-1103 (2004); UTAH CODE ANN. § 75-7-101 (LexisNexis 2004); VT. STAT. ANN. tit. 14A, § 101 (2010); VA. CODE ANN. § 55-541.03 (2006) (renumbered as VA. CODE ANN. § 64.2-701 (2012), effective October 1, 2012; *See* VA. LEGIS. SERV. 614 (West 2012)); W. VA. CODE § 44D-1-101 (LexisNexis Supp. 2011); WYO. STAT. ANN. § 4-10-1103 (2011).

[9] *Compare* R.I. GEN. LAWS § 4-23-1 (1998) *with* UNIF. TRUST CODE § 408 (amended 2010).

[10] UNIF. TRUST CODE § 105 (amended 2010); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105 (2004).

[11] UNIF. TRUST CODE § 103(18) (amended 2010); Pohlmann v. Neb. Dep't of Health & Human Servs., 710 N.W.2d 639, 645 (Neb. 2006).

[12] Carl Circo, *How Does the Arkansas Trust Code Affect Real Estate Transactions?*, 2007 ARK. L. NOTES 45, 46 (noting that most *Arkansas Trust Code* provisions are default rules and may be modified by express terms of a trust instrument subject to a few exceptions called mandatory rules).

[13] *In re* Hilgers, 352 B.R. 298, 304 (Bankr. D. Kan. 2006) (noting that certain provisions of the *Kansas Uniform Trust Code* cannot be overridden by the trust); Alan Newman, *Elder Law: The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 653 (2005).

mandatory provisions have been the primary source of angst amongst jurisdictions contemplating the adoption of the UTC.[14]

Several of the mandatory provisions have been entirely non-controversial. For instance, the requirements for creating a trust and the requirement that a trust beneficiary act in good faith have been adopted as mandatory provisions in every UTC jurisdiction.[15] On the other end of the spectrum, the mandatory disclosure provisions found in UTC sections 105(b)(8) and (9) have been revised or deleted in every UTC adopting jurisdiction.[16]

C. The Mandatory Disclosure Provisions of the Uniform Trust Code.

The default disclosure provisions are found in UTC section 813, but UTC section 105 converts certain default provisions to mandatory provisions. UTC section 105(b)(9) makes mandatory the requirement under UTC section 813(a) for the trustee to respond to requests for information by beneficiaries[17] and may arguably extend to the duty under 813(a) to keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for qualified beneficiaries to protect their interests.[18] This concept is consistent with the law

---

[14] *See* discussion, *infra* Part III.

[15] ALA. CODE § 19-3B-105(b)(1)-(2) (LexisNexis 2006); ARIZ. REV. STAT. ANN. § 14-10105(B)(1)-(2) (West 2009); ARK. CODE ANN. § 28-73-105(b)(1)-(2) (2005); D.C. CODE § 19-1301.05(b)(1)-(2) (LexisNexis 2004); FLA. STAT. § 736.0105(2)(a)-(b) (West 2009); KAN. STAT. ANN. § 58a-105(b)(1)-(2) (2006); MASS. GEN. LAWS ch. 203E, § 105(b)(1)-(2) (2012); ME. REV. STAT. ANN. tit. 18-B, § 105(2)A-B (2005); MICH. COMP. LAWS ANN. § 700.7105(2)(a)-(b) (West 2010); MO. REV. STAT. § 456.1-105(2)(1)-(2) (West 2006); NEB. REV. STAT. § 30-3805(b)(1)-(2) (2007); N.H. REV. STAT. ANN. § 564-B:1-105(b)(1)-(2) (LexisNexis 2011); N.M. STAT. ANN. § 46A-1-105(B)(1)-(2) (West 2007); N.C. GEN. STAT. § 36C-1-105(b)(1)-(2) (2009); N.D. CENT. CODE § 59-09-05(2)(a)-(b) (2007); OHIO REV. CODE ANN. § 5801.04(B)(1)-(2) (LexisNexis 2005); OR. REV. STAT. § 130.020(2)(a)-(b) (2009); 20 PA. CONS. STAT. ANN. § 7705(b)(1)-(2) (West 2006); S.C. CODE ANN. § 62-7-105(b)(1)-(2) (2010); TENN. CODE ANN. § 35-15-105(b)(1)-(2) (2007); UTAH CODE ANN. § 75-7-105(2)(a)-(b) (LexisNexis 2004); VT. STAT. ANN. tit. 14A, § 105(b)(1)-(2) (2009); VA. CODE ANN. § 55-541.05(B)(1)-(2) (2006) (Renumbered to VA. CODE ANN. § 64.2-703 (2012), effective October 1, 2012; *See* VA. LEGIS. SERV. 614 (West 2012)); W. VA. CODE § 44D-1-105(b)(1)-(2) (LexisNexis 2011); WYO. STAT. ANN. § 4-10-105(b)(i)-(ii) (2003).

[16] *See* discussion *infra* Part III.

[17] UNIF. TRUST CODE § 105(b)(9) (amended 2010).

[18] *Id.*

in many non-UTC adopting jurisdictions.[19] The trustee must respond to a beneficiary's request for information related to the administration of the trust, unless the request is unreasonable under the circumstances.[20] The later provisions of UTC section 813 essentially flush out the intent of section (a) by providing specific requirements for the trustee in terms of disclosures and timelines.

UTC section 105(b)(8) makes mandatory the trustee's duty to notify the qualified beneficiaries under UTC section 813(b)(2) and (3).[21] UTC section 813(b)(2) requires the trustee to notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number within 60 days after accepting a trusteeship.[22] UTC section 813(b)(3), which appears to have been inspired by the *Restatement (Second) of Trusts*,[23] requires the trustee to 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.[24] This notification must be provided within sixty days after the date the trustee either (i) acquires knowledge of the creation of an irrevocable trust, or (ii) acquires knowledge that a formerly

---

[19] Marshall & Ilsley Trust Co. v. Woodward, 848 N.E.2d 1175, 1184 (Ind. Ct. App. 2006) (holding in the non-UTC state of Indiana that a remote named contingent beneficiary was entitled to an accounting where the trust did not specifically exclude remaindermen from the statutory disclosure requirements and citing UNIF. TRUST CODE § 813(a) in its reasoning); McNeil v. McNeil, 798 A.2d 503, 509-10 (Del. 2002) (holding that the duty to furnish information is not a subset of the duty of care but a separate duty altogether and that trustees have a duty to inform an individual of the key facts of the trust including that they are a current beneficiary).

[20] *Woodward*, 848 N.E.2d at 1184.

[21] UNIF. TRUST CODE § 105(b)(8) (amended 2010).

[22] *Id.* § 813(b)(2).

[23] RESTATEMENT (SECOND) OF TRUSTS § 173 (1959); This section deals with the Trustee's duty to furnish information, provided that

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

Id.

[24] UNIF. TRUST CODE § 813(b)(3) (amended 2010).

revocable trust has become irrevocable, whether by the death of the settlor or otherwise.[25]

The other provisions of UTC section 813 are generally considered default provisions. These default provisions include the following requirements: (i) to provide a beneficiary with a copy of the trust instrument upon request,[26] (ii) to notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation,[27] and (iii) to provide "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."[28]

The reports are due at least annually and at the termination of the trust to the distributees or permissible distributees of trust income or principal *and* to other qualified or nonqualified beneficiaries who request it. While these provisions are technically default provisions, the broad mandatory requirement under section 813(a) "to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests" could easily be interpreted as making the default provisions relating to reports mandatory even absent UTC section 105.[29] In fact, courts in two UTC jurisdictions, where the legislatures specifically omitted the mandatory disclosure provisions of UTC

---

[25] *Id.*

[26] *Id.* § 813(b)(1). Somewhat peculiarly the trustee's obligation to notify a beneficiary of the "right to request a copy of the trust instrument" is mandatory, but then the requirement to actually furnish the beneficiary with a copy of the trust instrument is not. *See Id.* § 105(b)(8). This is likely an unintended consequence resulting from the committee's reluctant addition of specific cross references in section 105.

[27] *Id.* § 813(b)(4).

[28] *Id.* § 813(c).

[29] *See, e.g.*, Kirsten Franzen & Bradley Myers, *Improving the Law through Codification: Adoption of the Uniform Trust Code in North Dakota*, 86 N.D. L. REV. 321, 352 (2010) (seemingly suggesting that the duty to inform and report is mandatory in North Dakota based on N.D. CENT. CODE § 59-16-13(1) (2009), its version of UNIF. TRUST CODE § 813 (2010), but N.D. CENT. CODE § 59-9-05 (2007), North Dakota's version of the mandatory-provision statute, specifically omitted the duty to inform and report).

section 105, appear to have adopted this very position based on the seemingly mandatory language of UTC section 813.[30]

While the specific citations to 813 that were added after the initial version of the UTC were a step in the right direction, these revisions did not go far enough and were poorly drafted. For instance, these revisions have left the UTC with the odd result of mandatorily requiring the trustee to notify the beneficiaries of their right to a copy of the trust and to a report even when these rights do not actually exist because, as merely default provisions, they have been waived by the settlor. This inconsistency, which was borne out of the subsequent amendments to the UTC, may contribute to further inconsistencies among courts faced with interpreting a default provision deceptively dressed in a mandatory statute's clothing.

D. Comparing Common Law across Uniform Trust Code Jurisdictions

While the UTC was designed to greatly simplify the search for relevant case law across various jurisdictions, there are certain aspects of the UTC that can create a trap for the unwary. There are three critical factors that should be considered when comparing common law across UTC-adopting states.

First, the plain language of the relevant provisions from both jurisdictions should be carefully considered both in isolation and in context of the other provisions within each jurisdiction's version of the UTC. While this concept may seem very straight forward, particularly where jurisdictions differ on what language is adopted for the same section, even identical provisions may have

---

[30] Wilson v. Wilson, 690 S.E.2d 710, 716 (N.C. Ct. App. 2010); *In re* Estate of Alden v. Dee, 35 A.3d 950, 959 (Vt. 2011) (suggesting, in dicta, that the general requirement under UTC section 813 is mandatory even though Vermont's version of UTC section 105 specifically omits the duty to inform and report, but still upholding the disclosure provisions contained in the plain language of the trust as sufficient to meet the trustees' obligations to keep the beneficiaries sufficiently informed to protect their interests under Vermont's version of UTC section 813, and finding that the trustees were not required to disclose requests for distributions from a co-trustee beneficiary to the other beneficiaries).

different meanings in different jurisdictions when considered in light of other aspects of the respective trust codes, particularly the definitions and mandatory provisions sections. Therefore, a careful analysis of the relevant sections in context of the jurisdiction's overall code is essential in order to properly apply different case law across UTC adopting jurisdictions.

Second, it is important to note the effective date of each jurisdiction's uniform trust code, not just the date of passage, in order to determine the relevancy of each case.[31] The UTC drafters recognized this could present some confusion, particularly for trusts that have been in existence through multiple trust laws, and so the UTC includes a section establishing the effective date of the code.[32] However, the majority of adopting jurisdictions neglected to include this section as part of their uniform state codes, so it may be necessary to search the comments or the legislative history of a particular jurisdiction's uniform trust code to determine the effective date prior to relying on case law from that jurisdiction.[33]

---

[31] UNIF. TRUST CODE § 1106 (amended 2010).

[32] *Id.* § 1104; *In re* Esther Caplan Trust, 265 P.3d 364, 366 (Ariz. Ct. App. 2011).

