



2019 Federal Tax Institute of New England

Basics of the New Connecticut Uniform Trust Code

October 24, 2019
10:15 a.m. – 11:15 a.m.

Saint Clements Castle
Portland, CT

CT Bar Institute, Inc.

CT: 1.0 CLE Credits (General)
NY: 1.0 CLE Credits (AOP)

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Attorney Mary M. Ackerly (known as “Molly”) focuses her practice in the areas of estate and trust administration, estate planning, elder law, real estate and taxation. Molly was elected to the American College of Trust and Estate Counsel in 1995, and currently serves on the Elder Law and Digital Assets Committees. She is also a member of the American Bar Association and the Connecticut Bar Association, where she is a long-standing member of the Executive Committee of the Estates and Probate Section.

Molly earned her B.A. degree from Barnard College, *magna cum laude*, and her J.D. from Yale Law School. Molly has been a partner of the firm of Ackerly Brown since the firm was founded in 2001, having previously been associated with other Connecticut firms since her admission to the Connecticut Bar in 1977.

Molly has served as a Connecticut delegate to Uniform Law Commission since 2013; and was appointed as a Division Chair in 2017. She has served on numerous drafting committees, including the Uniform Trust Decanting Act, the Uniform Fiduciary Income and Principal Act (which updates the Uniform Principal and Income Act), the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, the 2017 revision of the Uniform Parentage Act, and the Electronic Wills Act.

Molly served as a Probate Judge for the district of Norfolk from 1987 through 1994. While acting as Probate Judge, she served on the Executive Committee of the Connecticut Probate Assembly and was the probate judge member of the Council on Probate Judicial Conduct from 1989 through 1994. She has served on the advisory Committee for the Probate Court Rules of Procedure since its inception. Molly also served on the Probate Advisory Committee of the Connecticut Law Revision Commission for many years.

Molly has served on the boards of numerous conservation and community organizations, including the Norfolk Library, the Norfolk Land Trust, and the Connecticut Chapter of The Nature Conservancy.



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John R. Ivimey is a Stockholder who began his career at Reid and Riege in 1991. He represents businesses and individuals in a wide range of estate planning and corporate matters, including drafting estate plans, settling estates, handling business succession matters, serving as trustee for clients and their families and representing individuals and fiduciaries in probate litigation. John is a frequent lecturer and writer on trust and estate matters.

In his relationships with his clients, John learns their goals and provides timely solutions to their problems.

John received his J.D., with high honors, from University of Connecticut School of Law, his M.A. (Humanities) from Wesleyan University and his B.A. from Colgate University. He is admitted to practice in the state of Connecticut.

John is a member of the Connecticut Bar Association and past Chair of the Estate and Probate Section. He is a Fellow of the American College of Trust and Estate Counsel and a member of the State Law Subcommittee. He also is a member of the Hartford Business and Estate Planning Counsel and the American Bar Association. John is the Treasurer of the Board of Directors for The Connection, Inc. and he is past President of Chester Rotary.

John has authored numerous publications including being Co-Author of the *Connecticut Bar Journal's* "Developments in Connecticut Estate and Probate Law" from 2007 to 2017.

John is AV® Preeminent™ Martindale-Hubbell Peer Review Rated. He is listed in *The Best Lawyers in America*® for Trusts and Estates (2018-2019) and in Connecticut *Super Lawyers*® for Estate & Probate (2006-2018).



Edward F. Krzanowski, Day Pitney LLP

Ed Krzanowski is an estate and trust lawyer in Day Pitney's Individual Clients Department and is resident in the West Hartford office. Ed advises clients as to all aspects of estate planning as well as estate and trust administration, with particular emphasis on sophisticated wealth preservation techniques, charitable giving, retirement benefits, executive compensation, and complex taxation. He has served as a guest speaker on estate planning and tax matters for the American Law Institute-American Bar Association (ALI-ABA), American Law Institute-Continuing Legal Education (ALI-CLE), the Connecticut Probate Assembly, the Federal Tax Institute of New England, the Estates and Probate Section of the Connecticut Bar Association, the Estates and Trusts Section of the

Hartford County Bar Association, the University of Connecticut Income Tax School Program, and the Institute for Paralegal Education. He also has written articles which have appeared in various periodicals and legal study guides. Ed authored, "When IRS Actuarial Tables Don't Apply in Valuing Interests," Estate Planning Journal, February 2005, as well as an article on the tax planning uses of intrafamily loans entitled, "Low Federal Interest Rates Are An Opportunity To Help Clients Shift Wealth From One Generation To Another With Little Or No Gift Tax Implications," Financial Planning magazine, May 1, 2002. Most recently, Ed updated a chapter on estate, gift, and generation-skipping transfer taxes, which treatise is entitled "Connecticut Continuing Legal Education: A Practical Guide to Estate Planning in Connecticut."

Prior to joining Day Pitney, Ed was employed as a tax consultant in the tax department of a Big Five national accounting firm. For several years, Ed taught estate planning as an adjunct professor at Western New England University School of Law. Ed is a Fellow of the American College of Trusts and Estates Counsel, and a member of both the Greater Hartford Estate and Business Planning Council of Hartford, Inc. and the Hartford Tax Discussion Group. He also is a current member of the respective estate and trust sections of the American Bar Association and the Connecticut Bar Association.



Kelley Galica Peck, JD, LLM

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Attorney Kelley Galica Peck focuses her practice in the areas of estate and trust planning and probate law. Kelley has significant experience working with individuals and families to plan for the management, protection, and transfer of wealth, including succession planning for owners of closely-held businesses. She handles planning for protection and preservation of assets, and estate, gift and income tax return preparation and review, complex charitable gift planning, estate planning for nontraditional families,. Kelley also represents individual and professional fiduciaries and beneficiaries in contested and uncontested probate courts.

Kelley is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and is AV® Preeminent™ Peer Review Rated in Martindale-Hubbell™ in the areas of Trusts and Estates, Asset Protection, Elder Law, Guardianship and Conservatorship, Probate, Taxation, and Nonprofit and Charitable Organizations (Martindale-Hubbell Peer Review Ratings is a trademark.. AV Preeminent is a certification mark of Reed Elsevier Properties, Inc.). Kelley also is recognized as a Notable Practitioner by Chambers and Partners in the inaugural issue of its *High Net Worth Guide* and was named among the *Best Lawyers in America* for Trusts and Estates since 2017, including as “Lawyer of the Year-2019” for Litigation in Trusts & Estates. She is the Chair of the Estates & Probate Section of the Connecticut Bar Association.

Kelley earned her Master of Laws (LL.M.) degree from Western New England University School of Law in Estate Planning and Elder Law, her Juris Doctorate (J.D.) degree, *summa cum laude*, from Western New England University School of Law, and her Bachelor of Science in Political Science (B.S.), *magna cum laude*, from Florida Southern College. Kelley is admitted to practice in Connecticut and before the US Tax Court. Kelley is the author of a number of books and articles related to estate and trust planning and administration and is a frequent lecturer on these topics. She also served as an adjunct professor of law at Western New England University School of Law in the Master of Laws (LLM) program.



Deborah J. Tedford is an attorney and principal in the Tedford Law Firm of Mystic, Connecticut. She graduated from Yale College *cum laude* in 1972 as a member of one of the first classes to include women, and from Boston University School of Law in 1976. She is also a qualified mediator, having completed 40 hours of formal training.

Deb was elected President of the Connecticut Bar Association, an organization of over 11,000 members, for the year 2002-2003, and previously served as Secretary and Vice President of that organization. She is the past chairman of the Connecticut Bar Association's Estates and Probate Section and also of its Elder Law Section. She was founding editor of the Estates and Probate Newsletter and is a past president of the Southeastern Connecticut Estate and Tax Planning Council. She has served as Chair of the Connecticut Bar Association's Pro Bono Committee and is currently the Chair of the CBA's annual Federal Tax Institute of New England. In that capacity, she organizes an annual educational program bringing in speakers from around the country to educate Connecticut practitioners in the trusts and estates and tax fields.

Deb was elected a fellow of the American College of Trust and Estate Counsel (ACTEC), a national organization of trust and estate attorneys, in 1992; was elected as a fellow of the Connecticut Bar Foundation in 1995; and a Fellow of the American Bar Foundation in 2012. She served three years as Chair of the Elder Law Committee of ACTEC and is a former Regent of the College. She is a member of ACTEC's Fiduciary Litigation Committee and has served on a number of other administrative committees including Long Range Planning, New Fellows and the ACTEC/NCPJ Task Force. She has been named one of the Top Twenty-Five Women Super Lawyers in Connecticut as well as one of state's top trusts and estates lawyers by the same organization, and is recognized by Best Lawyers.

As part of her years of service to the Bar and her profession, Deb co-chaired and was the principal author of the Connecticut Bar Association's Report of the Task Force on the Future of the Connecticut Probate System, published in May 2003. She has worked tirelessly with a number of colleagues on a Connecticut version of the Uniform Trust Code, without success to date, but with many interesting stories to tell. Deb has been asked to testify before Connecticut's Finance Committee on the effects of the estate tax laws in Connecticut, and has testified in favor of special needs trusts for the disabled. She recently served as ACTEC's observer to the Uniform Law Commission's re-writing of the national guardianship and conservatorship act, was on its undue influence and conservatorship sub-committee, and is now serving on the Uniform Law Commission Enactment Committee for the model act.

Deb is a frequent speaker at the state and national levels on topics related to the field of estate and trust law, including powers of attorney, special needs trusts, taxation, social security, and undue influence in probate matters, and has written several chapters in the book *Estate Planning for Modern Families* from the Stephen Leimberg Library.



CURRICULUM VITAE

SUZANNE BROWN WALSH

Suzanne Brown Walsh is a Partner at Murtha Cullina LLP, a large regional law firm with multiple offices in Connecticut and Massachusetts. She holds a Bachelor of Science Degree from Boston University and a Juris Doctor from Suffolk University Law School. Ms. Walsh specializes in estate and tax planning, planning and administering trusts and estates for individuals with special needs, trust modifications, trustee changes and estate and trust administration. Ms. Walsh is nationally known for her speaking and writing, including the Heckerling Institute on Estate Planning and numerous regional organizations throughout the country. She has been interviewed for On the Media, the PBS Newshour Weekend and Marketplace Money. Additionally, she has been quoted in the New York Times, Time Magazine, Bloomberg BNA's Electronic Commerce Law Report, The Chattanooga Times Free Press, The Kansas City Star and by NBC News, CBS News and Agence France-Presse. Ms. Walsh has also taught Estate Planning and Taxation at the University of Connecticut Law School.

Ms. Walsh has 31 years of experience practicing law, receiving her initial training in probate, trust, estate planning and tax law at Taylor, Ganson & Perrin in Boston, Massachusetts. After four years of practicing in Boston, she relocated to Connecticut and joined Copp & Berall, LLP in Hartford, expanding her practice to include elder law and estate planning for clients with disabilities and special needs. Most recently, Ms. Walsh was a Principal of Cummings & Lockwood, another large regional law firm.

Ms. Walsh has chaired two of the largest sections of the Connecticut Bar Association: the nearly 1,000-member Estates and Probate Section and the Elder Law Section, having served as its legislative liaison for five years. She remains a member of both Sections' Executive Committees. In addition, she co-chairs the Uniform Laws Subcommittee of the Estates and Probate Section. During Ms. Walsh's tenure, the Uniform Laws Subcommittee has overseen the study or enactment of numerous probate statutes, including the Uniform Trust Code, Uniform Transfers to Minors Act, the Uniform Testamentary Additions to Trusts Act, the Uniform Prudent Investor Act and the revised Uniform Principal and Income Act and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

Since 2005, Ms. Walsh has served as one of Connecticut's Commissioners on Uniform Laws. As such, she represents Connecticut as a member of the Uniform Law Commission, a national organization which promotes statutory uniformity. She chairs the ULC's Drafting Committee on Electronic Wills and chaired the ULC's Drafting Committee on the Revised Uniform Fiduciary Access to Digital Assets Act. Ms. Walsh currently is a member of the Regulation of Virtual Currency Businesses and Directed Trust Act Drafting Committees. She has served on the ULC's Scope and Program Committee and Drafting Committees for the Uniform Adult Guardianship and Protective Proceedings Jurisdiction, Uniform Insurable Interests in Trusts, Uniform Premarital and Marital Agreements, Uniform Powers of Appointment and Trust Decanting Acts. In addition, Ms. Walsh chaired the drafting committee on Amendments to the Uniform Principal and Income Act (2008), as well as a study committee on Mental Health Advance Directives.

Ms. Walsh is a fellow of the American College of Trust and Estate Counsel (ACTEC) and chairs its Digital Property Task Force. She is listed in The Best Lawyers in America in the area of Trusts and Estates Law. In 2007, Ms. Walsh was recognized in Connecticut Magazine as one of Connecticut's Top 25 Women Super Lawyers, was named by Law & Politics magazine as one of New England's Top 50 Women Super Lawyers and has been recognized as a Connecticut Super Lawyer annually since 2007. In 2010, Ms. Walsh was named by Hartford Magazine as one of Hartford's "Best and Brightest" estate planning lawyers, the only woman included among the eight-attorney list.

Ms. Walsh has written on UFADAA for numerous national publications and on the Uniform Trust Code for Estate Planning, The Practical Tax Lawyer, and Connecticut Lawyer magazine.

Federal Tax Institute of New England 2019

October 24, 2019

Agenda

8:00 a.m. – 9:00 a.m.

Registration

Prince Edward Grand Foyer

Breakfast

Bridal Foyer

9:00 a.m. – 9:05 a.m.

Introduction and Brief Background on Major Connecticut Law Changes

Waterford Room

9:05 a.m. – 10:05 a.m.

Opening Plenary Session

Waterford Room

Current Developments and Planning Ideas We Find Fun and Interesting

Turney P. Berry, Wyatt Tarrant & Combs LLP, Louisville, KY

Charles A. Redd, Stinson LLP, St. Louis, MO

Attorneys Berry and Redd will review the most interesting recent developments of general interest to estate planners, covering not only wealth transfer taxation but also various state cases and trends that make our planning easier and more challenging. They will take notice of Connecticut's adoption of the Uniform Trust Code and will discuss how the UTC can be used to implement modern estate planning efforts, including some specific pointers regarding changes made from the uniform act by the Connecticut legislature.

10:05 a.m. – 10:15 a.m.

Break

10:15 a.m. – 11:15 a.m.

Concurrent Session 1

A. Basics of the New Connecticut Uniform Trust Code

Waterford Room

Mary M. Ackerly, Ackerly Brown LLP, Bantam

John R. Ivimey, Reid and Riege PC, Hartford

Edward F. Krzanowski, Day Pitney LLP, West Hartford

Kelley G. Peck, Cummings & Lockwood LLC, West Hartford

Deborah J. Tedford, Tedford Law Firm PC, Mystic

Suzanne Brown Walsh, Murtha Cullina LLP, Hartford

B. Tax Issues Affecting Start-up Ventures and Early-stage Companies

Prince Edward Ballroom A

Clifford R. Ennico, Law Offices of Clifford R. Ennico, Fairfield

Representing a tech start-up or other early-stage business requires a special set of skills for practicing attorneys. Issues cannot always be “pigeonholed” into

specialized areas of practice, and counsel is often required to be a “utility infielder” with competence in a number of areas of law including taxation. In this fast-paced, entertaining presentation, business lawyer Cliff Ennico will cover some of the tax issues affecting Connecticut-based start-ups, including Section 199A (the 20 percent small business deduction), the rise of “economic nexus” in New York and other states, compensating “sweat equity” business owners in corporations and LLCs, overseas partners/investors in an LLC or other “pass through” entity, and tax treatment of stock in a failed startup.

C. Everyday Bias, Everyday Solutions: Advancing Diversity, Equity, and Inclusion in Your World

Prince Edward Ballroom B/C

Karen DeMeola, University of Connecticut School of Law, Hartford

Cecil J. Thomas, Vice President, Connecticut Bar Association; Greater Hartford Legal Aid, Hartford

Biases affect our daily interactions, often so seamlessly that we may not even recognize when they manifest. This session will give you the tools to advance diversity, equity, and inclusion in the world immediately around you: your professional dealings with clients and colleagues, your conversations, your workplace systems and policies. In an interactive presentation, you will consider the implications of systemic and personal bias, study some of its routine manifestations, and learn how to disrupt bias toward more equitable and inclusive outcomes.

11:15 a.m. – 11:25 a.m. Break

11:25 a.m. – 12:25 p.m. Concurrent Session 2

A. Tax Considerations in Trust Terminations, Modifications, and Decanting under Connecticut’s New Uniform Trust Code

Prince Edward Ballroom A

Ronald D. Aucutt, Bessemer Trust, Naples, FL

This presentation will discuss the federal tax issues to be aware of when terminating or modifying a trust under Connecticut’s new Uniform Trust Code, or decanting a trust under Connecticut’s Uniform Trust Code (or taking similar actions under similar statutes of other states). It will review some of the history of the IRS’s view of those issues reflected in regulations and rulings, including letter rulings in which the speaker was directly or indirectly involved. Against that background, the presentation will include predictions of where both formal IRS guidance and informal IRS reactions may go in the future.