[33] ALA. CODE § 19-3B-1204 (LexisNexis 2007) (effective Jan. 1, 2007); ARIZ. REV. STAT. ANN. § 14-10101 (West Supp. 2010) (effective Jan. 1, 2009); ARK. CODE ANN. § 28-73-1104 (2004) (effective Sept. 1, 2005); D.C. CODE § 19-1301.01 (LexisNexis 2008) (effective Mar. 10, 2004); FLA. STAT. § 736.0101 (West 2011) (effective July 1, 2007); KAN. STAT. ANN. § 58a-101 (2005) (effective Jan. 1 2003); MASS. GEN. LAWS ch. 203E, § 101 (2012) (effective July 8, 2012); ME. REV. STAT. ANN. tit. 18-B, § 1103 (Supp. 2010) (effective July 1, 2005); MICH. COMP. LAWS ANN. § 700.7101 (West Supp. 2011) (effective Apr. 1, 2010); MO. REV. STAT. § 456.11-1106 (West 2007) (effective Jan. 1, 2005); NEB. REV. STAT. § 30-3801 (notes) (2004) (effective Jan. 1, 2005); N.H. REV. STAT. ANN. § 564-B:1-101 (history) (LexisNexis 2006) (effective Oct. 1, 2004); N.M. STAT. ANN. § 46A-1-101 (West Supp. 2010) (effective July 1, 2003); N.C. GEN. STAT. § 36C-1-101 (2009) (effective Jan. 1, 2006); N.D. CENT. CODE § 59-09-01 (2010) (effective Aug. 1, 2007); OHIO REV. CODE ANN. § 5801.04 (LexisNexis Supp. 2011) (effective Jan. 1, 2007); OR. REV. STAT. § 130.910 (2009) (effective Jan. 1, 2006); 20 PA. CONS. STAT. ANN. § 7701 (West Supp. 2011) (effective Nov. 6, 2006); S.C. CODE ANN. § 62-7-1106 (history) (2009) (effective Jan. 1, 2006); TENN. CODE ANN. § 35-15-1103 (2007) (effective July 1, 2004); UTAH CODE ANN. § 75-7-101 (notes) (LexisNexis Supp. 2011) (effective July 1, 2004); VT. STAT. ANN. tit. 14A, § 101 (2010) (effective July 1, 2009); VA. CODE ANN. § 55-551.06 (2007) (effective July 1, 2006) (to be renumbered as VA. CODE ANN. § 64.2-805 (2012)); W. VA. CODE § 44D-1-101 (LexisNexis Supp. 2011) (effective June 10, 2011); WYO. STAT. ANN. § 4-10-1103 (2011) (effective July 1, 2003).

Third, the application to existing trusts must be considered.[34] The code is meant to apply to judicial proceedings concerning trusts commenced before the effective date unless such application would "[affect] judicial proceedings or prejudice the rights of the parties, in which case the particular provision . . . does not apply."[35] In such instances the pre-UTC state trust law is used. These provisions are meant to give the UTC the widest possible application within constitutional limits, but the application of these provisions can present a trap for the unwary.[36] The effective date of a particular provision is a critical aspect of the analysis as to whether the code provision applies to that particular trust, but the analysis is not a simple as checking the effective date.

If an action is commenced prior to the effective date of a jurisdiction's uniform trust code, some courts apply prior law under the judicial proceedings exception, even if the decision in that action is rendered after the effective date.[37] These decisions would appropriately be considered an act done before the effective date of the code under UTC section 1106(a)(5), even though the code is meant to apply to judicial proceedings commenced before the effective date absent some prejudice the rights of the parties. The code drafters clearly intended liberal application, but states can, and often do, interpret the same sections of the code in a variety of ways. Ultimately, the statutes cited by the court in any such decision should clearly demonstrate whether that jurisdiction's uniform trust code is being applied, but, even where this is the case, the actual language of the code needs to be analyzed as many of the jurisdictions that initially adopted the UTC passed subsequent revisions, particularly in relation to the mandatory disclosure provisions.

II. UNIFORM TRUST CODE ADOPTING JURISDICTIONS UNIFORMLY REJECTED THE MANDATORY DISCLOSURE

---

[34] UNIF. TRUST CODE § 1106 (amended 2010).

[35] *Id.* § 1106(a)(3).

[36] *Id.* § 1106, cmt.

[37] *See, e.g.*, Generaux v. Dobyns, 134 P.3d 983, 986-87 (Or. Ct. App. 2006); *In re* Chappell, No. 03-13891-JMD, 2006 WL 44156, at *5 (Bankr. D.N.H. Jan. 4, 2006).

PROVISIONS BY EITHER ALTOGETHER OMITTING OR LIMITING THE SCOPE OF THESE PROVISIONS

A. Adopting Jurisdictions' Treatment of the Mandatory Duty to Notify under Section 105(b)(8) of the Uniform Trust Code

Of the twenty-five jurisdictions that have adopted the UTC since its initial release twelve years ago, fifteen have now altogether omitted the duty to notify qualified beneficiaries under section 105(b)(8) of the UTC.[38] New Hampshire actually passed this provision initially and subsequently repealed it.[39] In these jurisdictions, the duty to notify under section 813 is merely a default provision that "can be waived by the terms of the trust."[40] Another seven states made modifications to this provision that limited the disclosure requirements,[41] leaving a mere three jurisdictions, Nebraska, New Mexico and Florida, that have actually and substantially adopted the duty to notify found in section 105(b)(8).[42]

Although, both Florida and Nebraska were more stringent than the UTC in terms of making disclosures mandatory as neither state limits the disclosure requirement to qualified

---

[38] ALA. CODE § 19-3B-105 (LexisNexis 2007); ARIZ. REV. STAT. ANN. § 14-10105 (West 2009); ARK. CODE ANN. § 28-73-105 (2005); KAN. STAT. ANN. § 58a-105 (2006); MASS. GEN. LAWS ch. 203E, § 105 (2012); N.H. REV. STAT. ANN. § 564-B:1-105 (LexisNexis 2011); N.C. GEN. STAT. § 36C-1-105 (2009); N.D. CENT. CODE § 59-09-05 (2007); S.C. CODE ANN. § 62-7-105 (2010); TENN. CODE ANN. § 35-15-105 (2007); UTAH CODE ANN. § 75-7-105 (LexisNexis 2004); VT. STAT. ANN. tit. 14A, § 105 (2009); VA. CODE ANN. § 55-541.05 (2006) (re-numbered as VA. CODE ANN. § 64.2-703 (2012), effective October 1, 2012; *See* VA. LEGIS. SERV. 614 (West 2012)); W. VA. CODE § 44D-1-105 (LexisNexis 2011); WYO. STAT. ANN. § 4-10-105 (2003).

[39] *See* legislative history to N.H. REV. STAT. ANN. § 564-B:1-105 (2011).

[40] Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 254 (2005).

[41] D.C. CODE § 19-1301.05 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 18-B, § 105 (Supp. 2010); MICH. COMP. LAWS Ann. § 700.7105 (West Supp. 2011); MO. REV. STAT. § 456.1-105 (West 2007); OHIO REV. CODE ANN. § 5801.04 (LexisNexis Supp. 2011); OR. REV. STAT. § 130.020 (2009); 20 PA. CONS. STAT. ANN. § 7705 (West Supp. 2011).

[42] *Compare* NEB. REV. STAT. § 30-3805 (Supp. 2004), *with* N.M. STAT. ANN. § 46A-1-105 (West Supp. 2011), *and* FLA. STAT. § 736.0105 (West 2010) (Michigan could have been included in this group as it adopted this section but deleted the reference to the right to request trustee reports consistent with its deletion of § 105(b)(9) from the mandatory provisions.).

beneficiaries over the age of twenty-five consistent with the initial version of the UTC, and Florida has a specific requirement that a notice of trust be filed upon the settlor's death.[43] While New Mexico would appear, on the surface, to be the lone jurisdiction that deemed section 105(b)(8) worthy of adoption in the form proposed by NCCUSL, even New Mexico appears to have gotten cold feet when, in 2007, it adopted an exception to the mandatory duty to account by allowing the settlor to waive the duty where the trustee is a regulated financial service institution.[44] When considered in conjunction with the directly related and specifically referenced disclosure provisions of section 813, there was not a single jurisdiction that adopted section 105(b)(8) in the manner that was originally intended by NCCUSL.

Of the seven states that elected to adopt a modified version of section 105(b)(8), five states used a model that was first adopted in Washington D.C. in 2004.[45] The District of Columbia added language to its mandatory provisions that allows the settlor to waive or modify the duty to account under certain circumstances.[46] The duties can be waived for the lifetime of the settlor or the lifetime of the settlor's surviving spouse, and the settlor can specify a different age where a beneficiary must be

---

[43] FLA STAT. § 736.0105 (West 2010); NEB. REV. STAT. § 30-3805 (Supp. 2004); William H. Lyons & John M. Gradwohl, *Discretionary Trusts, Support Trusts, Discretionary Support Trusts, Spendthrift Trusts, and Special Needs Trusts Under the Nebraska Uniform Trust Code*, 86 NEB. L. REV. 231, 278 (2007) (noting in its conclusion that the Nebraska Supreme Court views the Nebraska UTC as consistent with the great majority of the pre-UTC case law on trusts); David F. Powell *The New Florida Trust Code, Part 1*, FLA. BAR J., July-Aug. 2006, at 24, 26, *available at* http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/4c588b161b4b3db38525719a00542a5a!OpenDocument&Highlight=0,new,florida,trust* (noting the broad category of mandatory provisions under the Florida Trust Code include "the duty to notify, account to, and respond to requests for information by qualified beneficiaries" and "to file a notice of trust at the death of the settlor").

[44] While this exception is not specifically referenced in section 105(b)(8), section 813 clearly provides an exception to this mandatory rule based on the reference to a waiver by the settlor of the trustee's duty to "inform and report" to the beneficiaries applicable to regulated financial service institutions. *See* N.M. STAT. ANN. § 46A-8-813 (West 2003 and Supp. 2011).

[45] *See* D.C. CODE § 19-1301.05(b)(8) (LexisNexis 2008); ME. REV. STAT. ANN. tit. 18-B, § 105 (Supp. 2010); MO. REV. STAT. § 456.1-105 (West 2007); OHIO REV. CODE § 5801.04(B)(8) (LexisNexis 2006); OR. REV. STAT. § 130.020(h) (2009).

[46] D.C. CODE § 19-1301.05(c) (LexisNexis 2008).

notified.[47] Most significantly, the settlor can designate a person "to act in good faith to protect the interests of beneficiaries, to receive any notice, information, or reports required under" the Washington D.C. version of section 813 "in lieu of providing such notice, information, or reports to the beneficiaries." [48] The designated-person provision effectively allows the settlor to keep the trust information confidential from the beneficiaries without entirely sacrificing the only practical means of enforcement. This would offer one example of a good compromise for jurisdictions that are seeking to adopt the spirit of the UTC version but are wary of the heavy-handed UTC language. It is not surprising that four other jurisdictions, Oregon, Maine, Missouri and Ohio, adopted similar disclosure provisions to D.C.[49]

B. Adopting Jurisdictions' Treatment of the Mandatory Duty to Respond under Section § 105(b)(9) of the Uniform Trust Code

A similar story has unfolded among adopting jurisdictions for UTC section 105(b)(9), which makes mandatory the duty to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.[50] The UTC adopted the concept of a trustee report to transition from the more burdensome concept of accountings in an effort to ease the trustee's significant disclosure obligations.[51] Fifteen jurisdictions omitted this provision altogether,[52] although, interestingly, they

---

[47] *Id.* § 19-1301.05(c)(1)-(2).

[48] *Id.* § 19-1301.05(c)(3).

[49] *See* ME. REV. STAT. ANN. tit. 18-B, § 105(3) (Supp. 2010); MO. REV. STAT. § 456.1-105(3) (West 2007); OHIO REV. CODE § 5801.04(C) (LexisNexis 2006); OR. REV. STAT. § 130.020(3) (2009).

[50] UNIF. TRUST CODE § 105(b)(9) (amended 2010).

[51] Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 381 (2005).