B. Qualified Small Business Stock

Prince Edward Ballroom B/C

Daniel L. Gottfried, Day Pitney LLP, Hartford

Michael P. Spiro, Finn Dixon & Herling LLP, Stamford

This session will discuss the tax benefits available for qualified small business stock and will focus on the requirements, gain exclusion and rollover, and planning opportunities and traps for the unwary.

12:25 p.m. – 12:45 p.m. Break

12:45 p.m. – 1:35 p.m. Lunch and Award Session
Waterford Room

1:35 p.m. – 2:35 p.m. Afternoon Plenary Session
Waterford Room

Recent Developments in Asset Protection

Gideon Rothschild, Moses & Singer LLP, New York, NY

Asset protection trusts will arrive in Connecticut effective January 1, 2020. This presentation will review the legislation and planning with such trusts and other strategies for asset protection.

2:35 p.m. – 2:45 p.m. Break

2:45 p.m. – 3:45 p.m. Concurrent Session 3

A. Connecticut Directed Trusts

Waterford Room

Christiana N. Gianopulos, Day Pitney LLP, West Hartford

The Connecticut Uniform Trust Code includes the new Connecticut Uniform Directed Trust Act. This presentation will review the Directed Trust Act and the options and opportunities it presents. The presentation will also address planning and drafting considerations for practitioners advising clients on the use of Connecticut directed trusts.

B. Real Estate Tax Planning

Prince Edward Ballroom B/C

Stephen A. Baxley, Bessemer Trust, New York, NY

This presentation will cover topics in real estate tax planning, including itemized deductions, exclusion of gain on sale of principal residence, like-kind exchanges, rental property, passive activity losses, 199A – QBI deduction, qualified opportunity funds, and REITs.

C. *Kaestner Trust* Decision: The Significance for State Income Taxation of Trusts

Prince Edward Ballroom A

Beth Brunalli, Davidson Dawson & Clark LLP, New Canaan

On June 21, 2019, in an unanimous decision, the United States Supreme Court held that the taxation of undistributed income from a trust by North Carolina,

based solely on the basis of the beneficiaries' residence in the state, violated the Due Process Clause of the Fourteenth Amendment. The opinion, although narrow, is highly significant in being the Supreme Court's first attempt in many decades to address the increasingly important issue of state taxation of trust income. This program will provide an overview of the facts in *Kaestner Trust*, analyze the Supreme Court's decision, and discuss the implications of the decision for state income taxation of trusts.

3:45 p.m. – 3:55 p.m.

Break

3:55 p.m. – 4:55 p.m.

Closing Plenary Session

Waterford Room

Drafting Trusts under the New Connecticut Uniform Trust Code

Mary M. Ackerly, Ackerly Brown LLP, Bantam

John R. Ivimey, Reid and Riege PC, Hartford

Kelley G. Peck, Cummings & Lockwood LLC, West Hartford

Deborah J. Tedford, Tedford Law Firm PC, Mystic

Suzanne Brown Walsh, Murtha Cullina LLP, Hartford

4:55 p.m. – 5:00 p.m.

Raffle Drawing; Closing Remarks

Waterford Room

Basics of The New Connecticut Uniform Trust Code

CBA Federal Tax Institute of New England

October 24, 2019

Presented by:

Mary M. Ackerly

John R. Ivimey

Edward F. Krzanowski

Kelley G. Peck

Deborah J. Tedford

Suzanne B. Walsh

Public Act 19-137

- Contains four distinct acts: the Uniform Trust Code “UTC”, expanded RAP, Uniform Directed Trust Act and a Domestic Asset Protection Trust “DAPT” Act
- Does **not** include Uniform Prudent Investor Act, Uniform Principal and Income Act, Trust Decanting Act or Arbitration Provisions

Overview/Scope

- Venue and Jurisdiction (Sections 13-16)
- Virtual and Actual Representation (Sections 17-21) and nonjudicial settlement agreements (Section 11)
- Trust creation (Section 22, UTC 401)
- Court-approved modification or termination of an irrevocable trust (Sections 31 and 32, UTC 410- 412)
- The rights of creditors to reach the beneficiary's interest (Section 40,UTC 501)
- Revocable trusts (Section 41, UTC 602)

Overview/Scope

- Power of the court to remove the trustee (Section 49; UTC 706)
- Duty to keep the beneficiaries informed and the ability of settlor to waive information requirements (Sections 5 and 63, UTC 105 and 813).
- The duties and powers of the trustee (Sections 53-67)
- Trustee liability and relationships with third parties (Sections 68-78, UTC 1001-1012)

Definitions

Section 3

- While the “terms of the trust” is a defined term in the pure UTC, it was intentionally omitted from the CUTC.
- That leads to the anomaly of “terms of the trust” appearing many times in the act, without definition.
- “Trust” is not defined in the CUTC or UTC, but “trust instrument” is defined in Sec. 3(30). In the case of a charitable trust, it means *any written instrument* by which property is dedicated for a charitable purpose described in Section 26.

Mandatory Rules

- CUTC is a default statute, except for the mandatory rules listed in Section 5(b).
- **The mandatory notice rules are in Section 5(b)(7)-(8)**
- Most mandatory rules have not been controversial:
 - Requirements for trust creation (Sec. 22)
 - Duty of trustee to act in good faith and in accordance with trust terms, purpose (Sec. 53, UTC 801)
 - Requirement that trust purpose be lawful (Sec. 25)

Mandatory Rules

- Power of court to modify or terminate trust (Sec. 31-37)
- Power of court to modify or dispense with bond (Sec. 45)
- Power of court to adjust trust provision that specifies unreasonably low or high trustee compensation (Sec. 51)

State Overrides



- Sec. 2(d) prevents any CUTC provision from diminishing the state's collection rights against a self-settled, payback type of Special Needs Trust.
- Probate court supervision of testamentary trusts is preserved throughout the CUTC.
- AGO involvement with charitable trusts is likewise maintained throughout the CUTC.

Applicability

General Rule: Act applies to all trusts, whenever created, and to all lawsuits, whenever initiated. Sec. 109(a)(1).

- All background law and equitable principles continue to apply. Sec. 6.



Exceptions to Applicability

- No application to charitable trusts unless the Act says so. Sec. 2(b).
- No application to statutory business trusts under Ch. 615 (C.G.S. Sec. 34-500, et seq.). Sec. 2 (c).



Exceptions to Applicability

Exceptions to applicability, continued:

- No application to pending lawsuits if court finds it would substantially interfere with the suit or prejudice parties. Sec. 109(a)(3).
- New presumption of revocability is prospective. Sec. 41.
- No application of a rule of construction or presumption to existing trusts if there is a “clear indication of a contrary intent in the terms of the trust.” Sec. 109(a)(4).
- If an existing time period applied to grant, extinguish or bar a right before 1/1/20, that statutory time period applies and it is not extended by the Act. Sec. 109(b).

Situation 3 of Revenue Ruling 2004-64

- * No Taxable Gift If Grantor Pays Income Tax Attributable To Income Earned Inside An Irrevocable Grantor Trust
- * No Estate Tax Inclusion In Grantor's Gross Taxable Estate Solely Due To The Use Of A Fully Discretionary Grantor Trust Income Tax Reimbursement Provision If:
 - * No express or implied understanding between grantor and trustee regarding the trustee's exercise of discretion;
 - * Grantor's removal and appointment power is limited to independent successor trustees not related or subordinate to Grantor;
 - * Grantor trust reimbursement provision does not create "creditor access" under state law as self-settled spendthrift trust; and
 - * No "other facts".

Section 58 of the CUTC

- * Sec. 58. (NEW) (*Effective January 1, 2020*) The settlor of an irrevocable trust shall not be deemed to have a beneficial interest in such trust merely because the trustee is authorized under the trust instrument or any other provision of law to (1) pay or reimburse the settlor for any tax on trust income or trust principal that is payable by the settlor under the law imposing such tax; or (2) pay any such tax directly to the taxing authorities. No creditor of the settlor of an irrevocable trust shall be entitled to reach any trust property based on the discretionary powers described in this section.

DOES A GRANTOR TRUST TAX REIMBURSEMENT CLAUSE TRIGGER BANKRUPTCY CODE 11 USC 548(e) AND THUS CONSTITUTE AN “OTHER FACT” IN VIOLATION OF REVENUE RULING 2004-64?

- * Section 548(e) Enacted In 2005 To Counter-Act Domestic Asset Protection Trust Planning Under State Law
- * Ten Year Look-Back If:
 - * such transfer was made to a self-settled trust or similar device
 - * such transfer was by the debtor
 - * the debtor is a beneficiary of such trust or similar device and
 - * the debtor made such transfer with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted

Notice to Beneficiaries When?

- Creation of irrevocable trust – Sec. 63(b)(3)
- Acceptance of trusteeship – Sec. 63(b)(2)
- Trustee's annual report – Sec. 63(c)
- Transfer of principal place of administration – Sec. 8
- Termination of non-charitable inter vivos trust under \$200,000 – Sec. 35
- Division or combination of a trust – Sec. 38
- Resignation of a trustee – Sec. 48

Notice to Beneficiaries

- How to send notice (Sec. 9)
 - “...in a manner reasonably suitable under the circumstances and likely to result in receipt”
 - Email is permissible, if the recipient consents in advance
 - Per the applicable court rules, in a judicial proceeding
- * To whom to send notice (Sec. 10)
 - Qualified beneficiaries – the default rule
 - Other beneficiaries who request it
 - Designated representative (Sec. 21)

Notice to Beneficiaries, Charitable trusts

- A charity is treated as a qualified beneficiary if it:
 - Is a distributee or permissible distributee
 - Would be a distributee upon termination of current interests
 - Would be a distributee if the trust terminated
- BUT NOT if the charity's rights are subject to:
 - A power of appointment
 - Removal
 - Any other power of termination
- Attorney General is treated as “qualified beneficiary” of a charitable trust

Duty to Inform and Report

Section 63

The trustee must:

- “Keep the qualified beneficiaries reasonably informed...”
- Provide a copy of the relevant portions of the Trust instrument, upon request.
- Notify within 60 days of:
 - Acceptance of Trusteeship
 - Creation of (or conversion to) Irrevocable Trust
 - Existence of trust and identity of settlor
 - Right to annual reports and copy of Trust instrument

Duty to Inform and Report

Section 63

- Per Section 5, Trust instrument can't waive:
 - Duty to notify qualified beneficiaries (over age 25) of existence of irrevocable trust, identity of trustee, right to trustee's report
 - Duty to respond to beneficiary's request for information reasonably related to the administration of the Trust
 - Duty to respond to request of a qualified beneficiary for a trustee's report
- Rules that can be waived:
 - Duty to keep beneficiaries reasonably informed about the administration of the trust
 - Duty to provide beneficiary with a copy of relevant portions of the Trust instrument
 - Duty to provide annual Trustee reports

Other Trustee Duties and Powers

- Duty of Administration (Sec. 53) – act in good faith, consistent with terms of trust, settlor’s intent, beneficiaries’ interest
- Duty of Loyalty (Sec. 54) – watch out for conflicts!
- Duty of Impartiality (Sec. 55) – act equitably toward all beneficiaries
- Prudent Administration (Sec. 56) – administer the trust prudently; cf CGS 45a-541b
- Delegation by Trustee (Sec. 57) – cf CGS 45a-541i
- Control and Protection of Trust Property (Sec. 59) – take reasonable steps
- Recordkeeping and Identification of Trust Property (Sec. 60) – keep trust property separate, and designate as trust property
- Enforcement and Defense of Claims (Sec. 61) – take reasonable steps
- Collecting Trust Property (Sec. 62) – take reasonable steps to compel and redress breach
- Discretionary Powers (Sec. 64) – exercise in good faith

Fiduciary Powers

- Current Law

Must state powers explicitly or incorporate Fiduciary Powers Act C.G.S. Sect. 45a-233 *et seq.* by reference

- Section 65

Trustee may exercise:

- All powers conferred by the Trust instrument
- Any other powers to achieve proper investment, management, and distribution
- AND all powers conferred by the Act

- Section 66

- Specific powers given to Trustee without requirement of any reference in the Trust instrument.

Damages and Remedies

- Violation of Duty = Breach – Sec. 68
 - Existing law governs what damages may be imposed
- In absence of breach, no liability from loss or depreciation (or failure to make a profit) – Sec. 69(b)
- BUT Trustee is accountable to beneficiary for profit made by the trustee personally

Trustees' Protection from Liability

- Statute of Limitations (Sec. 70)
 - One year from sending annual report
 - Three years, generally
- Reliance on Trust Instrument (Sec. 71)
 - If the breach resulted from reasonable reliance
- Ignorance of an Event (Sec. 72)
 - If Trustee exercised reasonable care to ascertain if event occurred
- Exculpation by terms of trust (Sec. 73)
 - Not if bad faith or reckless indifference
 - Not if abuse of fiduciary/confidential relationship
 - Not if inserted by trustee, unless adequately disclosed

Protection of Trustee by Acquiescence of Beneficiary

- Proposal for Distribution on Termination – full or partial (Sec. 67)
 - Beneficiaries can't object after 30 days if sent the proposed distribution and notified of the right to object and the deadline for objecting
- Consent, Release, or Ratification (Sec. 74)
 - Trustee protected from liability for breach if beneficiary consented, ratified or released trustee
 - Except if improperly induced by trustee or if beneficiary ignorant of material facts or beneficiary's rights

Third Parties Dealing with Trustee

- Limitation on Personal Liability of Trustee (Sec. 75)
 - Trustee is generally protected from personal liability unless personally at fault
- Interest as General Partner (Sec. 76)
 - Negates personal liability re contracts and torts of partnership, if status as trustee is disclosed, UNLESS trustee or family member holds a personal interest in partnership
- Protection of Third Party (Sec. 77)
 - If acts in good faith and without knowledge that trustee is acting improperly or exceeding authority
 - No duty to inquire

Certification of Trust

Section 78

- Trustee can provide certification to any person other than a beneficiary or the Attorney General, in lieu of a copy of the entire Trust instrument.
- Must include:
 - Existence of the trust and date of trust instrument
 - Identity of Settlor; Identity and address of current Trustee(s)
 - Powers of the Trustee (attach an excerpt?)
 - Revocable vs. irrevocable, and who may revoke
 - Authority of co-trustees to sign, etc., and whether all must exercise powers
 - EIN
 - Manner of taking title
- Must be signed by a Trustee and state that the Trust instrument has not been revoked/modified/amended in a manner that would make the representations incorrect.

Other Trustee Duties and Powers

- Duty of Administration (Sec. 53) – act in good faith, consistent with terms of trust, settlor’s intent, beneficiaries’ interest
- Duty of Loyalty (Sec. 54) – watch out for conflicts!
- Duty of Impartiality (Sec. 55) – act equitably toward all beneficiaries
- Prudent Administration (Sec. 56) – administer the trust prudently; cf CGS 45a-541b
- Delegation by Trustee (Sec. 57) – cf CGS 45a-541i
- Control and Protection of Trust Property (Sec. 59) – take reasonable steps
- Recordkeeping and Identification of Trust Property (Sec. 60) – keep trust property separate, and designate as trust property
- Enforcement and Defense of Claims (Sec. 61) – take reasonable steps
- Collecting Trust Property (Sec. 62) – take reasonable steps to compel and redress breach
- Discretionary Powers (Sec. 64) – exercise in good faith

Fiduciary Powers

- Current Law
 - Must state powers explicitly
 - Fiduciary Powers Act C.G.S. Sect. 45a-233 *et seq.* – incorporation by reference
- Section 65
 - Trustee may exercise:
 - All powers conferred by the Trust instrument
 - Any other powers to achieve proper investment, management, and distribution
 - AND all powers conferred by the Act

Fiduciary Powers

- Section 66
 - Specific powers given to Trustee without requirement of any reference in the Trust instrument.
 - Not the same as Fiduciary Powers Act
 - Practitioners should compare to their own “long form” powers to address any inconsistencies.

Damages and Remedies

- Violation of Duty = Breach (Sec. 68)
 - Existing law governs what damages may be imposed
- In absence of breach,
 - No liability from loss or depreciation (or failure to make a profit) – Sec. 69(b)
- BUT
 - Trustee is accountable to beneficiary for profit made by the trustee personally

Trustees' Protection from Liability

- Statute of Limitations (Sec. 70)
 - One year from sending annual report
 - Three years, generally
- Reliance on Trust Instrument (Sec. 71)
 - To the extent that the breach resulted from reasonable reliance
- Ignorance of an Event (Sec. 72)
 - If the Trustee has exercised reasonable care to ascertain whether it happened

Exculpation

- Exculpation by terms of trust (Sec. 73)
 - Exculpatory term is unenforceable if:
 - It purports to relieve trustee from acting in bad faith or with reckless indifference
 - It was inserted as the result of abuse of fiduciary/confidential relationship
 - Exculpatory term inserted by the trustee is abuse, unless trustee proves it is fair and was adequately communicated to settlor.