[52] *See* ARIZ. REV. STAT. ANN. § 14-10105 (West Supp. 2010); ARK. CODE ANN. § 28-73-105 (Supp. 2011); KAN. STAT. ANN. § 58a-105 (Supp. 2010); MASS. GEN. LAWS ch. 203E, § 105 (2012); MICH. COMP. LAWS ANN. § 700.7105 (West Supp. 2011); N.H. REV. STAT. ANN. § 564-B:1-105 (LexisNexis Supp. 2010); N.C. GEN. STAT. § 36C-1-105 (2009); N.D. CENT. CODE § 59-09-05 (2010); 20 PA. CONS. STAT. § 7705 (West Supp. 2011); S.C. CODE ANN. § 62-7-105 (Supp. 2010); TENN. CODE ANN. § 35-15-105 (2007); UTAH CODE ANN. § 75-7-105 (LexisNexis Supp. 2011); VT. STAT. ANN. tit. 14A, § 105 (2010); W. VA.

were not the exact same jurisdictions that omitted section 105(b)(8). Alabama adopted UTC section 105(b)(9) and omitted section 105(b)(8), while Pennsylvania and Michigan omitted section 105(b)(9) and adopted section 105(b)(8).

Arizona is a sort of hybrid, because it technically adopted section 105(b)(9), but omitted the reference to section 813(a).[53] This intentional ambiguity is curious, as the natural implication would be that this section references section 813(a) of the Revised Arizona Probate Code, which is based on the uniform statute, but this implication makes little sense considering the intentional deletion of any such reference. The next natural implication of the deletion of the cross reference would be that Arizona's provision is intended to apply more broadly, to all of section 813, but that also seems incorrect because Arizona entirely omitted section 105(b)(8) from its mandatory provisions, which otherwise would have made certain aspects of section 813(b) mandatory. It would appear that Arizona's legislators are undecided in terms of the UTC mandatory disclosure provisions which, given Arizona's tortured legislative history on the matter, is understandable.[54] This apparently intentional ambiguity will undoubtedly be the source of significant future litigation in the Grand Canyon state, but the first round of appellate litigation interpreting this statute suggests that Arizona is a non-mandatory disclosure jurisdiction.[55] So, based on that authority, Arizona will be categorized as such in this article.

Five jurisdictions adopted a limited version of section 105(b)(9), four of which followed the D.C. model that carves out specific exceptions in the plain language of section 105 and limits the disclosure so long as the trustee is a regulated financial

---

CODE § 44D-1-105 (LexisNexis Supp. 2011); VA. CODE ANN. § 55-541.05 (2007) (to be renumbered as VA. CODE ANN. § 64.2-703 (2012)); WYO. STAT. ANN. § 4-10-105 (2011).

[53] ARIZ REV. STAT. ANN. § 14-10105 (West Supp. 2010). Arizona appears to have adopted the language in the original UTC versions from 2000 that was revised in each later version to add the specific references to section 813.

[54] *See* discussion of *Arizona Trust Code infra* Part V.A.

[55] *In re* Esther Caplan Trust, 265 P.3d 364, 366 (Ariz. Ct. App. 2011) (upholding the corporate trustee's actions in disclosing less than all of the information requested by the remainder beneficiaries and in making principal distributions to the current beneficiaries because the remainder beneficiaries' position was "inconsistent with the Trust's express terms" *id.* at 367.).

services institution.[56] New Mexico technically adopted the mandatory language of section 105(b)(9), but then carved out a narrow exception for regulated financial services institutions in its version of section 813.[57]

Nebraska, Missouri, Alabama, and Florida adopted provisions that are substantially similar to section 105(b)(9).[58] Clearly, more jurisdictions are comfortable with requiring a response to a beneficiary's request for information where the beneficiary already has knowledge of the existence of a trust than requiring a trustee to provide notice of the trust's existence in the first place. However, since the majority of jurisdictions still omitted this provision altogether, the best that can be said for section 105(b)(9) is that it was only slightly more palatable to adopting jurisdictions than section 105(b)(8).

C. Adopting Jurisdictions' Treatment of the Default Disclosure Provisions under Section 813 of the Uniform Trust Code

The mandatory disclosure provisions of the UTC were designed to simply incorporate by reference certain default provisions of section 813 of the UTC, which sets forth the trustee's specific duties to inform and report. Since section 813 is incorporated by reference into section 105, it is essential to consider the disclosure provisions of section 813 for adopting jurisdictions when assessing the uniformity of the mandatory disclosure provisions.

The essence of section 813 is part (a), which provides that a trustee "shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests" and "promptly respond to a beneficiary's request for information related to the administration of the trust," unless such a response

---

[56] D.C. CODE § 19-1301.05(c) (LexisNexis 2008); ME. REV. STAT. ANN. tit. 18-B, § 105(3) (Supp. 2010); OHIO REV. CODE ANN. § 5801.04(C) (LexisNexis 2006); OR. REV. STAT. § 130.020(3) (2009).

[57] N.M. STAT. ANN. § 46A-1-813(F) (West Supp. 2011)

[58] *See* ALA. CODE § 19-3B-105(b)(8) (LexisNexis 2007); FLA. STAT. § 736.0813 (2011); MO. REV. STAT. § 456.1-813 (West Supp. 2011); NEB. REV. STAT. § 30-3805(b)(8) (2004).

is unreasonable under the circumstances.[59] The vast majority of jurisdictions adopted provisions very similar to section 813(a), but there is significantly more variance regarding the remaining provisions of section 813.[60] This means adopting jurisdictions generally agree, at least in theory, that a trustee should have a duty to inform and report as a default rule, but they differ significantly on what specific actions the trustee must take to meet this duty and whether this duty, or any portion of it, can be waived by the settlor when drafting the trust instrument.[61]

D. Conclusions from an Analysis of the Adopting Jurisdictions Treatment of Sections 105 and 813 of the Uniform Trust Code

When considering sections 105(b)(8) and 105(b)(9) together with section 813, the jurisdictions can be divided into three

---

[59] UNIF. TRUST CODE § 813(a) (amended 2010).

[60] *See* ALA. CODE § 19-3B-813 (LexisNexis 2007); ARIZ. REV. STAT. ANN. § 14-10813 (West Supp. 2010); ARK. CODE ANN. § 28-73-813 (Supp. 2011); D.C. CODE § 19-1308.13 (LexisNexis 2008); FLA. STAT. § 736.0813 (2011); KAN. STAT. ANN. § 58a-813 (Supp. 2010); ME. REV. STAT. ANN. tit. 18-B, § 813 (Supp. 2010); MASS. GEN. LAWS ch. 203E, § 813 (2012); MICH. COMP. LAWS ANN. § 700.7814 (West Supp. 2011); MO. REV. STAT. § 456.8-813 (West Supp. 2011); NEB. REV. STAT. § 30-3878 (Supp. 2004); N.H. REV. STAT. ANN. § 564-B:8-813 (LexisNexis Supp. 2010); N.M. STAT. ANN. § 46A-8-813 (West Supp. 2011); N.C. GEN. STAT. § 36C-8-813 (2009); N.D. CENT. CODE § 59-16-13 (2010); OHIO REV. CODE § 5808.13 (LexisNexis Supp. 2011); OR. REV. STAT. § 130.710 (2009); 20 PA. CONS. STAT. § 7780.3 (West Supp. 2011); S.C. CODE ANN. § 62-7-813 (Supp. 2010); TENN. CODE ANN. § 35-15-813 (Supp. 2010); UTAH CODE ANN. § 75-7-813 (LexisNexis Supp. 2011); VT. STAT. ANN. tit. 14A, § 813 (2010); VA. CODE ANN. § 55-548.13 (2007) (to be renumbered as VA. CODE ANN. § 64.2-775 (2012)); W. VA. CODE § 44D-8-813 (LexisNexis Supp. 2011); WYO. STAT. ANN. § 4-10-813 (2011).

[61] *See* ALA. CODE § 19-3B-813 (LexisNexis 2007); ARIZ. REV. STAT. ANN. § 14-10813 (West Supp. 2010); ARK. CODE ANN. § 28-73-813 (Supp. 2011); D.C. CODE § 19-1308.13 (LexisNexis 2008); FLA. STAT. § 736.0813 (West 2011); KAN. STAT. ANN. § 58a-813 (Supp. 2010); ME. REV. STAT. ANN. tit. 18-B, § 813 (Supp. 2010); MASS. GEN. LAWS ch. 203E, § 813 (2012); MICH. COMP. LAWS ANN. § 700.7814 (West Supp. 2011); MO. REV. STAT. § 456.8-813 (West Supp. 2011); NEB. REV. STAT. § 30-3878 (Supp. 2004); N.H. REV. STAT. ANN. § 564-B:8-813 (Supp. 2010); N.M. STAT. ANN. § 46A-8-813 (West Supp. 2011); N.C. GEN. STAT. § 36C-8-813 (2009); N.D. CENT. CODE § 59-16-13 (2010); OHIO REV. CODE § 5808.13 (LexisNexis Supp. 2011); OR. REV. STAT. § 130.710 (2009); 20 PA. CONS. STAT. § 7780.3 (West Supp. 2011); S.C. CODE ANN. § 62-7-813 (Supp. 2010); TENN. CODE ANN. § 35-15-813 (Supp. 2010); UTAH CODE ANN. § 75-7-813 (LexisNexis Supp. 2011); VA. CODE ANN. § 55-548.13 (2007) (to be renumbered as VA. CODE ANN. § 64.2-775 (2012)); VT. STAT. ANN. tit. 14A § 813 (2010); W. VA. CODE § 44D-8-813 (LexisNexis Supp. 2011); WYO. STAT. ANN. § 4-10-813 (2011).

categories: (i) the fourteen non-mandatory disclosure jurisdictions,[62] (ii) the nine partially mandatory disclosure jurisdictions,[63] and (iii) the two mandatory disclosure jurisdictions.[64] Analyzing section 813 with a broader view based on these distinctions reveals some interesting trends.

1. The Non-Mandatory Disclosure Jurisdictions.

There were fourteen jurisdictions that eliminated the mandatory provisions in section 105 altogether, and ten of these jurisdictions actually substantially adopted the language from section 813. These adopting jurisdictions include: Arizona, Arkansas, Kansas, North Dakota, South Carolina, Utah, Vermont, Virginia, West Virginia, and Wyoming.[65] While the adoptions were not word for word, most of the revisions among these jurisdictions were fairly insignificant, such as provisions to clarify that section

---

[62] The non-mandatory disclosure jurisdictions are: Arizona, Arkansas, Kansas, Massachusetts, New Hampshire, North Carolina, North Dakota, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. *See* ARIZ. REV. STAT. ANN. § 14-10813 (West Supp. 2010); ARK. CODE ANN. § 28-73-813 (Supp. 2011); KAN. STAT. ANN. § 58a-813 (Supp. 2010); MASS. GEN. LAWS ch. 203E, § 813 (2012); N.H. REV. STAT. ANN. § 564-B:8-813 (LexisNexis Supp. 2010); N.C. GEN. STAT. § 36C-8-813 (2009); N.D. CENT. CODE § 59-16-13 (2010); S.C. CODE ANN. § 62-7-813 (Supp. 2010); TENN. CODE ANN. § 35-15-813 (Supp. 2010); UTAH CODE ANN. § 75-7-813 (LexisNexis Supp. 2011); VT. STAT. ANN. tit. 14A, § 813 (2010); VA. CODE ANN. § 55-548.13 (2007) (to be renumbered as VA. CODE ANN. § 64.2-775 (2012)); W. VA. CODE § 44D-8-813 (LexisNexis Supp. 2011); WYO. STAT. ANN. § 4-10-813 (2011).