Protection of Trustee by Acquiescence of Beneficiary

- Proposal for Distribution on Termination – full or partial (Sec. 67)
 - Beneficiaries foreclosed from objecting after 30 days if sent:
 - The proposed distribution
 - The right to object
 - The time allowed to object

Protection of Trustee by Acquiescence of Beneficiary

- Consent, Release, or Ratification (Sec. 74)
 - Trustee avoids liability if beneficiary
 - consented to a breach,
 - ratified the breach, or
 - released the trustee,
 - Unless
 - Induced by improper conduct by the trustee, or
 - The beneficiary did not know of beneficiary's rights or material facts

Third Parties Dealing with Trustee

- Limitation on Personal Liability of Trustee (Sec. 75)
 - Negates personal liability on contracts entered into as trustee
 - Relieves trustee from liability for torts, unless personally at fault
- Interest as General Partner (Sec. 76)
 - Negates personal liability re contracts and torts of partnership, if status as trustee is disclosed
 - UNLESS trustee or family member holds a personal interest in partnership

Third Parties Dealing with Trustee

Someone, other than a beneficiary, who assists a trustee or deals with a trustee is protected from liability if (Sec. 77):

- Acts in good faith and
- Without knowledge that the trustee is exceeding or improperly exercising a power or authority

No obligation to inquire into the extent of trustee's powers

Applies to dealings with former trustee, if no knowledge that trusteeship has terminated

Certification of Trust

Section 78

- Trustee can provide certification to any person other than a beneficiary or the Attorney General, in lieu of a copy of the entire Trust instrument.
- Must include:
 - Existence of the trust and date of trust instrument
 - Identity of Settlor; Identity and address of current Trustee(s)
 - Powers of the Trustee (attach an excerpt?)
 - Revocable vs. irrevocable, and who may revoke
 - Authority of co-trustees to sign, etc., and whether all must exercise powers
 - EIN
 - Manner of taking title
- Must be signed by a Trustee and state that the Trust instrument has not been revoked/modified/amended in a manner that would make the representations incorrect.

CT UTC expands grounds for modification or termination of trusts

- Proceedings may be brought by either a trustee or beneficiary
- Trustee is a necessary party
- For charitable trusts, modification or termination is limited to those trusts instruments that explicitly grant the settlor or the settlor's designee the right to do so
- For non-charitable trusts, the grounds for modification or termination have been greatly expanded

Five Paths for Modifying Trusts

- Changed Circumstances - to further the purpose of the trust
- Consent of All or Almost All Beneficiaries - consistent with a material purpose of the trust – We have a new, better idea
- It Seemed Like a Good Idea at the Time - Consent of Settlor, All Beneficiaries - even if INCONSISTENT with material purpose
- Correct Mistakes - both in expression, or in the inducement
- Tax Purposes - broad standard, if not contrary to settlor's intent

Changed Circumstances- § 32

“Who Knew?”

Applies to modification of both old and new trusts, both testamentary or inter vivos trusts, if court finds:

- Circumstances not anticipated by the Settlor
- Proposed changes will further the purposes of the trust
- Proposed changes must be in accordance with the Settlor’s probable intentions
- Consent of all beneficiaries is NOT required; a court can override beneficiary objection if appropriate

Permissible Modifications

- Administrative changes - especially if continuation of existing provisions would be “impractical, wasteful or impair the trust’s administration”
- Substantive changes - discretionary to “further the purpose of the trust”
- Spendthrift provisions are not automatically a material purpose unless Settlor explicitly provides
- First party special needs trusts - limited modifications

“Making It Better” - Modification by Almost All Beneficiaries §31(b)

- New ground for modification of new or existing trusts, even without changed circumstances, if parties have a better idea **and**
 - All beneficiaries consent, or
 - Almost all, if court finds any non-consenting beneficiaries are sufficiently protected, and if they had consented, the trust could have been so modified, and
 - Court finds proposed modification is **not inconsistent with a material purpose** of the trust
 - Spendthrift provision is not automatically a material purpose

“It Seemed Like a Good Idea at the Time” Consent of Settlor and Beneficiaries

Section 31(a) Requires court approval, applies only to new inter vivos trusts

- Changed circumstances are not necessary
- Modification (or termination) **may be CONTRARY to a material purpose** of the trust
- Settlor must still be living and consent; if incapable, conservator (with approval of probate court) or agent (if poa or trust permits agent to so act) may give consent
- Role of court is limited to finding unanimous consent

“Oops” - Modification or Reformation to Correct Mistakes, §36

- Applies to both pre and post CT UTC trusts, inter vivos or testamentary
- Petitioner must prove Settlor’s original intention by clear and convincing evidence
- Mistake can be scrivener’s error (mistake in expression) or Settlor’s mistake of fact or law (mistake in inducement)

Modification of Trusts for Tax Objectives, § 37

- A trustee or beneficiary can petition a court to modify a trust to achieve the settlor's tax objectives
- Modification must be “not contrary to the settlor's probable intent”
- Court order may be retroactive, but may not necessarily bind the IRS or DRS
- Applies to both testamentary and inter vivos trusts
- No longer limited to reforming marital deduction, creating a QDOT Trust, or reforming a charitable remainder trust

Trust Termination

- Many of the same provisions apply to trust termination as trust modification
 - Changed circumstances - Sec. 32(a)
 - Consent of all or almost all of the beneficiaries - Sec. 31 (b)
 - Consent of living Settlor (or legal representative) and all of the beneficiaries, even if inconsistent with material purpose - new trusts only - Sec. 31(a) (It seemed like a good idea at the time trusts)

Additional Methods for Termination

- There are two additional methods for terminating a trust that are not available for modification
 - A trust of any value that nonetheless is insufficient to justify the costs of administration relative to its material purposes - in the alternative, a court may also consider changing the trustee - Sec. 35 (b)
 - Nonjudicial (inter vivos trusts) termination is also available for trusts under \$200,000, requirement is 30 days notice to qualified beneficiaries by the trustee - Sec. 35(c); coordinate with Sec. 67(a) permitting trustee to send a proposal of the distribution to the qualified beneficiaries

Distribution in the event of termination

Standards for distribution of a terminating trust:

- If termination is by a court, then distribution is as directed by the court after considering the material purposes of the trust, Sec. 35
- If termination is by a court based on consent of the settlor and all beneficiaries, distribution can be in any manner, for any purpose, even if inconsistent with the material purposes
- For nonjudicial termination of inter vivos trusts under \$200,000, distribution must be consistent with trust purposes

Special Needs Trusts

- There are special provisions in the CT UTC for first party special needs trusts. Note - these provisions do not apply to third party supplemental or other fully discretionary trusts
 - Modification of SNTs is limited to modifications that are necessary to meet federal law requirements for SNTs, or
 - Modification of the ultimate remaindermen (after repayment to the state or states that provided medical or in the case of CT, other reimbursable assistance
 - Termination IS NOT PERMITTED other than by death

Nonjudicial Settlements – 8 Options

- Trust termination (inter vivos) for trusts under \$200,000, Sec. 35(a)
- Determination of the interpretation or construction of the terms of the trust, Sec. 11 (d)(1)
- Approval of a trustee's report or accounting, Sec. 11 (d)(2)
- Consent to directions to a trustee granting or refraining from performing a particular act, or granting additional power(s), Sec. 11 (d)(3)

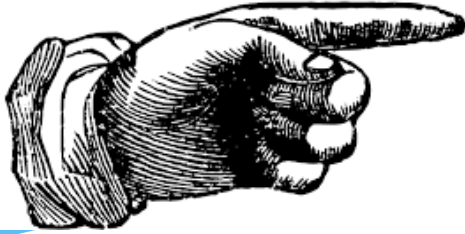
More nonjudicial settlements

- For inter vivos trusts, trustee matters such as resignation, appointment of successor, determination of a trustee's compensation, Sec. 11 (d)(4)
- Transfer of an inter vivos trust's principal place of administration to a new location, state or country (except for charitable trusts), Sec. 11 (d)(5)
- Determining the liability of the trustee of an inter vivos trust for a particular action, Sec. 11 (d)(6)
- Combining or dividing trusts, Sec. 38

Court Intervention in Nonjudicial Settlements

- A nonjudicial settlement can become a judicial settlement under the following circumstances:
 - An interested party may petition a court to approve a nonjudicial settlement agreement based on whether or not virtual representation was adequate
 - An interested party may petition a court to approve a nonjudicial settlement agreement to determine if the terms and conditions could have been properly approved by a court. Sec. 11 (f)

Please Notice This



Merger-the Sixth Way

- A trustee may, without the consent of a court, combine two or more inter vivos trusts after 30 days' notice to all qualified beneficiaries. Sec.38
 - The settlors of the combining trusts need not be the same - the trusts may be created by different family members or other individuals
 - The terms of the combining trusts need not be identical - only that “the result does not impair rights of a beneficiary or adversely affect achievement of the purpose of the trust”

More features of trust merger

- The required notice is thirty days
- Notice is only required to qualified beneficiaries, not to contingent or more remote beneficiaries
- Beneficiary approval is not necessary
- Court approval is not necessary; if a trustee or beneficiary wishes, court approval may be sought under Sec. 30
- This is an alternative to decanting; it is a default provision and can be restricted by drafting, but brings additional flexibility

Designated Notice Representative §21

- There is a new creature in the Connecticut trust law field – a designated notice representative – whose identity and function will likely evolve and be clarified over time
- It was modeled after a similar provision in the Florida UTC and inserted into our UTC to help with enactment. Caveat: this is relatively uncharted territory and there are risks and benefits
- The designated notice rep may be appropriate for those between the ages of 18 and 25 to avoid the negative effects of too much money at a sensitive time
- The designated notice rep may be appropriate for those with serious substance abuse or mental illness problems who might otherwise create disruption or worse for the orderly function of the trust and beneficiaries

Some cautions

- The designated notice rep is likely a fiduciary – the rep must act “in good faith” to avoid liability
- There is a potential of real liability for this position
- Good document drafting should provide guidance and standards for the notice rep until case law or statutes develop the law
- Without standards or good practice, the designated notice rep may lead to a claim that a beneficiary was deprived of his or her property interest without due process of law

Section 7

Governing Law

- Designation in trust controls unless contrary to public policy
- If none, law of state with most significant relationship controls

Section 8

Principal Place of Administration

- Designation in trust controls if:
 - Trustee's principal place of business or residence;
 - Trust Director's principal place of business or residence; or
 - Administration occurs in designated jurisdiction
- If none, factors include location of:
 - Trustee (individual trustee)
 - Trust officer (corporate trustee)
 - Trust assets
 - Records

Trustee's Duty re: Place

- Trustee has duty to administer the trust in the place that is appropriate to:
 - Purpose of trust
 - Administration
 - Interests of beneficiaries



Changing Place of Administration

- Trustee may transfer
 - All trusts: 60 day advance notice to qualified beneficiaries
 - New location and trustee's new contact information
 - Reason for transfer
 - Date of transfer
 - Testamentary trusts: prior court approval required
 - Charitable trusts: transfer outside U.S. prohibited
- Transfer does not deprive CT courts of jurisdiction

Why Place of Administration Matters

- Which court(s) have jurisdiction
- Trustee's duty to administer in an appropriate location
- Transfer procedures



Section 13- Mandatory Court Oversight of Testamentary Trusts

- Section 13 reiterates the longstanding reality that testamentary trusts remain subject to ongoing judicial supervision and inter vivos trusts are not.



Section 14 – Personal Jurisdiction

- Jurisdiction in this state is achieved if the principal place of administration is in this state, but there may be other methods of obtaining jurisdiction in Connecticut.
- A trustee submits to the personal jurisdiction in Connecticut if he accepts appointment of a trust that has its principal place of administration in Connecticut or if he moves the principal place of administration to Connecticut.
- A beneficiary is subject to personal jurisdiction in Connecticut if he accepts a distribution from a trust with its principal place of administration in Connecticut. (In personum jurisdiction)
- The beneficiary's interest in a trust is subject to jurisdiction in this state if the trust has its principal place of administration in Connecticut. (In rem jurisdiction)

Section 15 – Jurisdiction: Probate Courts vs. Superior Courts

- (15)(a) - Identifies testamentary trust matters where the Probate Courts have “sole original jurisdiction.” Most of these are areas where the legislature gave the Probate Courts jurisdiction under prior statutes but did not state explicitly whether the Superior Court had concurrent jurisdiction. Note, however, that subsection (c) qualifies the exclusive nature of probate court jurisdiction.
- (15)(b) - Identifies testamentary trust matters where the Probate Courts and the Superior Court have “concurrent original jurisdiction.” These mostly come from prior statutes granting jurisdiction to both the Probate Courts and the Superior Court.

Section 15 (continued)

- 15(c) - Overrides Sec. 15(a) to recognize original jurisdiction in the Superior Court over any testamentary trust matter if (1) it is consolidated with another matter involving the same trust where the Superior Court has jurisdiction or (2) where the Superior Court has statutory or common law jurisdiction or powers or remedies not available in Probate Courts.
- Please note the following analysis from the Appellate Court in *Geremia v. Geremia*, 159 Conn.App. 751, 125 A.3d 549 (2015):
 - General Statutes § 51-164s provides in relevant part that “[t]he Superior Court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute.
 - The concept of primary jurisdiction in the probate context ... involves a statutory question as to whether jurisdiction over the subject matter rests exclusively with the Probate Court.
 - It therefore is incumbent on a party moving to dismiss a complaint on primary jurisdiction grounds to demonstrate that the causes of action contained therein are matters entrusted exclusively to the Probate Court.

Section 15 (continued)

- 15(d) - Acknowledges that the Superior Court has original jurisdiction over all inter vivos trust matters, but also adds the matters where Probate Courts will have “concurrent original jurisdiction.”
- This section broadly expands access to the Probate Courts for inter vivos trust matters. Coupled with Section 16, it effectively grants the Probate Courts jurisdiction to hear and decide almost any matter related to an inter vivos trust without the need to first bring an action for an accounting.

Section 15 (continued)

- (15)(e) authorizes the Probate Courts or the Superior Court with jurisdiction to decide the following: (1) a trustee's request for instructions or for approval of an action; or (2) a party's request to compel or prohibit an action by a trustee.
- This essentially codifies Probate Rule 20 with respect to trusts. Rule 20 applies to all probate matters and Sec. 15(e) only applies to trust matters.

Section 16

Geographic Jurisdiction

- Superior Court: venue provisions in Title 52 unchanged
- Probate Courts / testamentary trusts:
 - Court that admitted the will
- Probate Courts / court-authorized inter vivos trusts
 - Court that authorized the trust

Geographic Jurisdiction (continued)

- Probate Courts / all other inter vivos trusts:
 - Principal place of administration
 - Trustee's residence or place of business
 - Location of trust assets or evidence of intangibles
 - Settlor's residence
 - For a deceased settlor, court that administered estate or residence at time of death
 - if the trust has no trustee, beneficiary's residence (or place of business for an entity)

Creditor Claims against Trusts

- The exemption from claims of a creditor of a beneficiary (i.e., spendthrift law) is still governed by C.G.S. § 52-321. This statutory provision was not revoked or amended.
- Section 3(26) adds to that by defining a “Spendthrift Provision” as any provision that restrains both voluntary or involuntary transfer of a beneficiary’s interest.

Protection From Trustee's Creditors

- § 39 - Trust property is exempt from personal obligations of the trustee.



Protection from Beneficiary Creditors

- § 40(a) is designed to make third party “support trusts” the same as fully discretionary third party trusts as a vehicle for creditor protection for beneficiaries.
- Creditors of a beneficiary cannot attach trust assets even if trust is a support trust (i.e., a HEMS standard) and beneficiary could compel a distribution on that basis.
- Prevents creditor claims against trusts on basis of:
 - (1) \$5,000/5% withdrawal power or “Crummey” power.
 - (2) A power to distribute that is limited by ascertainable standards, even where the beneficiary is a trustee.

Protection from Beneficiary Creditors

- Are independent trustees and fully discretionary trusts still necessary to gain creditor protection?
- That is the intent of the law, but not guaranteed if beneficiary resides in a different jurisdiction.
- Still advisable to include an independent trustee with sole discretion.

Protection from Grantor's Creditors

- § 58 - prevents a creditor of the grantor from making a claim against an irrevocable trust merely because the trustee has the power to pay the taxes on behalf of the grantor.
- Designed to eliminate one major concern regarding the power to reimburse grantor's tax liability rendering the trust subject to estate tax.

A Light at the End of the Tunnel

- CUTC finally establishes clear and concise Statutes of Limitation relative to trust contests and claims against trustees - at least for *inter vivos* trusts



Limitations on Trust Contests

- § 43 provides a statute of limitation with respect to the time frame for bringing objections to a revocable trust
- Equalizes the playing field with the time frames applicable to will contests.
- A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within one year after the settlor's death.

Limitations on Trust Contests

- The statute of limitations can be **shortened** to 120 days after trustee sends notice informing of the existence of the trust, including:
 - copy of the trust instrument
 - the trustee's name and address
 - the time allowed for commencing a proceeding to contest (i.e., 120 days from date of notice).

Limitations on Trust Contests

- Trustee should provide documentation/information to -
 - All persons entitled to notice of application for probate of settlor's estate or notice of admission of will to probate.
 - The beneficiaries of the trust and all other persons who have an interest that is adversely affected by the trust (in the opinion of the trustee).
 - **NOTE:** Cannot shorten the statute of limitations to 120 days if notice is sent to the designated representative for the beneficiary but NOT to the beneficiary.

Limitations on Trust Contests

- Provides protection to a trustee who makes distribution of trust property after the settlor's death unless:
 - Trustee knows of a pending judicial proceeding contesting the validity of the trust.
 - A potential contestant notified the trustee of a possible judicial proceeding to contest the trust and such a proceeding is commenced not later than 60 days after such notification to the trustee.
 - Trustee failed to give notice pursuant to Section 63.

Limitations on Trust Contests

- If the court determines that a distribution to a beneficiary of a trust is invalid, the beneficiary is required to return the distribution received (even without a refunding agreement).



Limitations on Claim for Breach

- § 73 Creates a clear and unequivocal timeframe in which a beneficiary may bring claims against the trustee for breach:
 - No more than one year from the date trustee provides a report to the beneficiary adequately disclosing the breach
- OR -
- If no report (with adequate disclosure) provided, the statute of limitations is three years from date the trustee ceased to act as trustee, the trust terminated or the beneficiary's interest in the trust ended.

Limitations on Claim for Breach

- Eliminates the old rule that statutes of limitations do not begin to run until the trustee accounts, but only for *inter vivos* trusts.
 - Testamentary trusts do NOT get the benefit of this SOL.
 - The provisions of § 74 providing for release of the trustee by beneficiary consent also do not apply to testamentary trusts.
 - Testamentary trusts have NO release or SOL protection until they file a formal accounting (or financial report) with the probate courts.

Concerning the Trustee

- § 44 changes the presumption regarding how to accept appointment
- § 46 reverses the presumption that co-trustees must act unanimously
- § 47 creates a default mechanism for how to fill vacancies - *inter vivos* trusts allow beneficiaries to act without court intervention; testamentary trusts mandate court intervention

Concerning the Trustee

- § 48 allows resignation with 30 days' notice for *inter vivos* trust if silent, but requires court approval under all circumstances for testamentary trusts
- § 50 gives trustees an ongoing duty to the trust property until actual transfer to the successor; court may override but doing so may leave assets at risk

Bonds

Section 45

- Substantially modifies existing law, which mandates bond by testamentary trustees unless expressly excused by the will and requires bonds of *inter vivos* trustees when seeking probate court jurisdiction over the trust if the trust instrument does not expressly excuse bond.
- § 45 reverses the presumption for bond, which is now required only if the court first determines that it is necessary to protect the beneficiaries or is affirmatively required under the trust instrument.
- This rule applies equally to testamentary and *inter vivos* trusts.

Removal Section 49

- Re-integrates the statutory removal provisions from Conn. Gen. Stat. § 45a-242 back into the UTC framework.
- Sec 49(b)(4) clarifies that the “no-cause” removal must be requested by all of the **qualified** beneficiaries - former C.G.S. § 45a-242 referred to “all of the beneficiaries.”
- NOTE.: C.G.S. § 45a-242 still exists as a separate statutory section to deal with other fiduciaries - executors, administrators, guardians and conservators, but now expressly excludes trustees.
- This provision applies equally to testamentary and *inter vivos* trusts.

Trustee Compensation

Section 51

- If the trust is silent, the trustee is entitled to reasonable compensation under the circumstances.
- The statute does not define what constitutes reasonable, but the official comments outline the factors to consider. The factors are comparable to the existing common law factors stemming from *Hayward v. Plant* and set forth in the Rules
- This should continue to inform the determination of “compensation that is reasonable under the circumstances.”

Trustee Compensation

Section 51

- However, if the terms of the trust instrument provide for compensation, the trustee is entitled to the compensation as specified in the trust.
- Court may only adjust that compensation (up or down) if (1) the trustee's duties are substantially different from that which is contemplated when the trust was created, or (2) the compensation specified in the terms of the trust would be unreasonably low or high.

Trustee Compensation

Section 51

- § 51(b) does NOT provide that the compensation must be “reasonable under the circumstances.” Court may only adjust if it is objectively too high or too low under any circumstances or are substantially different.
- The usual nine-factor test of the circumstances would not apply where the compensation is specified in the trust.
- Probate practice book should be amended. Until it is amended, the statute would override the practice book.

The Connecticut Uniform Trust Code

Major Developments in Connecticut Trust Law

CBA Federal Tax Institute of New England

October 24, 2019

PART I

INTRODUCTION, BACKGROUND AND OVERVIEW OF MAJOR CONNECTICUT DEVIATIONS

I. Introduction¹

Sections 1-80 of Public Act 19-137 contain Connecticut's version of The Uniform Trust Code ("UTC"). The UTC, which was approved by the Uniform Law Commission nineteen years ago in 2000 (and updated and amended multiple times since then), was intended to give states a comprehensive model for codifying trust law. The "pure" UTC, with its official comments, can be accessed at www.uniformlaws.org. According to its Reporter, Professor David English, most of the UTC is a codification of the prevailing common law, but it includes changes. To date, the UTC has been enacted in thirty-four states (with Illinois the most recent enactment) and in the District of Columbia.²

II. Background

The pure UTC was drafted in response to the frequent use of trusts as will substitutes and for tax planning and asset management. The greater the number of trusts, the greater the number of questions as to their administration, interpretation and use. The Connecticut UTC, or "CUTC³", was first proposed in 2002, was proposed in various forms at least five times after that, and was finally proposed in 2019 as HB 7104, enacted as Public Act 19-137. It will be codified in January, 2020.

The Uniform Laws Subcommittee of the CBA's Estates & Probate Section, including Professor John Langbein, one of the UTC's drafters, began its intensive study of the UTC twenty years ago, in 1999. Initially, the subcommittee worked closely with family law practitioners and representatives of Connecticut financial institutions to ensure that the CUTC would meet their clients' needs. In addition, subcommittee members met with several Probate Court judges to revise the Connecticut UTC to preserve existing court oversight of testamentary trusts, a substantial departure from the uniform act. A drafting committee then met to revise the UTC to incorporate the suggestions of all of these groups, with the assistance of the UTC reporter, Professor David English of the University of Missouri Law School. Thereafter, the subcommittee conferenced with Karen Gano of the Attorney General's Office ("AGO"), and with Tiana Gianopulos on behalf of the Connecticut Bankers Association, to tailor the CUTC to their needs. Debby Tedford has tirelessly negotiated over the years with representatives of the AGO's Collection Unit, which had concerns with Article 5, and most recently, with the mere idea of the act.

III. Major Connecticut Revisions to the UTC

The UTC provisions governing notice to beneficiaries have been varied by most enacting states. In principal, the Connecticut drafters agreed with the UTC's national drafters that for policy reasons, notice to trust beneficiaries is desirable. Without such notice, no one will be armed with the information necessary to enforce and protect the remainder beneficiaries' rights.⁴ Nevertheless, there are those who opposed making such notice mandatory, instead of waivable. As a compromise, we followed several other states' leads and allowed mandatory notice to be

¹ The author of Sections I, II and III of this presentation outline is Suzanne Brown Walsh of Murtha Cullina LLP.

² See <https://tinyurl.com/y6dke5nw> (last visited August 3, 2019).

³ The main provisions of the CUTC are in Sections 1-80 of Public Act 19-137.

⁴ For example, beneficiaries entitled to the trust after an income beneficiary dies might not learn of the trustee's improper investments for many years. If the trustee is an individual, their right to sue the trustee for the loss in the trust's value might be worthless. Both trustees and beneficiaries benefit from notice, which not only gives beneficiaries information, but requires them to act upon it in a timely manner or lose their right to do so.

given to a “designated representative” selected by the Settlor. This gives someone the information and ability to enforce beneficiary interests while it satisfies those for whom privacy is of paramount importance.

Another widely varied portion of the UTC is Article 5, on creditors’ rights. Like Colorado, the Connecticut version of the UTC omits almost all of Article 5. The primary, pragmatic reason was that Article 5 became a repeated barrier to enactment because of AGO opposition to any interference, theoretical or real, with its ability to seek reimbursement for state aid.

Perhaps the areas of greatest deviation from the UTC in the CUTC are to the jurisdiction provisions in Sections 15 and 16, which have no counterpart in Article Second of the UTC, the bifurcation of the application of the CUTC to testamentary and intervivos trusts, and the inapplicability of many provisions to charitable trusts.

IV. Basic Rules and Policies

A. Important definitions; PA 19-137, Section 3

1. "Beneficiary" means a person that (A) has a present or future beneficial interest in a trust, vested or contingent; or (B) in a capacity other than that of trustee, holds a power of appointment over trust property. "Beneficiary" does not include an appointee under a power of appointment until the power is exercised and the trustee has knowledge of the exercise and the identity of the appointee. CUTC Sec. 3(3) (hereinafter, all references to Section or Sec. are to Public Act 19-137, and not the UTC).
2. "Charitable trust" means a trust, or part of a trust, created (A) for a charitable purpose described in section 26 of this act; and (B) when property is dedicated for a charitable purpose, whether the dedication is by written instrument, declaration, deed, pledge, judgment or decree. Sec. 3(5).
3. "Court" means a court of this state having jurisdiction over the matter pursuant to sections 15 and 16 or a court of another state having jurisdiction under the law of the other state. Sec. 3(8).
4. "Current beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal. Sec. 3(9).
5. "Qualified beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined: (A) Is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) of this subdivision terminated on such date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on such date. Sec. 3(23).
6. "Settlor" means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to such person's

contribution, except to the extent another person has the power to revoke or withdraw such portion and as otherwise provided in section 40 of this act.” Sec. 3(25).

7. "Testamentary trust" means a trust created under a will and, unless otherwise expressly provided, any trust established pursuant to an order of the Probate Court. Sec. 3(28).
8. "Trust instrument" means any instrument executed by the settlor, including a will establishing or creating a testamentary trust, that contains terms of the trust, including any amendments thereto. In the case of a charitable trust, "trust instrument" means any written instrument by which property is dedicated for a charitable purpose described in section 26 of this act. Sec. 3(30).
9. "Mandatory distribution" means distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. "Mandatory distribution" does not include a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (A) include a support or other standard to guide the trustee in making distribution decisions; or (B) provide that the trustee "may" or "shall" make discretionary distributions, including distributions pursuant to a support or other standard. Sec. 3(18).

B. State Overrides

1. To preserve the state’s collection rights, Sec. 2(d) provides that “No provision of sections 1 to 123, inclusive of this act, as such provision may be applied to a trust established pursuant to and in compliance with 42 U.S.C. § 1396p (d)(4), shall be interpreted in a manner, nor shall any court having jurisdiction over any such trust issue an order, judgment, decree or ruling, that is inconsistent with, or that contravenes, the provisions of federal law.”
2. The CUTC was essentially bifurcated in order to preserve probate court supervision of testamentary trusts. Thus, Sec. 5(14) makes “the provisions of sections 1 to 83, inclusive, of this act dealing with judicial supervision of testamentary trusts” a mandatory rule that cannot be overridden. Specific provisions include:
 - a. Section 8(e), prohibiting transfer of the principal place of administration without Probate Court approval;
 - b. Sec. 13, providing that a testamentary trust is subject to continuing judicial supervision;
 - c. Sec. 15’s jurisdiction provisions;
 - d. Sec. 16’s venue provisions;
 - e. Sec. 38 trust merger, which requires court approval;

- f. A new trustee’s obligation to file an acceptance of trust with a court. Sec. 44.
 - g. Trustee’s obligation to obtain court approval before resigning. Sec. 48(b).
 - h. Sec. 67(d) prohibition against using nonjudicial settlement agreements upon termination.
 - i. The new statute of limitations on breach of trust does not apply. Sec. 70(e), nor does the Sec. 74 provision for beneficiary consent, release or ratification of the breach.
3. The CUTC was also modified throughout in order to maintain the current law and practice that gives and facilitates our AGO’s involvement in charitable trusts. For example:
- a. Sec. 2(b) provides that except as expressly provided in the Trust Code, it does not apply to a charitable trust as defined in Sec. 3(7).
 - b. Sec. 6 provides that those sections of the Act that do expressly apply to charitable trusts “apply only to supplement Connecticut common law of charitable trusts, and that “[n]o provision in sections 1 to 109, inclusive, of this act or title 45a of the general statutes shall be applied or construed to alter or diminish any charitable interest or purpose or any condition or restriction related to a charitable interest or purpose.”
 - c. Sec. 8(e) prohibits the transfer of a charitable trust to a jurisdiction outside the United States.
 - d. In Sec. 49(a), the AGO is given standing in certain Trustee removal proceedings.
 - e. In Sec. 70(d), notice to the AGO must include a copy of the trust instrument.
 - f. In the new version of C.G.S. Sec. 45a-520 set out in CUTC Sec. 121, the AGO is given standing to ask that a small (under \$150,000) charitable trust be terminated.

C. **Default and Mandatory Rules. (Section 5; UTC 105)** Most of the rules of American trust law can be overridden by the terms of a trust. The CUTC does not change that, as nearly all of its provisions can be overridden by the settlor in the terms of the trust. However, the CUTC codifies some principles of law that the settlor may NOT control and override.

- 1. Section 5 contains those **mandatory rules**:
 - a. The requirements for creating a trust. Sec 5(b)(1)(those requirements are in Sec. 22).

- b. The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust. Sec 5(b)(2).
- c. The Sec. 25 requirement that a trust have a purpose that is lawful and not contrary to public policy. Sec 5(b)(3).
- d. The power of the court to modify or terminate a trust under sections 31 to 37, inclusive. Sec 5(b)(4).
- e. The Section 45 power of the court to require, dispense with, modify or terminate a bond. Sec 5(b)(5).
- f. The Section 51 power of the court to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high. Sec 5(b)(6).
- g. The duty under Section 63(b)(2) and (3) to notify the Qualified Beneficiaries of an irrevocable trust who have attained 25 years of age, or the designated representative of the qualified beneficiary, if any, of the existence of the trust, of the identity of the trustee, and of the right of the qualified beneficiary to request a trustee's report. Sec 5(b)(7).
- h. The duty under Section 63(a) and (c) to respond to the request of a qualified beneficiary of an irrevocable trust or the designated representative of the qualified beneficiary, if any, for a trustee's report and other information reasonably related to the administration of a trust. Sec 5(b)(8).
- i. The effect of an exculpatory term under Sec. 73. Sec 5(b)(9).
- j. The rights under sections 75 to 78, inclusive, of a person other than a trustee or beneficiary. Sec 5(b)(10).
- k. The periods of limitation for commencing a judicial proceeding. Sec 5(b)(11).
- l. The power of the court to take such action and exercise such jurisdiction necessary in the interests of justice. Sec 5(b)(12).
- m. The jurisdiction of the court under sections 15 and 16. Sec 5(b)(13).
- n. The provisions of sections 1 to 83, inclusive, dealing with judicial supervision of testamentary trusts. Sec 5(b)(14).

2. **Drafting Considerations with Default and Mandatory Rules**

- a. Just because a statutory provision can be overridden, should it be overridden?
- b. Can a drafter increase the effectiveness of statutory provision by inserting certain provisions in the governing instrument?

- c. Are there provisions a drafter is currently placing in most trusts that can be removed to rely upon the default provision of the applicable trust code?

3. **How to Override a Trust Code Provision**

- a. The CUTC is silent as to how its default provisions can be overridden in a governing instrument.

- b. **Express reference.**

- i. Clearly an express reference to provision of the CUTC will override the provision.
- ii. For example, "The provisions of [CUTC Sec. 49]⁵ regarding the removal of trustees shall not apply to the removal of any trustee serving hereunder."

- c. **Implied Preemption**

- i. Query whether a governing instrument can demonstrate an intent for a settlor to preempt an issue also governed by a trust code, even though the governing instrument does not specifically override a specific trust code provision nor provide provisions that specifically conflict with a provision of the trust code.
- ii. For example, would a provision that governs the resignation, removal, and replacement of a corporate trustee demonstrate the settlor's intent to completely control the resignation, removal and replacement of all trustees, corporate and individual?
- iii. A trust provision that governs the same subject matter as a code provision but in a different manner should control.
- iv. For example, a comprehensive provision governing the resignation, removal, and replacement of both individual and corporate trustees should override conflicting provisions of CUTC sections 47, 48 and 49.
- v. Would the remaining default provisions still be available?

Drafting Point: Specifically override provisions you do not want to apply, even if you have provisions that cover the same subject matter.