[63] The partially mandatory disclosure jurisdictions are: Alabama, the District of Columbia, Maine, Missouri, Michigan, New Mexico, Ohio, Oregon, and Pennsylvania. *See* ALA. CODE § 19-3B-813 (LexisNexis 2007); D.C. CODE § 19-1308.13 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 18-B, § 813 (Supp. 2010); MO. REV. STAT. § 456.1-813 (West Supp. 2011); MICH. COMP. LAWS § 700.7814 (West Supp. 2011); N.M. STAT. ANN. § 46A-8-813 (West Supp. 2011); OHIO REV. CODE ANN. § 5808.13 (LexisNexis Supp. 2011); OR. REV. STAT. § 130.710 (2009); 20 PA. CONS. STAT. § 7780.3 (West Supp. 2011).

[64] The mandatory disclosure jurisdictions are Nebraska and Florida. *See* NEB. REV. STAT. § 30-3878 (Supp. 2004); FLA. STAT. § 736.0813 (West 2011).

[65] *See* ARIZ. REV. STAT. ANN. § 14-10813 (West Supp. 2010); ARK. CODE ANN. § 28-73-813 (Supp. 2011); KAN. STAT. ANN. § 58a-813 (Supp. 2010); N.D. CENT. CODE § 59-16-13 (2010); S.C. CODE ANN. § 62-7-813 (Supp. 2010); UTAH CODE ANN. § 75-7-813 (LexisNexis 2011); VT. STAT. ANN. tit. 14A, § 813 (2010); VA. CODE ANN. § 55-548.13 (2007) (to be renumbered as VA. CODE ANN. § 64.2-775 (2012)); W. VA. CODE § 44D-8-813 (LexisNexis Supp. 2011); WYO. STAT. ANN. § 4-10-813 (2011).

813 is a default statute.[66] Tennessee, New Hampshire, Massachusetts, and North Carolina almost completely redrafted section 813, although there are still specific provisions of section 813 which are found in these jurisdictions' versions of the statute.[67]

North Dakota added a provision explaining that the duty to inform and report is owed to the settlor as long as there is a power of withdrawal.[68] Vermont added provisions specific to charitable trusts,[69] and Virginia added a simple provision stating that a trustee who fails to comply with the notice requirements shall not be subject to removal or sanction so long as the trustee acted in good faith.[70] Notwithstanding these minor or duplicative additions, the significant majority of states that failed to adopt both of the mandatory disclosure provisions of section 105 adopted most of the UTC default disclosure language of section 813.

2. The Partially-Mandatory Disclosure Jurisdictions

The partially-mandatory adopting jurisdictions were the most willing to adopt the UTC language in section 813,[71] with Pennsylvania being the only partially mandatory jurisdiction that completely re-drafted it.[72] Although, these jurisdictions also proved to be the most likely to add other provisions beyond what

---

[66] *Compare* UNIF. TRUST CODE § 813 (amended 2010) *with* ARIZ. REV. STAT. ANN. § 14-10813 (West Supp. 2010); KAN. STAT. ANN. § 58a-813 (Supp. 2010); UTAH CODE ANN. § 75-7-813 (LexisNexis 2011); WYO. STAT. ANN. § 4-10-813 (2011).

[67] *See* MASS. GEN. LAWS ch. 203E, § 813 (2012); N.H. REV. STAT. ANN. § 564-B:8-813 (LexisNexis Supp. 2010); N.C. GEN. STAT. § 36C-8-813 (2009); TENN. CODE ANN. § 35-15-813 (Supp. 2010).

[68] N.D. CENT. CODE § 59-16-13(1) (2010).

[69] VT. STAT. ANN. tit. 14A, § 813(a), (f)(1) (2010).

[70] VA. CODE ANN. § 55-548.13(A) (2007) (to be renumbered as VA. CODE ANN. § 64.2-775(A) (2012)).

[71] *See* ALA. CODE § 19-3B-813 (LexisNexis 2007); D.C. CODE § 19-1308.13 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 18-B, § 813 (Supp. 2010); MICH. COMP. LAWS ANN. § 700.7814 (West Supp. 2011); MO. REV. STAT. § 456.8-813 (West 2011); N.M. STAT. ANN. § 46A-8-813 (West Supp. 2011); OHIO REV. CODE § 5808.13 (LexisNexis Supp. 2011); OR. REV. STAT. § 130.710 (2009); 20 PA. CONS. STAT. ANN. § 7780.3 (West Supp. 2011).

[72] *Compare* 20 PA. CONS. STAT. ANN. § 7780.3 (West Supp. 2011) *with* UNIF. TRUST CODE § 813 (amended 2010).

exists in section 813, aiming mostly at making the trustee's obligations more reasonable.

New Mexico added a provision for a knowing waiver of the duties to inform and report so long as the trustee is a regulated financial service institution qualified to do trust business in New Mexico.[73] The District of Columbia redrafted section 813(c) by re-wording the same provisions for clarity and adding a specific notice provision for when a co-trustee remains in office, a provision specific to dealing with personal representatives and a provision which distinguished the notice requirements upon a vacancy in trusteeship for qualified and nonqualified beneficiaries. [74] Maine and Alabama both added a similar provision to section 813 for personal representatives and conservators, and also inserted the unnecessary provisions clarifying that the duty to inform and report applies only to irrevocable trusts.[75]

Missouri added several provisions favorable to trustees including extending the notice requirements to 120 days rather than sixty days, allowing the trustee to charge a reasonable fee to the beneficiary for providing information, and requiring the beneficiaries to sufficiently identify the trust so the trustee can locate the records of the trust.[76] Missouri also added a provision creating a presumption that the trustee has fulfilled its disclosure duties so long as the trustee has complied with its obligations under the provision to make certain disclosures, as well as a provision requiring beneficiaries to be bound by any confidentiality restrictions the trustee is bound to with respect to details that are required to be disclosed to the beneficiary.[77]

Although Oregon added each of the same additional trustee-favorable provisions as Missouri, Oregon used a "reasonable time"

---

[73] N.M. STAT. ANN. § 46A-8-813(F) (West Supp. 2011).

[74] D.C. CODE § 19-1308.13(b)(3)-(5) (LexisNexis 2008).

[75] ME. REV. STAT. ANN. tit. 18-B, § 813(C), (D)(6) (Supp. 2010); ALA. CODE § 19-3B-813 (LexisNexis 2007). Alabama also added a specific provision absolving the trustee of the notice requirements under part (3) as to any beneficiary of a split interest charitable trust whose interest is not irrevocable. ALA. CODE § 19-3B-813(b)(3) (LexisNexis 2007).

[76] MO. REV. STAT. § 456.8-813(5)-(6) (West Supp. 2011).

[77] *Id.* § 456.8-813(1), (7).

standard for disclosure periods, did not adopt the trustee presumption of compliance, and then added the duplicative and unnecessary provision clarifying that the duty to inform and report does not apply to revocable trusts.[78] Oregon also added two other interesting provisions: one which limits all disclosures to beneficiaries other than the settlor's surviving spouse so long as all other qualified beneficiaries are the surviving spouse's descendants, and the other which eliminates the Trustee's duty to disclose and report for beneficiaries designated to receive a specific distribution of property or money so long as the distribution is made within six months.[79]

Ohio added language stating that the Trustee's duties are owed exclusively to the settlor during the lifetime of the settlor, again duplicating rules already stated under section 105.[80] Ohio also added a couple of provisions favorable to trustees, including allowing the trustee to disclose a redacted version of the trust that includes only those provisions of the trust instrument that the trustee determines are relevant to the beneficiary's interest in the trust[81] and clarifying that a trustee may provide more information than is required under the statute.[82]

Michigan added a partial disclosure provision requiring the trustee to disclose only "a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property."[83] Michigan also added a provision allowing the court to direct what statements of account and other information a trustee is to provide to a qualified trust beneficiary that is excluded from such accounts and information under the terms of the trust.[84]

In summary, the significant majority of the revisions to section 813 made by jurisdictions adopting partially mandatory disclosures were to clarify that the section only applies to irrevocable trusts—duplicating section 105—and, more

---

[78] OR. REV. STAT. § 130.710 (2009).
[79] *Id.*
[80] OHIO REV. CODE ANN. § 5808.13 (LexisNexis Supp. 2011).
[81] *Id.*
[82] *Id.*
[83] MICH. COMP. LAWS § 700.7814(2)(a) (West Supp. 2011).
[84] *Id.* § 700.7814(4).

substantively, to create exceptions directed at making the disclosure obligations more reasonable for the trustee or limiting the disclosure requirements based on the beneficiary's interest in the trust. The disclosure requirements as stated in section 813 are consistently more stringent than the disclosure requirements adopted in the majority of these jurisdictions.

3. The Mandatory Disclosure Jurisdictions

Only one of the two states that adopted the mandatory provisions of section 105 substantially adopted the language of section 813. Florida redrafted significant portions of section 813 for its version, leaving Nebraska as the sole state that adopted all of the mandatory provisions of sections 105 and 813 in substantially the same form. However, even Nebraska adopted an additional, albeit duplicative and unnecessary, provision in its version of section 813 by cross-referencing to its statute that states that the trustee's duties are owed exclusively to the settlor while the trust is revocable.[85] It is interesting that the lowest percentage of uniformity for section 813 is found among the two jurisdictions that actually adopted the mandatory provisions of section 105. Because the sample size is so small with only two such jurisdictions, it would certainly be improper to draw a statistical conclusion from this pool. However, the fact that only one jurisdiction out of twenty-five substantially adopted both the mandatory-disclosure provisions of sections 105 and 813 as initially intended by NCCUSL supports another conclusion: that the mandatory disclosure provisions of the UTC have been a total failure in terms of attaining uniformity among UTC-adopting jurisdictions.

---

[85] *See* NEB. REV. STAT. § 30-3878(e) (Supp. 2004) (referencing *Id.* § 30-3855).

III. NOTWITHSTANDING SIGNIFICANT CONTROVERSY SURROUNDING THE MANDATORY-DISCLOSURE PROVISIONS OF THE UNIFORM TRUST CODE, NCCUSL HAS RETAINED THESE PROVISIONS, WHICH THE DRAFTING COMMITTEE AND OTHER COMMENTATORS ARGUE ACTUALLY SERVE TO BETTER PROTECT THE INTENT OF THE SETTLOR.

A. NCCUSL Made Slight Revisions to the Mandatory Disclosure Provisions to Limit their Scope, but Retained these Provisions in Significantly the Same Form as Initially Drafted, which the Drafting Committee Deems to be the Best Balance of Competing Policy Considerations.

The mandatory disclosure provisions have been extremely controversial and have failed to gain traction in UTC-adopting jurisdictions. NCCUSL has made several attempts to modify the language of these provisions in response to the criticism and rejection by various UTC-adopting jurisdictions. In 2001, NCCUSL revised the mandatory disclosure provisions in sections 105(b)(8) and (9) by adding specific citations to the provisions of section 813 that are mandatory.[86] However, as discussed previously,[87] the citation to part (a) of section 813 could easily be interpreted as making the entire section mandatory. Consistent with this interpretation, the footnote to the 2001 revisions defines this change as a mere clarification,[88] but another reasonable interpretation is that adding specific citations to only a few of the provisions in section 813, as opposed to general references to the duty to inform, was a clear retreat from the aggressive mandatory-disclosure provisions that were proposed by NCCUSL in the first version. In 2003, the language in section 813(b)(8) was revised, for clarification purposes, because, when read with the initial language at the top of section (b), the sentence included two "excepts" creating a confusing sort of double negative.[89]

---

[86] *Compare* UNIF. TRUST CODE § 105 (2000), *with* UNIF. TRUST CODE § 105 (2001).

[87] *See supra* Part II.c.

[88] UNIF. TRUST CODE § 105 (amended 2010) (notes to 2001 Amendment).

[89] *Id.* (notes to 2003 Amendment).