D. **Nonjudicial Settlement Agreements (“NJSA’s”; Section 11; UTC 111).**

- 1. NJSA’s are expressly permitted for any matter, but only for inter vivos trusts, as long as the NJSA does not violate a material trust purpose and could be approved by a court, if presented. Examples of matters that can be resolved by NJSA are listed in Sec. 11(d), such as approval of an accounting, direction to a trustee to

⁵ Obviously, the override eventually will refer to the codified version of Public Act 19-137.

refrain from acting, resignation and appointment of trustees, the determination of compensation, transfer of trust's principal place of administration, and a trustee's liability for an action.

2. A NJSA may not modify or terminate an irrevocable trust. Sec. 11(e).
3. An interested person may ask the court to approve the NJSA, to determine if the virtual representation under the Trust Code was adequate, and to determine if the NJSA contained terms and conditions that could have been approved by a court. Sec. 11(f).
4. An "interested person" is defined in Sec. 11(a) to mean a person whose consent would be required in order to achieve a binding, court approved settlement.

E. Trust Creation (Section 22; UTC 401)

1. Sec. 22 specifies the manner of creating a trust, and Sec. 23 the requirements, which in the pure UTC simply mirror common law. Section 22(3) confirms that a trust may be created by means of the exercise of a power of appointment or distribution in favor of a trustee. In a provision unique to the CUTC, Section 22(4) confirms that a trust can be created by transfer of property pursuant to a statute or judgment that requires property to be administered in the manner of an express trust, including (A) that a trust can be created by the guardian of the estate of a minor or by the conservator of an estate; or (B) a trust described in 42 USC 1396p (d)(4), as amended from time to time; or (5) by court order. Section 23 further provides that the settlor's power to create or contribute to a trust can be exercised by an agent, if authorized in the power of attorney, or by a conservator if authorized by the court.
2. Section 23(e) quite broadly provides that "a charitable trust is created if the donor makes a gift with charitable intent." This language was inserted by the Connecticut AGO and is not in the pure UTC. Some Connecticut practitioners have expressed concern that this language abrogates the Uniform Prudent Management of Institutional Funds Act, which governs charitable endowments. To address that concern, the future Trust Code technical corrections bill will likely insert the phrase "subject to C.G.S. Sections 45a-535 to 45a-535i, inclusive" or the equivalent, to make it clear that UPMIFA is still applicable.
3. Section 26(a) governs charitable trusts which may be created "for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which are beneficial to the community consistent with the provisions of sections 45a-514 and 47-2 of the general statutes."
4. Sec. 26(c) provides that the settlor "or a person designated by the settlor who would not otherwise have standing, may maintain a proceeding to enforce the trust only to the extent specified in the trust instrument."

Drafting Point: As under current law, the trust must expressly grant the settlor standing to enforce a charitable trust, and it may also designate a Protector, Director or another person to do so.

5. Section 28 validates the use of oral trusts not subject to the statute of frauds or prohibited by other law, but for all non-charitable trusts the creation and terms require clear and convincing evidence.
- F. **Revocable Trusts. (Section 41; UTC 602).** Post-2019 trusts are presumed to be revocable and amendable.
1. Except for: a) trusts created before January 1, 2020, b) charitable pledges, or c) vested charitable interests, a trust is irrevocable and not amendable only if and to the extent the settlor expressly provides. Section 41.
 2. Reverses common law rule that trusts were irrevocable unless the power to revoke was expressly reserved.
 3. **NOTE:** The new revocability presumption is prospective only.
 4. Presumptions can be modified or waived by the governing instrument.

Drafting Point: Critical to include clause specifying that trust is irrevocable, as revocability is now presumed.

5. A settlor must substantially comply with the method of revocation or amendment specified in instrument, or any other method manifesting a clear and convincing evidence of the settlor's intent to revoke or amend if the manner of amendment or revocation in the trust is not made exclusive. Section 41(c).
6. A power to revoke, amend, or direct distributions can be exercised by a conservator (or a guardian if there is not conservator appointed) with an explicit order of the court, Section 41(f).
7. A Trustee without knowledge of the revocation or amendment of a trust is not liable for acting in accordance with the terms of the trust, as they existed prior to the amendment or revocation, Section 41(g).
8. Section 41(c) provides that a trust can be amended or revoked only by substantially complying with the manner of revocation or amendment set forth in the governing instrument. Only if there is no provision governing the manner of revocation or amendment will other manifestations of the settlor's intent be considered.
9. These provisions can be modified or waived by the governing instrument. In most UTC states a trust can be modified by complying with the method of amendment specified in governing instrument or by any other any other method manifesting clear and convincing evidence of the settlor's intent, unless the method for amendment specified in the governing instrument is made exclusive.

- a. This raises significant issues whether written or oral statements to parties other than the trustee will be deemed trust amendments.
- b. While a trustee without knowledge of an amendment is protected in making distributions, this still creates real risk.

G. Applicability/Effective Dates.

1. The act does not apply to charitable trusts unless expressly made applicable. Sec. 2(b).
2. The act does not apply to statutory business trusts created under chapter 615 of the general statutes. Sec. 2(c). (This is an old exclusion requested years ago, by commercial lawyers who use statutory trusts.)
3. Common law of trusts and principles of equity supplement the Act. Sec. 6. This is necessary because although the trust code is comprehensive, it includes and defers to the background of common law and equitable principles.
4. *General rule* is that the act applies to all trusts created before, on or after its effective date of 1/1/20. Sec. 109(a)(1). The rule in Sec. 109 (a)(3) for lawsuits is similar, except when it isn't. See paragraph H 7, below.

H. Exceptions to the general rule of applicability to all trusts.

1. Sec. 31's modification and termination provisions do not apply to irrevocable trusts created before, or revocable trusts that become irrevocable before, January 1, 2020. Sec. 31(a).
2. Sec. 31's modification and termination provisions do not apply to self-settled special needs trusts established pursuant to 42 USC 1396p(d)(4)(A) or (C). Sec. 31(f).
3. The new presumption of revocability is prospective, and only applies to trusts created under instruments executed after January 1, 2020. Sec. 41.
4. The default list of trustee powers in Sec. 66 apply to all existing and new trusts, whenever created, except when the trust instrument "reflects and intent to disallow the exercise of the power." Sec. 66(c).

Drafting Point: Be careful not to inadvertently reinstate a power that the client eliminated. Also be careful to avoid inadvertently waiving a default power, by saying that the express powers are in addition to the powers granted to a fiduciary under common law, versus law (as the latter includes the Act).

5. Coupled with Sec. 65(a)(2)(A), which is effective January 1, 2020 and says that a trustee (by default) may exercise "all powers over the trust property which an unmarried competent owner has over individually owned property," the Trustee has the default power to do almost anything. *See* cmt. to Sec. 815: "This section is intended to grant trustees the broadest possible powers, but to be exercised always

in accordance with the duties of the trustee and any limitations stated in the terms of the trust.”

Drafting Point: The default Trustee powers “cover” everything in the (now outdated) CT Fiduciary Powers Act, because that act was intended to include all possible powers. Essentially, then, a trustee can do anything that is not prohibited in the trust instrument or by law, but you would still want to include a list of powers, so you have provisions you can easily show to a closing attorney or financial institution. If the Settlor wants to *prohibit* the exercise of a power, you should say, “the Trustee shall not” followed by that power. You *could* say, “The Trustee shall not have the powers in [Sec. 66] and shall only have the following powers” but that would be more limiting and risky if one is unintentionally omitted. For Wills, you could say, “My executor shall have all of the powers of a trustee in [CT UTC] as if my executor were a trustee.”

6. The notice requirements of Sec. 63(b) (duty to respond to request for copy of trust, duty to notify qualified beneficiaries upon acceptance of trusteeship, and to notify qualified beneficiaries sixty days after irrevocability) and Sec. 63(c) (duty to annually report to current beneficiaries and qualified beneficiaries who request reports) do NOT apply to trusts that were irrevocable on January 1, 2020. Sec. 63(h).

Drafting Point: Trusts created before January 1, 2020 that remained revocable on that date will be subject to these new notice rules. That means that the trust must be amended to waive the non-mandatory notices, if desired, or to name a Designated Representative to receive them.

7. The act applies to lawsuits commenced before 1/1/20 *unless* the court finds that applying the act would substantially interfere with the effective conduct of suit or prejudice the rights of “the parties”, in which case prior law would apply. Sec. 109(a)(3).
8. Any rule of construction or presumption in the act applies to existing trusts unless there is “a clear indication of a contrary intent in the terms of the trust.” Sec. 109(a)(4).
9. “If a right is acquired, extinguished or barred upon the expiration of a prescribed period that has commenced to run under any provision of the general statutes, *other than sections 1 to 108, inclusive, of this act* before January 1, 2020, the provision of the general statutes continues to apply to the right even if the provision has been repealed or superseded.” Sec. 109(b). (Emphasis added)

I. **Other Innovations and Changes**

1. Section 75 (UTC 1010) reverses the common law rule and provides that a Trustee is **not personally liable on a contract**, as long as the contract discloses that the Trustee signed it in his or her fiduciary capacity.
2. Section 43 (UTC 604) clarifies that the **statute of limitations** for revocable trust contests is generally one year from death, or 120 days from direct notice.

3. Section 58 (no counterpart in UTC) provides that an irrevocable trust can safely require that the Settlor be **reimbursed for income taxes** paid by the settlor on grantor trust income, without subjecting the trust to creditors' claims.

V. Resources

- A. English, Boulton and Fitzsimons, *Case Law Under the UTC Through 2014*, <https://tinyurl.com/y68lropm> (last accessed 9-29-2019).
- B. David M. English, "The Uniform Trust Code (2000): Significant Provisions and Policy Issues," 67 Mo. L. Rev. 143 (2002) <https://tinyurl.com/yypfrszj>
- C. Langbein, John H., "Mandatory Rules in the Law of Trusts" (2004). *Faculty Scholarship Series*. 493, https://digitalcommons.law.yale.edu/fss_papers/493
- D. Articles on Notice under the UTC: <https://tinyurl.com/y5xe9rkq>
- E. UTC Articles, in general: <https://tinyurl.com/y4vc73tf>
- F. Pure UTC, with commentary: <https://tinyurl.com/yxdtpeu>

PART II

Trustees' Duties, Powers, and Remedies

VI. Notice⁶

A. When?

1. There are numerous sections of the Act that require a trustee to provide notice:
 - a. Creation of irrevocable trust, or a trust's becoming irrevocable (Sec. 63(b)(3))
 - b. Acceptance of trusteeship (Sec. 63(b)(2))
 - c. Annual report (Sec. 63(c))
 - d. Transfer of principal place of administration (Sec. 8)
 - e. Termination of non-charitable inter vivos trust under \$200,000 (Sec. 35)
 - f. Division or combination of a trust (Sec. 38)
 - g. Resignation of a trustee (Sec. 48)

B. Methods and Waiver of Notice (Section 9)

1. This section of the Act does not break much new ground. Notice must be given "in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document."
2. In addition to first-class mail, personal delivery, and "delivery to the person's last known place of residence or place of business," notice may be given by email, if the recipient consents in advance.
3. Notice of a judicial proceeding is to be given as provided in the applicable court rules.
4. In a proceeding involving a charitable trust, any notice that is required to be given to the Attorney General must include a copy of the trust instrument. Sec. 70(d).

C. Notice to Whom

Section 10 spells out to whom notice must be given when notice is required:

1. *Qualified Beneficiaries.* In general, notice is only required to be given to "qualified beneficiaries" (defined in Sec. 1(23)).
2. *Other Beneficiaries.* When notice is required to be sent to qualified beneficiaries, it must also be given to other beneficiaries (such as a contingent remainder beneficiary) who request it.

⁶ The author of Sections IV, V, VI, VII and VIII of this presentation outline is Mary M. Ackerly of Ackerly Brown, LLP, with the invaluable assistance of Rebekah M. Burgio.

3. Designated Representatives. The Act modifies the “pure” UTC in permitting notice to a designated representative (described in Section 21) of a beneficiary, “when notice to qualified beneficiaries is required.” The text of the Section 110 of the “pure” UTC provides only that “whenever notice to qualified beneficiaries of a trust is required..., the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.”

The insertion of the reference to notice to the designated representative into Section 10 in the middle of the sentence results in the literal reading of the Section that may be inconsistent with the language and the intent of Section 21. It also may be inconsistent with Section 63(j), which provides that notice to a designated representative satisfies the trustee’s duty to provide information or notice to the beneficiary. A technical correction may be needed.

4. Charities. A charity “expressly designated to receive distributions” has the rights and is entitled to the same notices/information as a qualified beneficiary, if, on the date its status as such is being determined, (1) it is a distributee or permissible distributee, (2) would be a distributee upon termination of the interests of other current distributees or permissible distributees, or (3) it would be entitled to a distribution if the trust were to terminate on that date. According to the UTC commentary, the intention is that a charity is only a qualified beneficiary if it is a “first-line” remainderman (as opposed to a more remote remainderman).

However, a charity is not entitled to the rights of a qualified beneficiary if its rights are subject to a power of appointment, removal or any other power of termination.

5. Attorney General. The Attorney General has the rights of a qualified beneficiary of a charitable trust if the trust’s principal place of administration is in Connecticut, or if the primary charitable beneficiary or intended charitable benefit is in this state. Note that the Attorney General’s status as a qualified beneficiary under this Section does not necessarily establish Connecticut jurisdiction over the trust.
6. Trusts for Pets or “Non-Charitable” purpose. A person appointed to enforce the terms of a pet trust or a trust under Section 29 (trust with noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee) has the rights of a qualified beneficiary.

VII. Duty to Inform and Report (Section 63)

- A. A trustee must “keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for the beneficiaries to protect their interests” and must “promptly respond to a beneficiary’s request for information reasonably related to the administration of the trust,” pursuant to subsection (a).
- B. A trustee must also give a copy of “the relevant portions of the trust agreement” to a beneficiary, upon request, pursuant to subsection (b)(1).
- C. Subsection (b) requires a trustee to provide to qualified beneficiaries:
 - 1. Subsection (b)(2) requires the trustee, within 60 days of accepting the trusteeship, to provide the trustee’s name, address and phone number.
 - 2. Subsection (b)(3) requires the trustee, within 60 days of the trustee’s learning of the creation of an irrevocable trust (or of the conversion of a revocable trust to an irrevocable trust) to provide:
 - a. notice of the trust’s existence,
 - b. the identity of Settlor(s),
 - c. the right to request a copy of the instrument, and
 - d. the right to an annual trustee’s report.
- D. Subsection (c) requires a trustee to report to the current beneficiaries, and to other qualified beneficiaries who request it.
 - 1. The trustee must report at least annually and at termination.
 - 2. When a vacancy occurs (i.e. if there is no trustee serving), then the former trustee must send the report. The executor, administrator, or conservator of a deceased or incapacitated trustee “may” send the report. According to UTC commentary, if a former trustee cannot report (having died or become incapacitated, rather than just resigned), then the personal representative is not under an obligation to provide the report.
 - 3. The report need not be “formal” but must include information about:
 - a. trust property,
 - b. liabilities,
 - c. receipts,
 - d. disbursements, including trustee compensation, and
 - e. listing of trust assets (with market values if feasible).

According to UTC commentary, the obligation to send the report may be satisfied by providing the annual income tax return and monthly brokerage statements, provided that the information in those documents is complete and clear.

E. Waiver by beneficiary

A beneficiary may waive the right to trustee's reports or other information to which the beneficiary may be entitled and may withdraw a waiver previously given (subsection (g)).

F. Special effective date rules

1. Unlike most of the Act, subsections (b)(2) and (3) – which spell out information to be provided to qualified beneficiaries about the trust and their rights to information -- only applies to trusts that become irrevocable after January 1, 2020 (subsection (h)).
2. Subsection (c) -- which requires the trustee to provide annual reports -- also only applies to trusts that become irrevocable after January 1, 2020.

G. Some of these obligations can be modified by the terms of the trust, other cannot.

1. Section 5 of the Act, which lists the provisions that cannot be overridden by the terms of the trust, makes certain provisions of Section 63 mandatory:
 - a. The duty, under subsections (b)(2) and (3) of Section 63, to notify each qualified beneficiary of an irrevocable trust who has attained age 25 (or his or her designated representative) of the existence of the trust, of the identity of the trustee, and of the right of the qualified beneficiary to request a trustee's report (Section 5(b)(7)).
 - b. The duty, under Section 63(a), to respond to a beneficiary's request for information reasonably related to the administration of the trust (Section 5(b)(8)).
 - c. The duty, under Section 63(c), to respond to the request of a qualified beneficiary of an irrevocable trust (or his or her designated representative) for a trustee's report.
2. This leaves quite a lot of obligations that can be waived or modified:
 - a. The duty under Section 63(a) to keep the beneficiaries reasonably informed about the administration of the trust and the material facts necessary to protect their interests is waivable. Section 5(b)(7) only mandates that the trustee respond to a beneficiary's request for information.
 - b. The duty under Section 63(b)(1) to provide a beneficiary with a copy of relevant portions of the trust instrument, if requested, can be waived. It is not clear what the implications of this might be; the duty, under Section

63(a) to respond to a beneficiary's request for information "reasonably related" to the trust's administration is not waivable, and what the trust instrument says would seem to be reasonably related to the trust's administration.