In the 2004 version of the UTC, NCCUSL added brackets to the mandatory-disclosure provisions and acknowledged that these provisions were unlikely to gain uniformity. In a lengthy footnote regarding the addition of brackets, NCCUSL stated:

> Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.
>
> Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary's request for information.[90]

In the remainder of this footnote, NCCUSL acknowledged that "there is little chance that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity."[91] The committee stated that it continues to believe that the provisions, as written, "represent the best balance of competing policy considerations" and then went on to advocate for the mandatory disclosure provisions.[92]

---

[90] *Id.* (notes to 2004 Amendment).
[91] *Id.*
[92] *Id.*

B. Commentators Assert that Omitting the Mandatory Duty to Account May Actually Run Contrary to the Intent of the Settlor Because it Creates an Environment that is Conducive to Trustee Malfeasance.

The primary reasons advanced for failing to adopt the mandatory-disclosure provisions are to allow greater deference to the settlor's wishes as expressed in the terms of the trust and to preserve the confidential nature of trusts.[93] Proponents of the UTC-disclosure provisions argue that the UTC is consistent with the prior law as stated in the *Restatement of Trusts* and that, to the extent that the omission of the mandatory-disclosure provisions causes the trustee to breach the terms of the trust, the intent of the settlor can be completely eviscerated by failing to adopt the mandatory disclosure provisions.

The trustee has a mandatory duty to administer the trust for the benefit of the beneficiaries in good faith.[94] However, eliminating the mandatory reporting requirement can make the beneficiaries powerless to discover whether the trustee is acting in good faith. In fact, without the notice requirements, the beneficiaries may not even know that the trust exists.[95] There is a legitimate concern that the trustee could act contrary to the terms of the trust without any accountability in circumstances where the settlor is either deceased or incapacitated. The courts have the authority to modify or terminate trusts. However without information regarding the trustee's actions, the beneficiaries will only have a speculative basis for a cause of action. It would be difficult to justify the expense of litigation on such speculation, particularly where a loss would mean the beneficiary foots the bill for both sides of the litigation, because the defendant's fees would be paid out of the trust. Absent mandatory disclosures, the settlor could exempt the trustee from the notice requirements or the settlor could specifically require that the beneficiaries not be informed of the trust or its details. In either of these instances, upholding the settlor's intent regarding notice will have the

---

[93] See *infra* Part V.

[94] UNIF. TRUST CODE § 105(b)(2) (amended 2010).

[95] *Id.* § 105(b)(8).

practical effect of defeating all other purposes of the trust in some situations.

NCCUSL stated that the mandatory nature of the disclosure provisions "are among the most important provisions in the UTC," and that "the essence of the trust relationship is accounting to the beneficiaries."[96] The committee gives little more than a passing glance to the policy concerns that have contributed to defeating this provision in the majority of jurisdictions and argues that, notwithstanding the desire for privacy, these provisions are necessary to avoid the greater danger of a beneficiary not learning of a breach by the trustee.[97] Proponents argue that the mandatory provisions are consistent with the common law of trusts which allows restrictions on the disclosure requirements for the trustee, but not the total elimination thereof, and so the UTC simply implemented this concept from the common law with the mandatory-disclosure provisions.[98] The *Restatement* confirms that a beneficiary's "enforcement of his or her rights as a trust beneficiary normally requires an awareness not only of the trust's existence but also of the terms of the trust."[99] The concept of avoiding trustee malfeasance tends to be a common theme among proponents of the mandatory-disclosure provisions.

In his article on the mandatory rules, Professor John H. Langbein discusses each mandatory rule as either defeating or serving the intent of the settlor.[100] He asserts that, at first glance, it may seem that any mandatory rule that cannot be overruled by the terms of the trust would always be intent-defeating; but certain mandatory rules generally implement the settlor's true

---

[96] *Id.* § 105 (notes to 2004 Amendment).

[97] *Id.* The committee also argues a trustee-friendly position, that these provisions actually protect trustees from beneficiary claims because trustees can bar claims of beneficiaries after a one-year statute of limitations period as opposed to a five-year limitations period that would apply in the absence of such notice.

[98] Millard, *supra* note 52, at 393 (citing RESTATEMENT (SECOND) OF TRUST § 173 cmt. c (1959), for the proposition that the terms of the trust may only regulate the amount of information which the trustee must give and the frequency with which it must be given, but cannot eliminate the trustee's duty to provide information altogether).

[99] RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. e (2007).

[100] John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004).

intent, while others tend to restrict the settlor's autonomy.[101] Professor Langbein[102] classifies the mandatory rules to account as intent-serving, similar to the restrictions on a "trust term purporting to abrogate all fiduciary duties, or a term authorizing the trustee to act in bad faith."[103] Also, the perspective that the mandatory disclosure provisions are intent-effectuating rather than intent-defeating has been challenged, even by proponents of the mandatory-disclosure provisions.[104]

Another commentator, T.P. Gallanis, argues that a settlor that allows complete nondisclosure is intuitively unlikely to have understood the true effect of such a term and any term which relieves a trustee of the duty to account may place the misuse of trust property beyond effective remedy.[105] He further states that "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."[106]

While this position is protective and paternalistic, Langbein argues that considering instances where the settlor is fully aware of the effect provides still more incentive for including this as a mandatory provision.[107] If a settlor does intend the effect of such terms, then the settlor should be required to simply make a beneficial gift to the trustee, which Langbein argues is the practical effect of such a provision.[108] Commentators have further suggested that failure to include these notice requirements makes the trust illusory.[109] The analysis is based on prior common law stating that a waiver of the trustee's fiduciary duties is not

---

[101] Langbein, *supra* note 103, at 1105.

[102] It is worth noting that Professor Langbien serves as a Uniform Law Commissioner, and he was a member of the drafting committees for the UTC, and so, notwithstanding his impressive credentials and contributions to this area of trust law, he is not an entirely disinterested scholar on the UTC. See John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1069 n.a1 (2007).

[103] Langbein, *supra* note 103, at 1126.

[104] T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1620 (2007).

[105] *Id*.

[106] Millard, *supra* note 52, at 395.

[107] Langbein, *supra* note 103, at 1126.

[108] *Id*.

[109] *Id*. at 1126. *See also* Millard, *supra* note 99, at 395.

effective, and so courts allegedly cannot uphold provisions waiving the duty to account. Consequently, courts will either need to choose between striking this language from the trust or determining that the trust is illusory.[110]

The argument that eliminating the Trustee's disclosure obligations will make the trust illusory sounds compelling on its surface, but the argument runs directly contrary to the law in most jurisdictions and is incongruent with the UTC itself.[111] There is simply no requirement in any jurisdiction that the beneficiaries must know about the trust for a trust to be created.[112] Further, the notice requirements prior to the beneficiary reaching the age of twenty-five can be waived under the UTC itself.[113] If a trust lacking disclosure requirements were illusory, then any trust in existence prior to a qualified beneficiary reaching the age of twenty-five that follows the UTC requirements would be illusory as well. This is clearly not the case. Therefore, the notice requirements cannot be necessary for valid trust formation, and trusts that waive these notice requirements are clearly not illusory.

Other arguments in favor of the mandatory disclosure provisions tend to be based on the practical issues that arise where a settlor specifically absolves the trustee of its obligation to inform and report. A couple of these practical issues were summarized in practitioner Kevin D. Millard's article regarding the disclosure provisions of the UTC.[114] He points out that certain distributions of the net income of a trust require the trustee to provide the beneficiary with a Schedule K-1 (K-1) containing the information necessary for the beneficiary to prepare its personal tax return.[115] This schedule would disclose the name and existence

---

[110] Millard, *supra* note 52, at 395.

[111] *See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 678-79 (2005) (providing several reasons why trusts are still valid in states where the disclosure requirements are not mandatory).

[112] *See* Newman, *supra* note 115, at 678.

[113] *See Id.* at 679. *See also* UNIF. TRUST CODE § 402 (amended 2010), *and Id.* § 105(b)(8).

[114] Millard, *supra* note 52, at 395-96.

[115] *Id. See also* Newman, *supra* note 112, at 679.

of the trust to the beneficiary. However, this practical issue doesn't necessarily require a mandatory disclosure provision for two reasons. First, the law regarding what information may be disclosed where the trust terms conflict with the internal revenue code is easily determined under the implied preemption doctrine because federal tax law would preempt the non-disclosure provisions of any state trust law where an income distribution is made that must be reported on the K-1.[116] Although, a provision in UTC section 105 stating that the reporting requirements under the internal revenue code cannot be waived by the terms of the trust would be an appropriate clarification on this issue. Second, the concern over disclosing the existence of the trust is no longer relevant once distributions have begun. So, unless the K-1 is reporting phantom income, the beneficiary will already know about the existence of the trust because of the distributions the beneficiary will have received during the tax year. Therefore, the practical concern over the trustee's responsibility to furnish a K-1 does not lead to the conclusion that a mandatory provision is necessary in all circumstances and a more limited disclosure requirement would adequately address this concern.

Mr. Millard also points out that certain trusts require the trustee to make discretionary distributions based on the beneficiary's needs and financial situation, and that inquiries to adult beneficiaries that are not aware of the trust's existence would be difficult to justify if the trustee were prevented from disclosing the existence of the trust.[117] However, a trustee that is a family member, as opposed to a corporate trustee, may have ready access to this information by nature of their relationship to the beneficiary without any such inquiry. Again, this otherwise valid concern does not apply to all situations.

---

[116] Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (The Court noted that implied preemption is found to apply "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (internal citations omitted)). *See, e.g.,* Wheeler v. Thomas F. White & Co., No. CV 97-9564-WDK, 1998 WL 239266 (C.D. Cal. Mar. 19, 1998) (citing *Myrick*, 514 U.S. at 287 to support the position that the internal revenue code would control in any conflict with the state constitution under the implied preemption doctrine).

[117] Millard, *supra* note 52, at 395.

The last practical concern Mr. Millard raises is the fact that corporate trustees would resist provisions that do not provide for disclosures to beneficiaries because non-disclosure extends the statute of limitations for actions against the trustee.[118] Once again, this concern is limited to only certain specific circumstances and there are likely innumerable provisions that corporate trustees would resist that do not merit a mandatory UTC provision excluding such terms altogether. It would seem the actual resistance to limited disclosure provisions by corporate trustees, if any, would be in the form of an increase in fees due to increased exposure and a corresponding increase in the corporate trustee's liability insurance policy. Based on this author's experience in a non-mandatory disclosure jurisdiction, corporate trustees have not based their fees on the nature of the disclosure provisions in the trust or otherwise resisted restrictions on disclosures, notwithstanding this valid concerns regarding the statute of limitations. If there actually were an increase in fees based on the disclosure requirements then Settlors and practitioners, if applicable, could take that issue into consideration when weighing the various factors for determining how to craft the disclosure provisions of the trust instrument.

IV. THE MANDATORY DISCLOSURE PROVISIONS, BOTH AS INITIALLY DRAFTED AND SUBSEQUENTLY REVISED, ARE CONTRARY TO THE PRINCIPALS OF CONFIDENTIALITY AND RESPECT FOR THE SETTLOR'S INTENT AND ARE NOT NECESSARY IN EVERY CIRCUMSTANCE TO ACCOMPLISH THE GOALS OF PREVENTING TRUSTEE ABUSE.

A. Respect for the Settlor's Intent and Confidentiality are Viewed by Many as Two of the Fundamental Purposes for Trusts and are the Primary Concerns of Opponents of the Mandatory Disclosure Provisions of the Uniform Trust Code.

One of the key achievements of the uniform trust code is its establishment of nearly unfettered respect for the intent of the

---

[118] *Id.* at 396.

settlor,[119] the mandatory disclosure provisions, of course, being perhaps the most notable exception. While the issue of whether mandatory disclosure provisions inconsistent with the trust instrument actually effectuate the intent of the settlor in the long run may be subject to debate, these provisions are facially intent defeating. The same could be said for any of the mandatory provisions which, by definition, override the intent of the settlor, but a mandatory disclosure provision faces particularly significant scrutiny because it affects not only the settlor's ability to dictate the terms of the trust but also the settlor's privacy.

The distinction between the confidentiality under the law for wills as opposed to the law for trusts is far from irrelevant and, in fact, is one of the fundamental reasons that many settlors decide to use living trusts for making testamentary distributions rather than wills.[120] The use of a living trust allows the decedent to avoid the probate process and affords the decedent and the decedent's heir's financial privacy, unlike a will, where the dispositive provisions and the inventory of assets typically become public information.[121] In fact, avoidance of publicity concerning family and business plans via probate has long been considered one of the basic fundamental purposes for doing a revocable trust, as opposed to a will, as the primary testamentary instrument.[122]

While the privacy concerns as to the public are often misplaced in assessing the UTC disclosure provisions, the concerns in terms of the UTC preventing settlors from maintaining privacy from the beneficiaries is legitimate. Even with mandatory reporting requirements, trusts remain significantly more private than probated wills since the

---

[119] *See* Benjamin D. Patterson, *The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent,* 43 CREIGHTON L. REV. 905 (2010).

[120] Dennis M. Patrick, *Living Trusts: Snake Oil or Better than Sliced Bread?*, 27 WM. MITCHELL L. REV. 1083, 1092 (2000).

[121] *Id.*

[122] *See* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 725 (2006) (citing to *In re* Estate of Meskimen, 235 N.E.2d 619, 622 (Ill. 1968) to support the proposition that courts have held that including the trust instrument in the probate files would defeat one of the basic purposes of the trust, which is avoidance of publicity concerning family and business plans).

information is usually only available to trust beneficiaries rather than to the general public. When a settlor deliberately excludes the notice and reporting requirements to beneficiaries in the terms of the trust, this greatly exceeds mere confidentiality from the public. Notwithstanding the foregoing, the UTC disclosure provisions have been interpreted to require that notice be given to certain contingent beneficiaries of irrevocable trusts who may never receive any distributions.[123] This interpretation of the trustee's burden of disclosure goes well beyond what many settlors might envision when creating their estate plan.

The distinction between public disclosure and disclosure to beneficiaries seemed to make little difference to the UTC opposition in Arizona which, after becoming the fifth UTC-adopting jurisdiction in 2003, elected to repeal its newly instated law based on grassroots resistance over the mandatory disclosure provisions.[124] Arizona eventually enacted the UTC which took effect in 2005, but partially omitted the UTC mandatory-disclosure provisions the second time around. Practitioners in several jurisdictions have been critical of the UTC disclosure provisions. Privacy concerns appear to have prevented UTC adoption in Colorado, notwithstanding the Colorado bar's support for it.[125]

While the privacy arguments may be significantly less compelling when dealing with a beneficiary as opposed to the general public, a wealthy settlor may have any number of reasons for keeping trust information private from the trust beneficiaries. The reasons that have been commonly advanced generally include concerns over immature beneficiaries losing their work ethic after developing an overreliance on the funds or concerns over exploitation or excessive claims against the trustee.[126] Indeed, this author has encountered several clients who were concerned about these very issues. Fortunately, this author also practiced in a

---

[123] Marshall & Ilsley Trust Co. v. Woodward, 848 N.E.2d 1175, 1184 (Ind. Ct. App. 2006). *See also* Scott Bieber, *Trustee's Duties Extend to Remainder Beneficiaries Too*, EST. PLAN., Nov. 2011, at 27.

[124] Foster, *supra* note 126, at 763. *See also* Jessica Haynes, *Quieting the "Noisy" Trusts of the Missouri Uniform Trust Code*, 74 UMKC L. REV. 139, 152-53 (2005).

[125] Foster, *supra* note 126, at 765.

[126] *See* Haynes, *supra* note 128, at 154.

state that adopted a version of the UTC that provided the flexibility as a practitioner to craft disclosure provisions that were appropriate for each individual client's situation.

There have been various commentators that have attempted to discredit these privacy concerns while advancing the UTC mandatory disclosure provisions. Arguments on both sides of the aisle are highly subjective as are the reasons a settlor might seek to eliminate the trustee's duty to report and account in the first place. In an effort to provide an objective approach, Kevin D. Millard was only able to offer up inconclusive empirical evidence as to whether the settlor's privacy concerns were valid:

> 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." However, the empirical evidence is inconclusive as to whether Carnegie was right. The Gallos conclude that trust funds seem to be an incentive to beneficiaries who are entrepreneurial but might be a disincentive for beneficiaries who work as employees.[127]

So there is evidence that, depending on the circumstances, trust funds might act as a disincentive for certain beneficiaries and an incentive for others. Mr. Millard oddly takes the approach that this inconclusive empirical evidence somehow supports the need for mandatory disclosure provisions. This author would politely disagree because this empirical evidence shows, if anything, that knowledge of trust funds can create disincentives in certain circumstances. This conclusion would cut against the mandatory disclosure provisions rather than support them.

B. The Mandatory Disclosure Provisions of the Uniform Trust Code May Be Too Burdensome Where A Family Member Serves as a Trustee on a Voluntary Basis.

The unique dynamics of family-member trustees provide other instances where a settlor might reasonably be reluctant to

---

[127] Millard, *supra* note 52, at 393-94.

impose such high disclosure requirements as are mandatory under the UTC. For instance, a settlor might reasonably waive some of the disclosure requirements for a family-member trustee of a low-value trust that is not compensated for their time simply as a matter of efficiency. Additionally, family-member trustees often view their trustee obligations as a favor to the other beneficiaries rather than a legal fiduciary obligation.[128] This reasoning would be particularly prevalent where such a trustee is not compensated. A settlor might reasonably prefer to keep the burden of disclosures to a minimum for the protection of an unsophisticated family member trustee.

C. Both Sides of the Mandatory Disclosure Provision Debate Assert that the Ramifications of Litigation on Privacy Support their Point of View.

Litigation is one aspect of the trust privacy debate that weighs very heavily in terms of the ultimate effect of the UTC disclosure provisions. While settlors often express concern that disclosure may lead to litigation, commentators have opined that keeping the trust a secret or failing to communicate effectively with beneficiaries may actually increase the risk of litigation and that withholding information from beneficiaries will not protect the trustee from claims.[129] Litigation can make all of the details of the trust part of the public record similar to a probated will, which creates a significantly greater invasion of privacy than if just the beneficiaries knew the details of the trust. The counter-argument is that there is a significant built-in disincentive for beneficiaries to bring such actions in many jurisdictions because the trustee's attorney's fees may be charged to the trust even if the trustee loses as long as the trustee defends the action in good faith.[130]

One indication of how drastically litigation can affect the disclosure provisions of a trust is found in what can only be

---

[128] Timothy P. O'Sullivan, *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 MARQUETTE ELDER'S ADVISOR 264 (2007).

[129] O'Sullivan, *supra* note 133; *See, e.g.,* Robert Whitman & Kumar Paturi, *Improving Mechanisms for Resolving Complaints of Powerless Trust Beneficiaries*, 16 QUINNIPIAC PROB. L.J. 64, 69 n.6 (2002).

[130] *See, e.g.*, Sundquist v. Sundquist, 639 P.2d 181, 188 (Utah 1981).

described as the curious case of *Wilson v. Wilson*.[131] In this case, a beneficiary sought an order in North Carolina, a non-mandatory disclosure jurisdiction, to enforce its purported right to an accounting against the settlor of an irrevocable trust where the trust document specifically waived any such right.[132] The trust instrument clearly stated that the trustee "shall not be required by any law, rule or regulation to prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary."[133] The lower court granted a protective order to the trustee as to the information based on the non-mandatory nature of the disclosure provisions of the *North Carolina Uniform Trust Code* (NCUTC), including its legislative history and statutory comments which clearly supported this position.[134] The trial court found that the disclosure provisions could be expressly over-ridden by the settlor in the trust instrument, issued a protective order, and granted partial declaratory judgment in favor of the trustee, which the beneficiary appealed.[135]

In a 2-1 decision, the appellate court reversed and ruled in favor of the beneficiary. The appellate court rejected the plain language of the NCUTC, as well as the legislative history and the official comment included in the statute to reach its result and instead relied on *Taylor v. Nationsbank Corp.*,[136] a case decided ten years prior to the passage of the NCUTC. The court also relied on its interpretation of the mandatory provisions requiring the trustee to act in good faith and the court's power to "take any action and exercise any jurisdiction as may be necessary in the interests of justice."[137] Ultimately, the court held "that the

---

[131] Wilson v. Wilson, 690 S.E.2d 710 (N.C. Ct. App. 2010), *review denied*, 699 S.E.2d 926 (N.C. 2010), *appeal withdrawn*, 708 S.E.2d 310 (N.C. 2011).

[132] *Wilson, Id.* at 711.

[133] *Id.*

[134] *Id.* at 712.

[135] *Id.*

[136] 481 S.E.2d 358 (N.C. Ct. App. 1997).

[137] Wilson, 690 S.E.2d at 714. *See* State *ex rel.* Working v. Costa, 216 S.W.3d 758, 765 (Tenn. Ct. App. 2006) (discussing mandatory provision regarding the "powers of the Court to take such action and exercise such jurisdiction as may be necessary in the interest of justice," which the court exercised in order to determine a trust situs for jurisdictional purposes).

information sought by Plaintiffs was reasonably necessary to enforce their rights under the trust, and therefore could not legally be withheld, notwithstanding the terms of the trust instrument."[138] Further, the court determined that "[a]ny other conclusion renders the trust unenforceable by those it was meant to benefit."[139]

The dissent felt strongly that this decision ran directly contrary to the legislature's intent when the mandatory-disclosure provisions were specifically omitted from the NCUTC.[140] The dissent criticized the majority opinion for not only over-riding the NCUTC, but also misinterpreting *Taylor*, which held that "*absent an explicit provision in the trust to the contrary*, plaintiffs as trust beneficiaries are entitled to view the trust instrument from which their interest is derived."[141] It would have seemed that the holding in *Taylor* actually supported the trustee's position that the explicit provision in the trust instrument was contrary to the beneficiaries' position of requesting accountings. It is, frankly, very difficult to reconcile the court's interpretation with the plain language of the NCUTC and this is, perhaps, a decision where the court sought a specific outcome and simply ignored key aspects of the NCUTC to attain it.

It is doubtful that commentators on either side of the mandatory disclosure debate would welcome this result. While this decision wreaks havoc on the privacy rights of North Carolina settlors, it does not cut either way in terms of supporting or defeating the UTC mandatory disclosure provisions. In fact, it would suggest that this entire debate is irrelevant; as some courts will ultimately do whatever they want based on their power to take such action as may be necessary in the interests of justice, including ignoring all other relevant provisions of the UTC and their state's relevant legislative history. While it may make little or no sense, *Wilson v. Wilson* is the law in North Carolina until another court addresses this issue, and courts in other non-mandatory-disclosure jurisdictions potentially follow suit.

---

[138] *Wilson*, 690 S.E.2d at 716.
[139] *Id.*
[140] *Id.* at 718.
[141] *Id.* (emphasis added).