- c. The duty to provide annual reports, under Section 63(c) can be waived. It is only the duty to provide a report to a beneficiary who requests it that cannot be waived.

H. A beneficiary may petition the court for an accounting by the trustee.

1. The court may grant the petition of:

- a. A qualified beneficiary of a testamentary trust, if the court finds it necessary to protect a beneficiary's interests; or
- b. Any other beneficiary of a testamentary trust, or a beneficiary of an inter vivos trust, if the following criteria of Conn. Gen. Stat. §45a-175(c) are met:
 - i. The beneficiary has a "sufficient" interest in the trust,
 - ii. Cause has been shown that an accounting is necessary, and
 - iii. The petition is not for purposes of harassment.
- c. The court decides who is entitled to notice and to a copy of the accounting.

VIII. Other Trustee Duties and Powers (Sections 53-57, 59-62, 64)

A. Duty of Administration (Section 53)

Once a trustee has accepted the trusteeship, the trustee must administer the trust:

1. In good faith;
2. In accordance with its terms;
3. In accordance with the Settlor's intent and the interests of the beneficiaries; and
4. In accordance with the Act.

The "pure" UTC (Section 801) does not include a reference to the Settlor's intent. There was considerable discussion, when the UTC was being adapted for Connecticut, concerning the balancing of the settlor's intent against the interests of the beneficiaries. It was decided that reference to the Settlor's intent was important. Nonetheless, the modification provisions of the Act (Sections 30-38) create several mechanisms for changing a trust, if circumstances warrant.

B. Duty of Loyalty (Section 54)

1. The Trustee has the duty to administer the trust assets solely in the interests of the beneficiaries consistent with the Settlor's intent. As with Section 53, the comparable provision of the UTC (Section 802) does not mention settlor's intent.
2. Transactions involving a conflict between the trustee's fiduciary and personal interests may be voidable by a beneficiary.
3. A transaction is presumed to be affected by a conflict if it involves the Trustee's spouse or other close family members, an agent or attorney of the Trustee, or a business in which the Trustee has an interest that may affect the Trustee's best judgment.
4. A transaction between the Trustee and a beneficiary from which the Trustee benefits may be voidable by the beneficiary.
5. A transaction by the Trustee in his or her individual capacity that concerns an opportunity belonging to the Trust constitutes a conflict (i.e., the Trustee personally takes an investment opportunity that was meant for the Trust).
6. The following transactions/investments are presumed not to be affected by a conflict if they (i) comply with the Connecticut Uniform Prudent Investor Act, and (ii) are not prohibited by the Trust instrument:
 - a. An investment by the Trustee in securities of an investment company or investment trust to which the Trustee (or its affiliate) provides services in a capacity other than as Trustee;
 - b. An investment by the Trustee in an insurance contract purchased from an insurance agency is owned by, or affiliated with, the Trustee (or its affiliate)
 - c. The placing of securities transactions by a Trustee through a securities broker that is a part of the same company as the Trustee, is owned by the Trustee or is affiliated with the Trustee.
7. The Trustee is required to act in best interests of the beneficiaries and consistent with the intentions of the Settlor in voting shares of stock or exercising similar powers of control and appointing directors/managers.
8. The following types of transactions/arrangements are not precluded, as long as they are fair to the beneficiaries:
 - a. An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
 - b. payment of reasonable compensation to the trustee;

- c. a transaction between a trust and another trust, decedent’s estate or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
 - d. a deposit of trust money in a regulated financial service institution operated by the trustee; or
 - e. an advance by the trustee of money for the protection of the trust.
9. Court may appoint a special fiduciary to make decisions about a proposed transaction.
- C. **Duty of Impartiality (Section 55).** If trust has two or more beneficiaries, the Trustee is required to “act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries’ respective interests.”
- D. **Prudent Administration (Section 56).** The Trustee is required to “administer the trust as a prudent person would, considering purposes, terms, distribution requirements, and other circumstances of the trust.” The Trustee is required to “exercise reasonable skill, care, and caution.”
- E. **Delegation by Trustee (Section 57).**
- 1. The Trustee may delegate duties and powers that a prudent trustee could properly delegate under the circumstances.
 - 2. If the Trustee does delegate duties and/or powers, he or she must “exercise reasonable skill, care, and caution in: (1) Selecting an agent for the delegation; (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) Periodically reviewing the agent’s actions to monitor the agent’s performance and compliance with the terms of the delegation. If the Trustee complies with these requirements he or she will not be liable to the beneficiaries for an action of the delegee.
 - 3. The agent (i.e., the delegee of duties and/or powers) has a duty to “exercise reasonable care to comply with the terms of the delegation.” By accepting the delegation, the agent has submitted to the jurisdiction of the Connecticut courts.

This is virtually the same language as in the Prudent Investor Act, Conn. Gen. Stat. 45a-541i.

- F. **Control and Protection of Trust Property (Section 59).** The Trustee is required to “take reasonable steps to take control of and protect the trust property.”
- G. **Recordkeeping and Identification of Trust Property (Section 60)**
- 1. The Trustee is required to (i) keep adequate records of the administration of the trust; (2) keep trust property separate from his own property; and (3) cause the trust property to be designated so that the interest of the trust appears in records maintained by a party other than a trustee or beneficiary.

2. The Trustee is permitted to invest two or more separate trusts together (i.e., in a pooled fund), if the records clearly indicate the respective interests.
- H. Enforcement and Defense of Claims (Section 61). The Trustee is required to take reasonable steps to enforce and defend against claims.
- I. Collecting Trust Property (Section 62). The Trustee is required take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to remedy known breaches by any former trustee.
- J. Discretionary Powers (Section 64)
1. Trustees are required to exercise discretionary powers in good faith and in accordance with the terms and purposes of the trust, settlor's intent and the interests of the beneficiaries. This is the case even if the Trust instrument states that the Trustee has absolute discretion (or similar).
 2. A non-settlor Trustee who is also a beneficiary may only make discretionary distributions to himself or herself in accordance with the an ascertainable standard under I.R.C. §2041(b)(1)(A) or §2514(c)(1) (i.e., health, education, maintenance and support).
 3. A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.
 4. A discretionary power limited or prohibited by Section 64 may be exercised by a majority of the remaining trustees not subject to the same limitation/prohibition. If there are no such trustees, the court may appoint a special fiduciary with authority to exercise the power.
 5. The limitations/prohibitions under Section 64 do not apply to a power held by the settlor's spouse over a QTIP or GPOA marital trust, a trust that may be revoked or amended by its settlor (until it becomes irrevocable); or a minor's trust under I.R.C. §2503(c).

IX. Fiduciary Powers (Sections 65-66)

Under current law, a Trustee only has those powers that are explicitly stated in the Trust instrument. Powers under the Fiduciary Powers Act (§§45a-233 *et seq.*) may be incorporated by reference (§45a-234) or by specific individual reference (§45a-235).

Under Section 65 of the Act, the Trustee may exercise (1) powers conferred by the terms of the trust, and (2) except as limited by the Trust instrument: (a) all powers over the trust property which an unmarried competent owner has over individually owned property; (b) any other powers appropriate to achieve the proper investment, management and distribution of the trust property; and (c) any other power conferred by the act.

This is very broad authority. If there are things a Settlor does not want a Trustee to do, it is best to be specific in the trust instrument.

Section 66 lists the specific powers given to a Trustee without the requirement of any reference in the Trust instrument.

Practitioners using “long form” powers in their Trust instruments, or incorporating the Fiduciary Powers Act by reference, may wish to compare the Section 66 powers to their forms, to determine whether they will update their long form powers or implement some or all of the Section 66 powers going forward, and to eliminate any inconsistencies or ambiguities.

X. Liability of Trustees, Remedies, and Rights of Others (Sections 67-78)

A. Remedies for Breach of Trust (Section 68)

1. Section 68 simply states that “[a] violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.”
2. The pure UTC (Section 1001) includes remedies for breach of trust that are omitted from the act because in Connecticut remedies are available under other law. Also, some remedies available in a Superior Court proceeding may not be available in a Probate Court proceeding.

B. Damages in Absence of Breach (Section 69)

1. A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from administration of the trust, even absent a breach of trust.
2. Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

C. Limitations of Action Against Trustee (Section 70)

1. If a beneficiary has been sent a report (as spelled out in Sec. 63), the beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date on which the beneficiary (or a representative of the beneficiary) was sent the report. This protection is available only if the report adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
2. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
3. If no report has been provided, then the 1-year period does not apply. Instead, there is a three-year statute of limitations: A judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced “not later than three years after the first to occur of: (1) The removal, resignation or death of the trustee; (2) the termination of the beneficiary’s interest in the trust; or (3) the termination of the trust.”

4. In a proceeding involving a charitable trust, any notice that is required to be given to the Attorney General must include a copy of the trust instrument. Sec. 70(d).
 5. Section 70 does not apply testamentary trusts.
- D. Reliance on Trust Instrument (Section 71)
1. A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.
 2. The reliance must be reasonable. According to the UTC commentary to Section 1006, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.
- E. Event Affecting Administration or Distribution (Section 72)
1. If an event, such as marriage, divorce, performance of educational requirements or death, affects administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.
- F. Exculpation of Trustee (Section 73)
1. A provision of a trust instrument that says a trustee is not liable for breach of trust is unenforceable to the extent that it: (1) Relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
 2. Except for terms intended to provide protection for carrying out a stated trust purpose, an exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.
 3. Section 73 cannot be overridden by the terms of the trust instrument.
- G. Protection from Liability by Acquiescence of Beneficiary
1. Proposal for Distribution (Section 67)
 - a. When a termination event occurs, the trustee must expeditiously distribute the trust property to the remainder beneficiaries (the trustee may hold a reserve for the payment of debts, expenses and taxes).
 - b. Upon termination or partial termination of a trust, the trustee may send to the qualified beneficiaries a proposal for distribution, which should include notice of the right to object and of the time allowed for objection.

The right of any beneficiary object to the proposed distribution would then be foreclosed if the beneficiary does not notify the trustee of an objection within thirty days after the date on which the proposal was sent.

- c. A release by a beneficiary is invalid if: (1) It was induced by improper conduct of the trustee; or (2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.
- d. Section 67 does not apply to testamentary trusts. Trustees of testamentary trusts are required to follow the procedures for accounting as set forth in the Probate Court Rules of Procedure.
- e. Note that Section 67 only addresses a procedure for proposed distributions. Section 11 deals with non-judicial settlement agreements; subsection (d)(2) specifically includes the approval of a trustee's report or accounting (with respect to an inter vivos trust) in the list of matters that may be resolved by non-judicial settlement.

2. Beneficiary's Consent, Release, or Ratification (Section 74)

- a. A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless: (1) The consent, release or ratification of the beneficiary was induced by improper conduct of the trustee; or (2) at the time of the consent, release or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.
- b. Note that Section 74 does not apply to testamentary trusts. Accordingly, a trustee of a testamentary trust will not be protected in the event of consent, release or ratification by the beneficiary, only by a judicial decree.

3. Non-Judicial Settlement Agreement – See discussion of Section 11, above.

H. Limitation on Personal Liability of Trustee (Section 75)

- 1. A trustee is not personally liable on a contract entered as trustee (unless the contract says otherwise) in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.
- 2. Except as otherwise provided by statute, the trustee is personally liable for torts/obligations arising from ownership or control of trust property (including environmental) only if the trustee is personally at fault. The commentary to the UTC notes that this provision differs from the Restatement (Second) of Trusts, which imposes liability on the trustee regardless of fault, including liability for acts of agents.
- 3. A claim may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the

claim, if the claim is based on (1) a contract entered into by a trustee in the trustee's fiduciary capacity, (2) an obligation arising from ownership or control of trust property, or (3) a tort committed in the course of administering a trust. The commentary to the UTC notes that this provision alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

I. Interest as General Partner (Section 76)

1. Except as per item 3 below, or per the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the Uniform Partnership Act or Uniform Limited Partnership Act.
2. Except as per item 3 below, a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.
3. The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings or parents, or the spouse of any of them.
4. If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

J. Protection of Person Dealing with Trustee (Section 77)

1. A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.
2. A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.
3. A person (including a beneficiary) who in good faith delivers assets to a trustee need not ensure the proper application of such assets.
4. A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated, is protected from liability as if the former trustee were still a trustee.

5. Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

K. Certification of Trust (Section 78)

1. The trustee may provide a “certification of trust” to any person, other than a beneficiary or (in the case of a charitable trust) the Attorney General, instead of giving them a copy of the entire trust agreement.
2. This is intended to protect the privacy of a trust instrument by setting out an alternative method of providing necessary information about the trust to third persons (e.g. banks and brokerage firms). The certification does not need to contain the dispositive terms of the trust.
3. A third party may rely on a certification of trust to verify a trustee’s authority. A person who acts in reliance on the certification without knowledge of that the representations in it are incorrect is protected from liability. And a person who enters into a transaction in reliance on the certification may enforce the transaction against the trust property, as if the representations were correct.
4. The certification must include the following information:
 - a. That the trust exists and the date the trust instrument was executed;
 - b. the identity of the settlor;
 - c. the identity and address of the currently acting trustee;
 - d. the powers of the trustee;
 - e. the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
 - f. the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
 - g. the trust's taxpayer identification number; and
 - h. the manner of taking title to trust property.
5. In addition, the certification needs to be signed by a trustee (no need for it to be signed by all trustees) and must state that it has not been revoked, modified, or amended in any manner that would make the representations in the certification incorrect.
6. This section does not apply to judicial proceedings.

Part III

Termination,
Modification and the
Designated Notice
Representative:

Meaningful Changes in
Connecticut Law

I. Trust Modification and Termination⁷

- A. Historically, Connecticut has been a strict constructionist state when it comes to modifying or terminating existing trusts. The principal case, *Adams v. Link*, 145 Conn. 634 (1958) permitted modifying or terminating trusts only if “...every reasonable ultimate purpose of the trust’s creation and existence has been accomplished.” It has stood as a barrier to adapting trusts to changed circumstances, whether of the beneficiary, the overall economic circumstances, changes in family or any other unforeseen developments. In fact, with the increasing nationwide trend toward long term trusts, one of the motivating reasons for this state to adopt a version of the Uniform Trust Code was to overrule this case and provide greater flexibility for trustees or beneficiaries in the future.
- B. In general. The new Trust Code provides a number of opportunities to modify existing trusts if there are appropriate reasons for so doing. Most of the provisions apply to both existing trusts, those in existence prior to January 1, 2020, and for newer trusts, those created and funded after the effective date of the act. There is one provision for modification or termination that applies only to “new” trusts. In general:
- (1) A proceeding to modify or terminate an irrevocable non-charitable trust may be brought by either the trustee or a beneficiary of the trust. Sec. 30(c).
 - (2) The trustee is a necessary party in any proceeding to modify or terminate a trust, Sec. 30 (d).
 - (3) Modification or termination of a charitable trust may be commenced by the settlor or a person designated by the settlor IF the trust instrument specifically grants the settlor or his or her designee the right to do so. Sec. 30 (c).

C. An Overview of Modification – the Five Paths:

- (1) **Changed circumstances** – to further the purpose of the trust
- (2) **Consent of all (or almost all) of the beneficiaries** –consistent with a material purpose of the trust (also known as, “we have a better idea now”).
- (3) **Correct mistakes**, both in expression (usually scrivener error) or in inducement (usually settlor error in law or fact)
- (4) **Tax purposes** – broad standard, not limited to specific issues, modification must not be contrary to settlor’s intent.
- (5) **It seemed like a good idea at the time** – modification through the consent of the settlor and all beneficiaries, even if inconsistent with a material purpose of the trust.

- D. **Changed Circumstances.** Trust modifications for existing as well as new trusts, other than in changes to deal with mistake or to achieve the Settlor’s tax objectives, are primarily covered in Section 32 of the new Code, and must be approved by a court. The legal theory

⁷ The author of Sections I to IV of this Presentation Outline is Deborah J. Tedford of Mystic, Connecticut.

supporting the court's power is that of **equitable deviation**. The first method of modification focuses on the applicant meeting three different factors

- (1) "Circumstances not anticipated by the Settlor" is the key test for likely the most common method of modification. Accordingly, a petitioner must allege some form of changed circumstances in order to bring a proceeding to modify trust terms.
- (2) In reviewing and evaluating any proposed changes, a court must find that the proposed changes "will further the purposes of the trust."
- (3) Any proposed modifications must be made "in accordance with the Settlor's probable intention."
- (4) The consent of all of the beneficiaries is not required for changed circumstances modification; a court can override beneficiary objections if appropriate.
- (5) **Scope**. Modification can apply to both the administrative or substantive terms of the trust.