Other non-mandatory-disclosure jurisdictions have interpreted the mandatory provisions more literally.[142] In *Wood v. Lowery*, a Tennessee appellate court upheld a provision in a will that stated that the trustee "shall [not] be under any duty to audit the books, records or accounts of [the] probate estate or of any trust administered by any preceding Executor or Trustee under this Will."[143] Furthermore, the trustee was permitted to waive the necessity of any notice for or filing of an inventory, accounting or settlement by the Executor.[144] The court upheld these provisions finding that the trustee had no duty under the will to obtain an accounting because, under the Tennessee Uniform Trust Code, the "duties of a trustee may be modified in a will, except the duty to act in 'accordance with the purposes of the trust.'"[145] An Arizona court utilized in camera hearings to review personal financial information pertinent to the trustee's administration of the trust so that the financial information would remain private from the remainder beneficiaries[146] and upheld the provisions of the trust placing the decision of whether to issue principal distributions to the lifetime beneficiary in the sole discretion of the trustee.[147]

Ultimately, the issue of whether failing to adopt the mandatory disclosure provisions of the UTC actually fosters litigation or further hampers the settlor's privacy rights through litigation varies from jurisdiction to jurisdiction. Both proponents and opponents of the mandatory-disclosure provisions can find case law that supports their position depending on the jurisdiction. Another important observation is that the widely disparate outcomes of litigation in jurisdictions that adopted very similar disclosure provisions is further evidence of the negative effects of the haphazard revisions to the UTC disclosure provisions and suggests that the UTC provisions have failed to close the gap among the varying jurisdictions as to the trustee's disclosure requirements, even where identical laws are passed.

---

[142] Wood v. Lowery, 238 S.W.3d 747 (Tenn. Ct. App. 2007).

[143] *Id.* at 765.

[144] *Id.*

[145] *Id.* (citing TENN. CODE ANN. § 35-15-105(b) (2007)).

[146] *In re* Esther Caplan Trust, 265 P.3d 364, 369 (Ariz. Ct. App. 2011).

[147] *Id.* at 370.

D. Trust Protectors Provide One Example Where the Mandatory Provisions May Unnecessarily Defeat the Intent of the Settlor because Trust Protectors could be an Effective Protection Against Trustee Abuse in Certain Circumstances.

Trust protectors are a fairly recent creation under American trust law.[148] The concept was "imported into the United States from offshore jurisdictions seeking to attract asset protection business."[149] Foreign asset protection trusts typically name a trustee beyond the jurisdiction of American courts to place the assets out of the reach of American creditors.[150] Settlors frequently proved reluctant to place unfettered control in a foreign entity, and so trust protectors evolved as a means of dividing certain powers over the trust and the trustee of an irrevocable trust that would not otherwise be available under the classic three-party trust structure.[151]

In some circumstances settlors have named themselves as the trust protector, but this strategy is complicated and risky, because the greater authority the settlor retains over the trust the more likely the asset protection function of the trust may be rendered ineffective.[152] The settlor would want to retain sufficient power to carry out the purpose of the trust, but providing too much authority to the settlor as the trust protector could defeat the purpose of the asset protection trust altogether.[153] So it has become the norm for settlors to name third parties as trust protectors, but the specific powers conferred on the trust protector varies greatly among different trusts.

Domestic trusts that are not intended as asset protection instruments do not have these same limitations in terms of delegation of authority to a trust protector. Therefore, it is not surprising that the concept has found a fit within domestic trusts

---

[148] Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807, 2807 (2006).

[149] Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2764 (2006).

[150] *Id.*

[151] *Id.*

[152] *Id.* at n.15.

[153] *Id.* at 2765.

under certain circumstances.[154] Part of the utility of a trust protector in a non-asset protection context is that the settlor can "tailor the trust protector's powers" in the trust document "to be as broad or narrow as the settlor wants."[155] Certain concepts that are immutable and fundamental to the role of a trustee, like fiduciary duties and agency law, may be applied in vastly different ways by utilizing a trust protector.

Given the intentional flexibility appropriate to this creation of trust lawyers, it is also not surprising that trust protectors have arisen as a solution to prevent trustee abuse where the disclosure requirements are waived.[156] This is a natural fit for trust protectors since the trust protector role was borne out of the settlor's reluctance to fully trust a foreign trustee.

The concept of a trust protector has been codified in the five states that followed the D.C. Model for UTC section 105 utilizing a surrogate.[157] In these states, a surrogate, other than the trustee, may be appointed to receive the required information on behalf of the beneficiaries in order to act in good faith to protect the interests of the current beneficiaries. This provides an alternative to sending the various notices, reports, and other information to current beneficiaries.[158]

A beneficiary surrogate has a duty to act in good faith to protect the interests of the current beneficiaries for whom the notices, information, or reports are received. Presumably other waivable duties of notice—such as the duty to respond to requests for information related to the administration of the trust by a person who is not a current beneficiary—could be given to the beneficiary surrogate if required under the trust instrument, but some commentators have opined that the use of a surrogate "may not completely insulate a beneficially interested person from

---

[154] *Id.* at 2765.

[155] Alexander, *supra* note 153, at 2810.

[156] Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925 (2011).

[157] *Id.* at 949.

[158] Alan Newman, *The Uniform Trust Code: An Analysis of Ohio's Version*, 34 OHIO N.U. L. REV. 135, 186 (2008).

receiving notices that disclose the existence of the trust."[159] Given the policy issues involved, it would be odd for a settlor to be able to use a surrogate to satisfy the requirement for non-waivable notices, but not for waivable notices. So, it is reasonable to assume that in the D.C. Model jurisdictions, a settlor may use a beneficiary surrogate for waiver of notices of both types.

The primary criticism of this approach has been the vagueness of the surrogate's duties to the current beneficiaries, whether fiduciary or otherwise, and concerns over how these provisions would be enforced.[160]

There are a number of legitimate practical concerns about the surrogate model, particularly where the trustee has an obligation under the internal revenue code to provide a K-1 to the beneficiaries but is prevented under terms of the trust instrument from disclosing even the mere existence of the trust. Presumably, the internal revenue code would preempt the state trust law allowing disclosure in this situation. Therefore, a trustee should be able to issue the K-1 to the extent required under federal law without regard to a nondisclosure provision in the trust instrument, although a clarification in the trust code to this effect would be appropriate given the nuanced nature of preemption law.

Other practical concerns over the surrogate model include whether a current beneficiary can maintain an action against a beneficiary surrogate, whether the surrogate has standing to bring suit on behalf of the current beneficiaries, and whether the statute of limitations applicable to trustees would apply to actions against these beneficiary surrogates.[161] It is also unclear whether the *Crummey* disclosure requirements can be met through a surrogate and state statutory disclosure requirements from non-trust code provisions that would be applicable to beneficiaries.[162] While the concept of a trust protector or disclosure surrogate has come under criticism in scholarly writings, disclosure surrogates have more credibility from the perspective of adopting

---

[159] Susan S. Locke & Veena Khanna, *Beneficiary Information and Notices*, 17 OHIO PROB. L.J. 5 (2006).

[160] Newman, *supra* note 163, at 186.

[161] *Id.* at 186.

[162] Locke & Khanna, supra note 164.

jurisdictions than the actual mandatory disclosure provisions of the UTC, even though the UTC disclosure provisions have had a far better reception among scholars. It may be easy to argue that the UTC provisions are generally better in most circumstances, but the concept of trust protectors provides one example of where the goals of the settlor can reasonably be achieved outside the bounds of the mandatory disclosure provisions of the UTC. The problem with the D.C. Model is that it codifies only one such alternative. States that have eliminated the mandatory-disclosure provisions altogether have left the door open for other unique solutions to the problem that the mandatory provisions seek to remedy.

The practical and policy concerns surrounding the disclosure provisions of the Ohio Trust Code prompted Joanne E. Hindel and Bernard L. Karr to draft the appropriately titled article regarding the trustee's duty to inform and report: *You Can't Please All the People All the Time*.[163] This article articulates the issues that arise when settlors vary the trustee's duty to inform and report by inserting specific client scenarios into the different proposed notice requirements.[164] It notes that fixing a problem for a settlor may create a problem for a beneficiary and eliminate protections afforded the trustee.[165] Simply understanding that the proper duty to inform and report is a complex issue that may vary depending on the individual circumstances of each settlor would tend to refute the arguments in favor of a mandatory one-size-fits-all disclosure provision.

E. Contrary to the Position of NCCUSL and The Majority of Commentators, the Mandatory Disclosure Provisions of the Uniform Trust Code Are Bad Policy Because These Provisions Generally Rely on the Malfeasant Trustee to Protect Against Trustee Malfeasance.

---

[163] Joanne E. Hindel & Bernard L. Karr, *"You Can't Please All the People All the Time": Three Perspectives on the Trustee's Duty to Inform and Report*, 18 OHIO PROB. L.J. 191 (2008).

[164] *Id.*

[165] *Id.*

While this paper focuses significantly on the fact that the mandatory disclosure provisions have failed to achieve uniformity and, as such, should be deleted from the UTC, it is worth addressing why legislators might be unwilling to adopt these provisions. Perhaps the greatest weakness to the arguments in favor of mandatory disclosure provisions as a protection against trustee malfeasance is that these requirements rely on the breaching party to provide the disclosures. Is it really reasonable to assume that a trustee that breaches its fiduciary duty relating to the retention and disposition of trust property is going to be diligent in keeping the more technical disclosure requirements? It would seem that, in most cases, the opposite would be true and a trustee would in fact be far more likely to be diligent in its primary role as a fiduciary over the property and remiss in the technical disclosure requirements than the other way around. The disclosure provisions may provide the intended effect in some limited circumstances particularly where an initially good intentioned and compliant trustee has a change of heart and breaches its obligations after making the proper initial disclosures.

Notwithstanding this exception, if we borrow the concepts of internal control design from the accounting world,[166] a far more robust and effective control environment than imposing mandatory disclosure obligations on an already negligent or intentionally breaching trustee could be achieved by segregation of duties. Segregation of duties is deemed an effective internal control because "[a]ssigning different people the responsibilities of authorizing transactions, recording transactions, and maintaining custody of assets is intended to reduce the opportunities to allow

---

[166] AICPA, Statement on Auditing Standards No. 115, Communicating Control Related Matters Identified in an Audit, Professional Standards vol.1, AU section 325.05 (American Institute of Certified Public Accountants, effective December 15, 2009) (stating that a deficiency in the design of the control environment exists where "a control necessary to meet the control objective is missing") available at http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00325.pdf

any person to be in a position to both perpetrate and conceal errors or fraud in the normal course of his or her duties.[167]

The segregation of duties can be achieved with the involvement of multiple parties by appointing multiple trustees, or a trustee and a trust protector as is the case under the D.C. Model, that either share the trustee authority or, ideally, hold separate aspects of the trustee authority. With multiple trustees, the trust could require multiple signatures on checks as a control to cash disbursements or use a trust protector for segregation of duties by requiring a trust protector's approval to dispose of certain significant trust assets like real property. Additionally, access to financial information could be shared between a trustee and one or more beneficiaries without including all similarly situated beneficiaries in these disclosures. Ideally, the additional parties would become involved in their respective duties for the first time at some point *prior to* the trust becoming irrevocable at the death or incapacity of the settlor.

Introducing the concept of segregation of duties is not meant to provide the magic bullet for prevention of all trustee malfeasance, but, rather, to provide an example of how the mandatory-disclosure requirements may fail to achieve an effective internal control in all circumstances. As a practical matter, certain trusts may have insufficient assets to justify the cost and effort of such a sophisticated control environment. There may be any number of more effective ways of preventing trustee malfeasance depending on the specific circumstances of the settlor. The greater point of this article is not to advocate for the D.C. Model or a similar segregation of duties based model, but to point out that settlors and practitioners should be given the ability to determine what controls are appropriate under their specific circumstances rather than requiring specific disclosures to

---

[167] AICPA, Statement on Auditing Standards No. 109, Understanding the Entity and Its Environment and Assessing the Risks of Material Misstatement, Professional Standards vol.1, AU section 314, Appendix B15 (American Institute of Certified Public Accountants, effective December 15, 2006) available at http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00314.pdf

all beneficiaries in all circumstances. In this author's opinion, the UTC disclosure provisions are still a good policy as default rules and, while the concept of segregation of duties could potentially be further implemented into the default rules, the disclosure provisions should not be mandatory.