(a) **Administrative changes** should be permitted if continuing the trust on the existing administrative terms would be "impractical or wasteful or impair the trust's administration." Sec. 32 (b).

(b) **Substantive changes**. There are no specific guidelines for modifying the substantive terms of the trust, which would be considered by the court on a case by case, fact and circumstance basis to "further the purposes of the trust." Sec. 32 (a).

(c) **Special limitations for first party Special Needs Trusts**. A special needs trust established for a disabled beneficiary pursuant to the terms of 42 U.S.C. Sec. 1396p (d) (4) (A) or (C) may not be terminated under any circumstances prior to the death of the disabled beneficiary. The trust may not be modified to eliminate the state payback provisions, but modification to ensure compliance with the requirements of federal law. Modification is also permissible to modify the contingent beneficial interest after the death of the primary, disabled beneficiary, a not uncommon development in these trusts, especially when the primary beneficiary is young at the inception of the trust. Modification cannot restrict payback to the State of Connecticut or other states for medical assistance or any other claims which Connecticut might have against the estate of the deceased beneficiary. Payback to the State is considered a material purpose of the trust.

E. Modification by Consent of All or (Almost) All Beneficiaries (but not necessarily the Settlor). If all of the beneficiaries consent, or if a court finds sufficient protection for non-consenting beneficiaries, a court may also modify a trust, whether old or new, if the court concludes **that the proposed modification is not inconsistent with a material purpose of the trust**, Sec. 31(b).

- (1) A court may still approve a modification of the trust under this section even if not all beneficiaries consent if the court is satisfied that if the beneficiaries had all consented, the trust could have been modified under this section **and**

- (2) If the interests of non-consenting beneficiaries will be adequately protected. See Sec. 31 (e).
- (3) Spendthrift provisions, which have become “boilerplate” in many instruments, are not automatically a material purpose of the trust, but can be drafted to be a material purpose if the Settlor so wishes. Sec. 31 (c).
- (4) It is not essential to allege or prove changed circumstances, although if applicable, the provisions for modification due to circumstances not anticipated by the Settlor under Sec. 32 (a) would be an alternate route.

F. Modifying “New” Inter Vivos Trusts – Consent of Settlor and All Beneficiaries EVEN IF Inconsistent with a Material Purpose. In comparison, for new trusts only, those established or made irrevocable after the effective date of the Connecticut trust code, January 1, 2020, broader grounds are available for modification under Sec. 31 of the Code, although all modifications must be done with the participation of a court. In this case, the role of the court appears limited.

- (1) This type of consent modification (or termination) is possible under Sec. 31(a) if the Settlor is still living. If a Settlor is still alive and capable, or if incapable, is appropriately represented by a conservator or agent under a power of attorney authorizing such action, then an inter vivos trust may be modified or terminated even if the proposed modification or termination is inconsistent with a material purpose of the trust.
 - (a) The court’s role in this instance appears limited to finding that there is unanimous consent to the modification.
 - (b) If a conservator is representing the Settlor, the court handling the conservatorship must give its approval to the proposed modification or termination of the trust.
 - (c) If there is no conservator but there is an agent under a power of attorney, then either the power of attorney or the trust must authorize the agent’s authority to apply for modification or termination of a trust. Note that the Connecticut long form power of attorney act authorizes an agent to create, modify or terminate a trust if that power is affirmatively selected by the principal when the document is signed. C.G.S. Sec. 1-352, long form power (O).
 - (d) This concept has not been controversial and has been part of both the Restatement (Second) of Trusts and the Restatement (Third) of Trusts.
- (2) If the Settlor is no longer living, or if living, does not consent, has no conservator or agent authorized to consent to a proposed modification or termination, then an irrevocable inter vivos trust, may be modified by a court with consent of “mostly all” the beneficiaries, but in this case, under Sec.31 (b) the modification must not be inconsistent with a material purpose of the trust.

- (a) The language of the CT UTC provides that if consent of all the beneficiaries is not reached, a court may still grant the proposed changes if the court is satisfied that the trust could have been modified under this section if all the beneficiaries had consented, and the interest of any beneficiary who did not consent would be “adequately protected.” Sec. 31 (e).

E. Modifying or Reforming Trusts to Correct Mistakes

- (1) Section 36 of the CT UTC allows a court to reform the terms of a noncharitable trust whether inter vivos or testamentary, whether pre or post January 1, 2020, to conform to the terms of the Settlor’s intention. This is not just for tax purposes, but for any mistake.
- (2) A petitioner must first prove by clear and convincing evidence just what that intention was.
- (3) Second, the petitioner must prove that the mistake was either one of fact or law, whether “in expression” (a mistake in drafting that fails to state the settlor’s intention, such as by omitting a term that was supposed to be included, or including one that was not) – is usually a mistake of the scrivener and not the Settlor. The alleged mistake could also be “in the inducement.” This occurs when the instrument correctly sets forth the terms that were intended but information reveals that the Settlor’s intention was based on a mistake of fact or understanding of the law - usually a mistake of the Settlor and not the scrivener.

F. Modifying Trusts for Tax Objectives. Similar to Section 36, CT UTC Sec. 37 allows a trustee or beneficiary to petition a court to modify an inter vivos or testamentary trust to achieve the Settlor’s tax objectives.

- (1) The court must do so in a manner “that is not contrary to the settlor’s probable intention.”
- (2) In so doing, the court may make its order retroactive. Previously, reform for tax purposes was limited to 45a-485, reforming the marital deduction or creating a Q DOT for a non-citizen spouse.
- (3) Whether such a decision will be binding on the IRS or DRS in all cases is another matter and beyond the scope of this outline.

II. Terminating Trusts. The trust code provides several paths for terminating inter vivos trusts based on the date of creation, the size of the trust and the reasons for terminating the trust. Most of these are the same as for modification of trusts, with a few exceptions.

- (1) If the trust, either old or new, is over \$200,000 in value, termination must be by a court:
 - (a) Under Section 31(b), by **consent of ALL OR MOST of the beneficiaries**, not just qualified beneficiaries (and not necessarily the Settlor) “if the court concludes that continuance of the trust is not necessary to achieve any material

purpose.” Subsection (c) of that section clarifies that a spendthrift provision, which has become boilerplate in many documents, is not automatically presumed to be a material purpose of the trust.

- (b) Under Section 32 (a) if, due to **circumstances not anticipated** by the settlor, termination will further the purposes of the trust.” This section does not require the consent of all beneficiaries.
- (c) Under 35 (b), if the trust property is **insufficient to justify the costs of administration** relative to the material purposes of the trust. An alternative that the court may consider in this instance is a change in trustee – removing a professional trustee and replacing it with a family or other less expensive option.
- (d) If a trust is terminated by any of these methods by a court, the final distribution must be made “in a manner consistent with the purposes of the trust as directed by the court.

(2) **Consent termination inconsistent with material purpose.** If the inter vivos trust is a new, post 2019 trust, then all of the above methods of termination apply, plus one more, described above regarding trust modification. Under Sec. 31 (a), if the Settlor, trustee and all beneficiaries (not just qualified beneficiaries) consent, then a trust may be terminated even if the termination is inconsistent with a material purpose of the trust. A conservator or agent under a power of attorney may, in appropriate circumstances, exercise that power on behalf of the Settlor. In this case, distribution may also be made in a manner contrary to a material purpose of the trust.

(3) **Exception for Special Needs Trusts.** Remember – NONE of these provisions apply to first party special needs trusts regardless of size, regardless of whether the settlor and all beneficiaries consent. These trusts may only terminate on the death of the disabled beneficiary.

(4) **Small trust nonjudicial termination.** Both existing and new inter vivos trusts with assets below \$200,000 in value may be terminated nonjudicially. To take advantage of this provision in Section 35(a), the trustee of a noncharitable inter vivos trust must give 30 days’ notice to the qualified beneficiaries and such other beneficiaries as the trustee deems reasonable. The trustee must then distribute the trust property “in a manner consistent with the purpose of the trust. Sec. 35 (c)(1). There is no requirement that the trustee obtain the consent of all beneficiaries, just notify them of the proposed action.

- (a) Note that Section 67 (a) permits the trustee to send a proposal for distribution to the qualified beneficiaries when a trust is being fully or partially terminated.
- (b) If the trustee’s proposal informs those beneficiaries of their right to object to the termination or to the proposed terminating distribution within a specified period of time, at least 30 days, and they fail to do so, the expiration of that time period allows is the expiration of the beneficiaries’ right to object.

- (c) In this context, a release from a beneficiary obtained by a trustee for breach of trust is invalid if the release was induced by improper conduct of the trustee or the beneficiary was unaware of material facts relating to the breach at the time of signing the release. Sec. 67(c).
- (5) A trustee of an inter vivos trust under \$200,000 in value can also make use of judicial termination based on the provisions detailed above; the trustee is not limited to nonjudicial termination.
- (6) Distribution in the case of termination. If a trust under \$200,000 is terminated by determination of the trustee that the trust is insufficient to justify the costs, then the trustee must distribute the trust property in a manner consistent with the purposes of the trust. If the trust is larger and termination is based on court approval, then distribution is as directed by the court after considering the material purposes of the trust. Sec. 35 (c); the exception is consent termination by the settlor and all beneficiaries of “new” trusts, which may be contrary to the material purpose of such trust.

H. Nonjudicial Settlements under the Connecticut UTC. While modification of all trusts and termination of trusts over \$200,000 must be made with some level of court approval, there are a number of matters in inter vivos trust administration that can be resolved nonjudicially, at least, if no one objects. These tools can be surprisingly powerful, and include:

- (1) Determining the interpretation or construction of the terms of the trust, Section 11 (d) (1);
- (2) Approving a trustee’s report or accounting, Sec. 11 (d) (2);
- (3) Consenting to directions to a trustee to refrain from performing a particular act, or granting a trustee any necessary or desirable power, Sec. 11 (d) (3);
 - (a) Trustee matters such as trustee resignation, appointment of a new trustee, and the determination of the trustee’s compensation, Sec. 11 (d) (4);
 - (b) The transfer of a trust’s principal place of administration, Sec. 11 (d)(5);
 - (c) Determining the liability of a trustee for an action relating to the trust, Sec. 11 (d)(6);
 - (d) Terminating an inter vivos trust whose corpus is under \$200,000, Sec. 35 (a);
 - (e) Combining (merger) or dividing trusts, a technique that may be more powerful than it may appear, See comments on Sec. 38 below.

(f) Exception for court intervention. An interested party may request a court to approve a nonjudicial settlement agreement, based on whether or not the virtual representation was adequate.

(g) Exception for court intervention. An interested party may request a court to approve a nonjudicial settlement agreement to determine whether the agreement contains terms and conditions the court could have properly approved. Sec. 11 (f).

III. Combination or Merger of Trusts - a Sixth Path for Modification, or Perhaps More.

- (1) Section 38 of the Connecticut UTC allows nonjudicial combination of inter vivos trusts. Existing law only allowed a court to divide trusts for tax (GST) purposes, C.G.S. 45a-488, required that the resulting trusts be “identical” and that the resulting division be in the best interests of the beneficiaries of the trust. This statute has also been used to separate trusts when multiple beneficiaries each want their own separate trusts if the instrument so provides, but current law has no provision for combination of similar trusts, and has no provision for either combination or division to be done nonjudicially. That will now change.
- (2) The new CT UTC will grant trustees of an inter vivos trust, not just a court, the power to combine (or divide) trusts after 30 days’ notice to all qualified beneficiaries. There is no requirement that the Settlor be the same; that the trusts arise under the same instrument, that the terms be identical - no. The standard is that “the result does not impair rights of a beneficiary or adversely affect achievement of the purposes of the trust.” Sec. 38 (a).
 - (a) The language, other than limiting the nonjudicial application to inter vivos trusts (i.e., excluding testamentary trusts) comes directly from Sec. 417 of the Uniform Trust Code. It follows Sec. 68 of the Restatement Third of Trusts, which also provides for merger of trusts even if the terms are not identical.
 - (b) Note that notice is required only to qualified beneficiaries, and is not mandatory to contingent or more remote beneficiaries.
 - (c) Court approval is not necessary, although if the dispositive terms of the trusts are substantially different, a trustee may wish to seek court approval. Either a beneficiary or a trustee can bring a petition under this section (See CT UTC Sec. 30).
 - (d) Beneficiary approval is not necessary; only notice to qualified beneficiaries. A trustee may simply act to combine or divide with the requisite 30 day notice.
 - (e) This is a default provision, that is, a Settlor can exclude the possibility of trust merger in drafting the instrument. Before a trustee takes action to combine trusts, a careful reading of the particular instruments is needed to make certain there are no material limitations on a proposed combination.
 - (f) The UTC Commentary indicates that typically a trust combination will involve trusts created by different family members whose primary differences are administrative in

nature. The benefits of combining trusts include more efficient trust administration and may be an alternative to terminating an uneconomic trust by reducing trustee fees, being able to file one combined income tax return, and “the ability to invest a larger pool of capital more efficiently.” Commentary to UTC Sec. 417. However, other states, including Delaware, have taken this provision much further.

- (g) The Commentary also observes that neither a combination nor division need be approved either by the court or the beneficiaries, but points out that “Prudence may dictate... that court approval under Section 410 (Section 30 of the CT UTC) be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other.”
- (h) For trusts where decanting is not a possibility because the trustee does not have broad authority to distribute principal, whether such decanting would be pursuant to another state’s law or under some form of Connecticut common law decanting, this may be an alternative. Think about it.
- (i) Practitioners in other states have made broad use of this seemingly small, administrative provision in daily practice. The ability to combine non-identical trusts “that do not impair the rights of a beneficiary” can be potentially dramatic. Delaware found that its equivalent provision (“does not result in a material change in the beneficial interests of the trust beneficiaries”) so useful that it amended its trust laws in 2015 to specify that the trust being merged into could be a new, unfunded trust, and that the power to merge trusts would be available even when the new, recipient trust was created solely for the purpose of merger. This provision rather than decanting is now often used to update administrative provisions of trusts in Delaware. Similarly, this may be a tool that is more useful than might seem on the surface for Connecticut practitioners.

IV. Virtual Representation and the New Designated Notice Representative

A. Connecticut has had the virtual representation section of the Uniform Trust Code for a number of years. The new CT UTC clarifies that virtual representation applies to all proceedings under the Code, both judicial and nonjudicial. Sec. 17.

B. An important new feature of Connecticut’s trust code, and one that is not in many other states’ trust codes or laws, is the newly created designated notice representative. This is an individual named by the Settlor in the trust instrument to receive notice on behalf of any beneficiary except a charity. Sec. 21.

- (1) Why create a new role? The purpose of this new role is to allow a Settlor who wishes to include and benefit a young person, an emotionally troubled family member, an individual with substance abuse or other serious problems as a beneficiary under the trust, without them receiving formal notice. This allows those individuals to benefit from the trust without being directly involved in the trust administration process.
- (2) This can be especially useful for minor or relatively young beneficiaries to avoid the “trust fund baby” syndrome, reducing the youthful beneficiary’s motivation to be educated or work hard to overcome obstacles early in life.

- (3) This feature can also be a useful solution for settlors to consider on behalf of beneficiaries with mental health or substance abuse problems who may regard the trust as a source of temptation for their illness.
- (4) It may also be appropriate if a settlor is aware of a potential beneficiary who is likely to harass the trustee if given unlimited rights of notice and the right to request unlimited information from the trustee.

E. What are the duties and what is the potential liability of this new designated notice representative? Is this new position a fiduciary, with fiduciary responsibilities? How much or how little information should the new notice beneficiary provide his or her representee? What factors should be weighed in making these decisions?

- (1) This is not a standard UTC provision; only two other jurisdictions, Florida and the District of Columbia, have anything equivalent, and Connecticut appears to have a broader scope of application for a notice representative. There is little formal guidance. Hence, there will likely be a learning curve as practitioners and family members learn through experience and discussion with attorneys both in those jurisdictions and Connecticut.
- (2) The notice representative cannot be the trustee, and should not also be a trust beneficiary, unless he or she is a close relative of the beneficiary being represented (spouse, grand, parent or sibling, for example); or unless the notice representative is specifically named by the settlor to act in this role. However, even if permitted as a close relative, note that there are potential conflicts of interest for notice representatives who are also trust beneficiaries, which can lead to conflict and litigation. Drafting attorneys should advise clients of the potential issues that can and are likely to arise in the case of conflicts of interests especially with a role as new and undefined as this.
- (3) The notice representative is likely a fiduciary, so the duties of loyalty, impartiality if there is more than one representee, diligence, etc. would apply. The Code specifies that the notice representative is exonerated from liability as long as he or she acts in good faith. Sec. 21 (d).
 - (a) Factors that are likely relevant are the types and severity of any impairments of the beneficiary being represented; the likely reasons for omitting that beneficiary from receiving direct notice, and the good faith efforts of the notice representative to communicate the beneficiary's needs and status with the trustee and if appropriate, provide some level of information about the trust.
 - (b) It is not hard to imagine court cases that may arise in time to flesh out the parameters of the notice beneficiary's duties, but the statute clearly states there is no liability by the designated notice representative to the beneficiary whose interests are represented for any actions or omissions to act made in good faith. Good drafting suggests minimizing the potential for claims that would erode the good faith defense such as obvious conflicts of interest, and

providing guidance to the notice representative of his or her expected duties and responsibilities. Such guidance may include regular meetings with the person being represented, regular communication of that person's circumstances and needs to the trustee, and possibly including advocacy on behalf of that individual where appropriate.