V. NOTWITHSTANDING THE LEGITIMATE POLICY CONCERNS AT THE HEART OF THE MANDATORY DISCLOSURE PROVISIONS, THESE PROVISIONS ARE INCONSISTENT WITH AT LEAST ONE OF THE KEY OBJECTIVES OF TRUST LAW AND HAVE FAILED TO GAIN TRACTION AMONG ADOPTING JURISDICTIONS AND SO THE ONLY WAY NCCUSL CAN ACHIEVE ITS OBJECTIVE TO PROMOTE UNIFORM LAWS IS BY DELETING THE MANDATORY DISCLOSURE PROVISIONS CONSISTENT WITH THE POSITION OF THE MAJORITY OF UNIFORM TRUST CODE ADOPTING JURISDICTIONS.

A. Establishing the Proper Framework for Weighing Arguments for and against the Mandatory Disclosure Provisions of the Uniform Trust Code.

Before drawing a conclusion as to the competing policy concerns regarding the mandatory disclosure provisions of the UTC, it is important to establish the framework for analyzing these arguments. The question should not be whether disclosure is generally better than nondisclosure because the answer to this question merely determines what the default rules should be. All UTC-adopting states have adopted default disclosure rules in one form or another, indicating that they generally agree that disclosure provisions are appropriate. But in the case of a mandatory rule, which entirely removes non-disclosure as an option, particularly in the manner stated in UTC section 813(a), the real questions should be whether there are *any* legitimate arguments that would justify nondisclosure or *any* common circumstances where nondisclosure would be preferable. It takes only a single such valid argument or common circumstance to determine that the disclosure requirements are inappropriate as

mandatory provisions; and commentators and jurisdictions have raised several such arguments and circumstances.[168]

Such a standard may seem intentionally crafted to support the conclusion that the mandatory disclosure provisions of the UTC should be deleted, but considering the opposite view illustrates why this high standard should apply for mandatory provisions. If, hypothetically speaking, the arguments in favor of non-disclosure were found to be significantly stronger than the arguments for disclosure, then the drafting committee might consider eliminating the disclosure requirements from the default provisions. However, the committee would never consider using the strength of these arguments against disclosure to make nondisclosure mandatory. In order to justify such a position, nondisclosure would have to be the best policy in not just the majority of circumstances, but in substantially all circumstances. Simply finding that the arguments in favor of nondisclosure are stronger than the arguments in favor of disclosure would be appropriate for determining the proper default provisions, but would be wholly inadequate to justify drafting a mandatory provision.

B. The Mandatory Disclosure Provisions of the Uniform Trust Code Continue to Stand in the Way of Accomplishing the Statute's Primary Purpose of Promoting Uniformity.

The purpose of NCCUSL, as stated very plainly in its constitution, is "to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable." [169] However, notwithstanding NCCUSL's very purpose, uniform laws frequently are passed that have clearly placed a reform-based goal ahead of uniformity. The mandatory disclosure provisions of the UTC have been a failure because they fall squarely into the reform-based category.

NCCUSL is "organized as a private legislature with representatives from every state" that attempts to incorporate all

---

[168] *See supra* Part V.

[169] CONST. TO NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, art. I, § 1.2, *available at* http://www.uniformlaws.org/Narrative.aspx?title=constitution.

states' views into the process giving NCCUSL the necessary political legitimacy and credibility to promote passage of its proposals.[170] However, since it would be impracticable for such a large group to effectively draft uniform laws, responsibility for each law is delegated to a smaller group called the drafting committee.[171] The commissioners retain the ability to pass the uniform laws as drafted by each committee, but the "bifurcation of power affects the substance of NCCUSL proposals in a way that compromises NCCUSL's uniformity goal."[172]

It is by no means an easy task to attempt to strike the right balance between drafting a law that will likely achieve uniformity and that is "desirable and practicable" in the eyes of the drafting committee. Drafting committees have even been criticized for allowing practitioners to overpower the more reform-minded drafters.[173] There is often a tension between reform-minded drafters and uniformity-minded drafters and so uniform law drafting requires compromise. However, this same compromise that greases the wheels of a diverse drafting committee can sometimes result in "idiosyncratic provision[s]" that are unlikely to gain wide acceptance among the many jurisdictions.[174]

The comment to the mandatory provisions of UTC section 105 seems to support the assertion that the drafting committee was not entirely on board with these revisions as it states that these provisions "reflect a compromise position between opposing

---

[170] *Id.* § 2.2; Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 343 (2009).

[171] CONST. TO NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, art. I, § 5.2, *available at* http://www.uniformlaws.org/Narrative.aspx?title=constitution; Kobayashi & Ribstein, *supra* note 173, at 343.

[172] Kobayashi & Ribstein, *supra* note 173, at 343.

[173] Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B And 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69, 81-83 (1997) (asserting that consumer advocate voices are not generally heard in the drafting process of the UCC because of structural barriers, including a scarcity of resources for consumer protection agencies combined with the rotating schedule for drafting committee meetings, and the high level of specialization required to effectively advocate for consumer protection during the process).

[174] Kobayashi & Ribstein, *supra* note 173, at 352 (noting that the idiosyncratic provisions of the ULLCA, which are currently struggling to gain wide acceptance, were likely the result of compromises between reform-minded and uniform-minded drafters on the drafting committee).

viewpoints." Commentators have also noted the significant discussion regarding these provisions at the drafting level.[175] The UTC drafting committee "continues to believe that Sections 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations."[176]

In this case, it is highly questionable as to whether the language is a balance of competing policy considerations or even a compromise at all since the approach is on the extreme side in terms of favoring beneficiary rights over the settlor's intent and privacy. In fact, if the UTC were an actual UTC-adopting jurisdiction, its mandatory disclosure provisions would be arguably the most extreme in the union, with Florida being the only potential exception. It would appear that the reform-minded drafters won this battle entirely as it is difficult to imagine a more beneficiary-favorable provision than was initially drafted in the mandatory disclosure provisions of the UTC. However, with so few jurisdictions adopting these provisions, it is abundantly clear that the reform-minded drafters on the drafting committee have lost the proverbial war. As the mandatory disclosure provisions of the UTC are carried lifeless off the battlefield of more and more state legislatures, it is clear that NCCUSL should have involved a more uniformity-minded drafting committee and certainly should do so the next time the UTC is revised.

C. The Mandatory Disclosure Provisions of the Uniform Trust Code Must be Deleted or Revised if NCCUSL is to Accomplish its Purpose of Advocating for the Adoption of Uniform Laws Among the Several Jurisdictions.

Jurisdictions are generally willing to impose disclosure provisions where the trust fails to address disclosure, but jurisdictions have proven consistently unwilling to override trusts where such disclosures have been explicitly removed by the settlor. Given that the mandatory-disclosure provisions have failed to gain widespread acceptance, or really any acceptance for

---

[175] David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 201 (2002).

[176] *See* UNIF. TRUST CODE § 105 cmt. (amended 2010).

that matter, the drafting committee's ongoing advocacy for these provisions of UTC section 105 is directly contrary to NCCUSL's purpose of seeking uniformity among the various jurisdictions. But, apart from the argument that the provisions are defective merely because they have not gained widespread acceptance, a more important question is why these provisions have failed to achieve uniformity. There are many circumstances where the mandatory disclosure provisions of the UTC would inappropriately defeat the intent of the settlor, such as where an effective trust protector has been appointed. Regardless of whether they would be appropriate in the majority of situations, which is questionable considering the provisions are only effective to the extent the malfeasant is an effective control against its own malfeasance, these provisions should no longer be mandatory in UTC section 105. While the leading academics on this topic consistently favor mandatory-disclosure provisions, at some point the UTC drafting committee has to face the reality that legislators are simply not going to adopt these provisions and should revise the UTC accordingly.

In this author's opinion, given the deficiencies in the control environment and legislative disfavor of the current mandatory provisions, the only mandatory disclosure provision that would be proper in every circumstance is a provision in section 105 stating that the trust cannot supersede the trustee's disclosure requirements under the internal revenue code and, if applicable, any disclosure requirements under the state's tax code. This would merely clarify the law that already exists under the doctrine of preemption as to the federal code and clarify which law takes priority between any conflicting state tax law. Additionally, section 813 needs to be revised to soften the language in order to reflect that non-mandatory nature of the disclosure provisions. Also, in terms of the default provisions, a modification to section 813 to apply a relevance test to determining the extent to which the trustee should disclose the trust instrument to any particular beneficiary and allowing the trustee to limit disclosures of the trust document to only the sections of the trust that are relevant to the requesting beneficiary, as exists under the D.C. Model, would be an appropriate and well received revision to the default disclosure provsions.

Trustees or other fiduciaries are required under certain circumstances "to report the beneficiary's share of income, deductions, and credits from a trust or a decedent's estate" by filing a K-1 with its U.S. income tax return for Estates and Trusts.[177] This includes the requirement to "request and provide a proper identifying number for each recipient of income" and the fiduciary may be charged a penalty for failure to do so.[178] A mere clarifying provision in section 105(b) identifying the internal revenue code and state tax laws as exceptions where the terms of the trust do not prevail in determining the trustee's duties would provide proper guidance to trustees faced with these requirements.

A ready counter-argument to this approach is a stylistic argument that mentioning the tax code might cause confusion as to whether other federal laws or state that are not mentioned in the UTC carry similar pre-emptive weight. While this may be a legitimate concern from a drafting perspective generally, it should not outweigh the important goal of clarity in assisting the trustee to understand the minimum disclosure obligations. Tax laws are particularly important to the process of estate planning and there are several UTC provisions drafted specifically with tax laws in mind the most relevant of which is a provision which actually allows a court to modify the trust in order to "achieve the settlor's tax objectives.[179]" Given the poorly drafted state of the current mandatory provisions of the UTC as amended,[180] this minor potential inconsistency should not be rejected as a matter of drafting purity. Particularly in light of the fact that many trustees reading the statute may likely lack expertise in the disclosure requirements under tax law and federal preemption.

A secondary option for the drafting committee would be to adopt the D.C. Model of the mandatory disclosure provisions under section 105, which would then actually represent a compromise of competing policy issues. The D.C. Model is a better

---

[177] *See* 2012 Instructions for Form 1041 and Schedules A, B, G, J, and K-1, at 34, *available at* http://www.irs.gov/pub/irs-pdf/i1041.pdf.
[178] *Id.*
[179] UNIF. TRUST CODE § 416 (amended 2010).
[180] See discussion, infra Part I-C.

statute both in terms of its treatment of the control environment and in terms of acceptance among UTC adopting states. It introduces a third party non-malfeasant to protect against trustee malfeasance. Also, by adopting the Washington D.C. model, the UTC would at least be consistent with a small minority of jurisdictions as opposed to its current bracketed format, which is consistent with no jurisdiction at all. So, in terms of accomplishing the goal of uniformity and protecting against trustee malfeasance, the D.C. Model is a significant improvement over the current version of the UTC. That said, this author would support mandatory disclosure provisions that limit the settlor no more than the applicable law for tax disclosures in order to give the trustor the maximum flexibility to craft disclosure provisions in the manner the trustor deems appropriate, whether designed after the D.C. Model, the current UTC, or otherwise.

CONCLUSION

The mandatory-disclosure provisions of the UTC have been universally rejected by UTC-adopting jurisdictions. This encroachment on the settlor's ability to control the terms of the trust for disclosures fails to effectively prevent trustee malfeasance because it relies wholly on the malfeasant. Therefore, the drafting committee should delete the current mandatory disclosure provisions and either draft a very limited tax-based provision or, secondarily, adopt the D.C. Model for mandatory disclosures. Continuing with the current version, even in its bracketed form, is inconsistent with NCCUSL's very purpose of promoting uniformity among the several states through uniform laws that are desirable and practicable.