- (4) The intent of the statute is to permit the appointment of a designated notice representatives in appropriate cases, including trust modifications and terminations, both substantive and administrative; and for the court to construe the position liberally in the process.

F. **Virtual Representation.** Connecticut's virtual representation statutes, which were based on the 2000 UTC, are repealed and replaced by Sections 17 through 20 of the new act.

- (1) Section 45a-487a and 45a-487b and 478f are essentially incorporated into Section 17, setting forth the general concepts of virtual representation, what matters it applies to and the effect of the representation.

- (2) Section 18 of the act deals with holders of powers of appointment representing the potential appointees and replaces 45a-487 (b); the changes appear to be primarily grammatical.

- (3) Section 19 replaces Sec. 45a-487d regarding conservators and guardians representing their respondents, agents under a power of attorney being able to bind their principals; trustees being able to bind the trust beneficiaries; estate executors or administrators binding those interested in the estate and parents represent minor or unborn children if no guardian is appointed.

- (4) Section 20 of the new act replaces Sec. 45a-487e, allowing a court to appoint a guardian ad litem if an interest is not represented or represented inadequately. Such guardian ad litem may receive notice, give consent or otherwise represent and bind the minor, incapacitated or unknown person.

PART IV

CONTESTED MATTERS:

JURISDICTION, CREDITORS AND TRUSTEES CHANGES

1. Contested Matters

Claims and Trustee Matters⁸

I. Protection from Creditors

A. . . . of the Beneficiary

7. Protection from claims of a creditor of a beneficiary in a third party trust (i.e., traditional spendthrift law) is still governed by C.G.S. § 52-321, which was not revoked or amended. It provides that if the income of a trust may be used for the support of the beneficiary, the income is not subject to the claims of the beneficiaries creditors. By common law, if the income is protected, so is the principal.
8. Section 3(26) of CUTC adds to that by defining a “Spendthrift Provision” as any provision that restrains both voluntary or involuntary transfer of a beneficiary’s interest.

Drafting Tip: Check spendthrift provisions to ensure reference to restraint on both voluntary and involuntary transfers.

9. CUTC § 40(a) enhances creditor protection for beneficiaries of a third party trust by further preventing creditor claims against trusts on basis of:
 - (i) \$5,000/5% withdrawal power or “Crummey” power.
 - (ii) A power to distribute that is limited by ascertainable standards, even where the beneficiary is a trustee.
10. CUTC § 40(a) is designed to elevate third party “support trusts” to the same level of creditor protection as a fully discretionary third party trusts as a vehicle for creditor protection for beneficiaries. Creditors of a beneficiary cannot attach trust assets even if trust is a support trust (i.e., a HEMS standard) and beneficiary could compel a distribution on that basis.

Drafting Tip: Are independent trustees and fully discretionary trusts still necessary to gain creditor protection? That is the intent of the law, but not guaranteed if beneficiary resides in a different jurisdiction. Still advisable to include an independent trustee with sole discretion.

B. . . . of the Trustee

Under § 39, trust property is exempt from personal obligations of the trustee. This section applies whether or not the trustee is also a beneficiary.

⁸ This section was prepared by Kelley Galica Peck, a Principal of Cummings & Lockwood LLC, resident in West Hartford, Connecticut.

C. . . . of the Grantor

1. Under § 58, the creditors of the grantor are precluded from making a claim against an irrevocable grantor trust merely because the trustee has the power to pay the taxes on behalf of the grantor or reimburse the grantor for the payment of taxes. Designed to eliminate one major concern regarding the power to reimburse grantor's tax liability rendering the trust subject to estate tax.

2. CUTC also adopts a regime for self-settled asset protections trusts (DAPTs). A story for another outline . . .

3. CUTC does NOT contain any provisions regarding the process of making claims against a revocable trust that is comparable to the claims process against a decedent's estate. The status of liability of a revocable trust for the debts of a deceased grantor remains uncertain, at least in the probate courts. See *Lefevre v. Lefevre*, 071612 CT Sup., CV064006595 (New London, Martin, J.)

Drafting Tip: While the status of liability of a revocable trust for the personal obligations of the grantor remains undetermined, it is prudent to include express provisions in the trust to guide the trustee -- either mandating or prohibiting payment, whichever is preferred, but do not leave ambiguous because may cause liability to the trustee.

II. A Light at the End of the Tunnel - Statutes of Limitation

Under the common law, the statutes of limitations related to trusts were essentially non-existent. CUTC establishes clear and concise timeframes in which a trust contest may be brought and when claims against trustees must be raised. However, these timeframes apply only to *inter vivos* trusts.

A. Limitations on Trust Contests - Section 43

1. Provides a statute of limitation with respect to the timeframe for bringing objections to a revocable trust at the death of the grantor. Designed to equalizes the playing field to provide a comparable timeframe with that applicable to will contests.

2. A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within one year after the settlor's death. The rule is not applicable to testamentary trust, but the rules applicable to contesting testamentary trusts are all of those rules applicable to contesting the will itself.

3. The statutes of limitations can be **shortened** to 120 days after trustee sends the person notice informing the person of the existence of the trust, including: (i) copy of the trust instrument; (ii) the trustee's name and address; and (iii) the time allowed for commencing a proceeding to contest (i.e., 120 days from date of notice).

4. **NOTE:** The trustee cannot shorten the statute of limitations to 120 days if notice is sent to the designated representative for the beneficiary (as permitted under Section 21) but NOT to the beneficiary.

5. The statute of limitations provides protection to a trustee who makes distribution of trust property after the settlor's death beyond the applicable period limitations unless: (i) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or (ii) a potential contestant notified the trustee of a possible judicial proceeding to contest the trust and such a proceeding is, in fact,

commenced not later than 60 days after such notification to the trustee; or (iii) the trustee failed to give the required notice pursuant to Section 63.

6. Trustee should provide the necessary documentation/information to: (i) all persons entitled to notice of application for probate of settlor's estate or notice of admission of will to probate; and (ii) the beneficiaries of the trust and all other persons who (in the opinion of the trustee) have an interest that is adversely affected by the trust.

7. If the court determines that a distribution to a beneficiary of a trust is invalid, the beneficiary is required to return the distribution received (even without a refunding agreement). Provides additional protection for a trustee.

B. Limitations on Claim for Breach - Section 73

1. Creates a clear and unequivocal timeframe in which a beneficiary may bring claims against the trustee for breach. The statute of limitation is:

- (i) No more than one year from the date trustee provides a report to the beneficiary adequately disclosing the breach, or
- (ii) If the trustee does not provide a report (which contains adequate disclosure) to the beneficiary, the statute of limitations is three years from the date the trustee ceased to act as trustee, the trust terminated or the beneficiary's interest in the trust ended.

2. Note that this is a default rule and is not mandatory so it is possible to shorten the period of limitations in trust instruments. However, courts may be persuaded not to enforce such a shortened period.

3. This statutorily overrules the common law rule that statutes of limitations do not begin to run until the trustee accounts, but it applies only for inter vivos trusts. Testamentary trusts do NOT get the benefit of this statute of limitations and the trustee of a testamentary trust remains liable until the trustee files a formal judicial accounting in the probate court. NOTE: The provisions of § 74 providing for release of the trustee by a beneficiary consent also do not apply to testamentary trusts. Further, the provisions of Probate Court Rule 32.7, which allows for a process in lieu of a final accounting for testamentary trust if the will waives interim accountings, also does NOT allow for a release of liability for the trustee sine no formal judicial accounting was filed. There may be equitable estoppel arguments available to testamentary trustees if they utilize the Rule, but there is no case on point at this time.

III. Concerning the Trustee

A. Change of Trustees - Section 44

1. Modifies the common law presumptions in Connecticut law regarding acceptance or declination of appointment, which presumes acceptance absent an affirmative act to decline appointment.

2. Under § 44, a nominated trustee is presumed to decline to act unless the trustee affirmatively take steps required by the trust instrument to accept or affirmatively manifests an intent to accept by taking possession of trust property or exercising trust powers/duties.

3. For testamentary trusts, the trustee also must take the added step of filing an acceptance with the probate court. This provision leaves some doubt as to the liability of a testamentary trusts who begins to act and breaches a fiduciary duty but never actually filed an acceptance with the court. There might be equitable claims that the individual should be liable, but if not actually appointed as trustee, the question of fiduciary liability for a person who acts without a formal appointment remains an open question.

Drafting Tip: Add explicit procedures for declining or accepting appointment as a trustee.

B. Bonds - Section 45

1. Substantially modifies existing law, which mandates bond by testamentary trustees unless expressly excused by the will and requires bonds of *inter vivos* trustees when seeking probate court jurisdiction over the trust if the trust instrument does not expressly excuse bond.

2. Section 45 reverses the presumption for bond, which is now required only if the court first determines that it is necessary to protect the beneficiaries or is affirmatively required under the trust instrument. There is no provision in the statute defining what is necessary to protect the beneficiary, but it must be some material finding that the absence of a bond presents a risk based on a particular set of facts and circumstances, not just a general presumption that having a bond is better than not having a bond.

3. This rule applies equally to testamentary and *inter vivos* trusts. It is not a mandatory provisions, so it may be modified by the trust instrument.

Drafting Tip: Include an express provision in revocable trusts waiving bond. If the client wants a bond, then it must be affirmatively inserted in the will or trust since silence no longer means that a bond will be required.

C. Co-Trustees - Section 46

1. Reverses the presumption in Connecticut law that co-trustees must act unanimously and cannot delegate powers among themselves.

2. Under § 46, co-trustee are presumed to act by majority rule and any trustee may delegate to any other trustee unless the trust instrument requires otherwise.

3. A trustee who does not participate in a decision (either because not a part of the majority or because duty was delegated) is not liable for the acts/omissions of the other trustees who do.

4. This rule applies equally to testamentary trusts and *inter vivos* trusts. It is not a mandatory provisions, so it may be modified by the trust instrument.

Drafting Tip: If client wants unanimity for any action or to prohibit delegation, the trust instrument must expressly so state as it is no longer the presumption.

D. Vacancies and Successors - Section 47

1. Establishes a default mechanisms to fill a vacancy if the trust instrument is silent or inadequate:
2. For *inter vivos* trusts, vacancy can be filled as provided by the terms of the trust or, in the absence of terms, by unanimous agreement of the qualified beneficiaries. Alternatively can be filled by a court. This process can be overridden in the trust instrument.
3. For testamentary trust, vacancy can be filled as provided by the terms of the will with approval of the probate court. Alternatively, a vacancy can be filled by the probate court if there is no process or mechanism in the will. The beneficiaries of a testamentary trust have no power to appoint a successor trustee absent an express power in the will, and, even if the will permits the beneficiaries to appoint a successor, the actual appointment is valid and effective only upon court approval. The courts typically honor a recommendation of the beneficiaries.

E. Resignations - Section 48

1. Enhances the rules for the method of resigning as a trustee of *inter vivos* trusts by requiring the trustee to provide 30 days' notice to the qualified beneficiary, settlor and co-trustees, unless the trust instrument requires otherwise. This is a default that can be modified by the trust instrument. This provides the beneficiaries an opportunity to appoint a successor, if authorized by the Trust instrument, or to seek court appointment of successor, if necessary.
2. For testamentary trusts, the trustee still must obtain probate court approval before resignation is effective and trustee is released from responsibility as trustee. Probate courts have authority to impose reasonable conditions on the resigning trustee of testamentary trusts to protect trust assets, beneficiaries and other trustees - “**as law and equity may require.**”

Drafting Tip: Include clear instructions on the process for resigning in the instrument so that the trustee knows how to resign. It is also prudent to include a requirement that the sole trustee cannot effectively resign until a successor is acting, though there is a duty to the trust under Section 50 until the new trustee actually receives the property.

F. Removal - Section 49

1. The provisions of UTC regarding removal of trustees was already part of the Conn. Gen. Stat. § 45a-242, but Section 49 re-integrates the trustee removal provisions back into the UTC framework. **NOTE:** C.G.S. § 45a-242 still exists as a separate statutory section to deal with removal of other fiduciaries - executors, administrators, guardians and conservators, but it now expressly excludes trustees.
2. Section 49(b)(4) clarifies that the “no-cause” removal must be requested by all of the **qualified** beneficiaries (i.e., the beneficiaries currently eligible to receive distributions and the presumptive remainder beneficiaries). Formerly, C.G.S. § 45a-242 referred to “all of the beneficiaries” so was a much harder standard to meet.
3. This provision applies equally to testamentary and *inter vivos* trusts. It is not a mandatory provisions, so it may be modified by the trust instrument.

Drafting Tip: The trust instrument should always set forth specific provisions governing how, when, why and by whom a trustee can be removed. Consider including an express prohibition in the trust instrument regarding no-cause removal for certain trustees (such as a family member) if the grantor does not want beneficiaries to collude to remove a particular trustee. Caution against including such a prohibition regarding the drafting attorney who serves as trustee as such a provision may be an ethical violation without clear conflict waivers.

G. Delivery of Trust Property by Former Trustee - Section 50

1. A former trustee (whether resigning or removed) has ongoing trust powers and duties relative to protecting the trust property, if there is no other acting trustee, until the property is actually delivered to the successor trustee.
2. The court may order otherwise, but is advised against doing so as this requires a former trustee to protect and preserve trust assets and provides continuing liability for breaches.
3. This provision applies equally to testamentary and *inter vivos* trusts. It is not a mandatory provisions, so it may be modified by the trust instrument.

H. Trustee Compensation - Section 51

1. If the trust is silent, the trustee is entitled to reasonable compensation under the circumstances.
2. The statute does not define what constitutes reasonable compensation nor does it state what circumstances are to be considered in determining what is reasonable. However, the official comments outline various factors to consider. The factors are comparable to the existing common law factors stemming from *Hayward v. Plant* and set forth in the Probate Court Rules. Since the common law remains intact unless expressly inconsistent with or overridden by the CUTC, the *Hayward* factors remain intact for the analysis of what would constitute reasonable compensation under § 51(a) and will continue to inform the determination of “compensation that is reasonable under the circumstances.”
3. By contrast, § 51(b) provides that if the terms of the trust instrument expressly provide for compensation, the trustee is entitled to receive the compensation as specified in the trust instrument. The court may only adjust that compensation (up or down) if (1) the trustee’s duties are substantially different from that which is contemplated when the trust was created, or (2) the compensation specified in the terms of the trust would be unreasonably low or high.
4. **NOTE:** § 51(b) does NOT provide that the compensation must be “reasonable under the circumstances.” Court may only adjust if it is objectively too high or too low under any circumstances. The usual nine-factor test set forth in *Hayward* and the Probate Court Rules would not apply where the compensation is specified in the trust. Instead, the court must find either that the trustee’s duties substantially differ from what was originally contemplated (e.g, the trust once held a business asset but now is only marketable securities) or that the compensation could not be considered reasonable under any circumstances (e.g. a requirement that the trustee be paid one dollar, or that the trustee be paid on the basis of its usual fee schedule, but it has been modified to be exponentially higher than when the trust was created).

Drafting Tip: Include a compensation provision in the trust instrument when possible. If the trustee is a professional who will charge on the basis of a fee schedule (whether fixed fee or hourly) have the grantor sign a separate agreement indicating awareness of the schedule and approving the schedule to prevent claims of changed circumstances or lack of knowledge regarding the anticipated fee schedule.

I. Reimbursement of Expenses - Section 52

1. A trustee is entitled to be reimbursed out of trust property, with appropriate interest, for any expense incurred by the trustee in the defense or administration of the trust, unless the trustee was found to have committed a breach of trust. The trustee has a lien against trust property for the reimbursement.

2. This provision is slightly different from the pure language UTC, which does NOT expressly reference reimbursement for defense of the trust or recognize an exception in the case of breach of trust. Pure UTC refers only to expenses incurred in the administration of the trust. However, defending the trust is an inherent duty of the trustee and, therefore, is part of the administration of the trust. The last sentence of the comments to pure UTC state that the provision applies to the payment of attorney fees and expenses in defending an action and that a trustee ordinarily is not entitled to reimbursement of attorney fees and expenses if it is determined that the trustee breached the trust. Thus, the language merely takes that concept out of the comments and puts it directly into the statute itself. As such, the reference to defense of the trust and breach should not be seen as materially different from pure UTC and its comments should still apply

3. This provision applies equally to testamentary trusts and *inter vivos* trust. It is not a mandatory provisions, so it may be modified by the trust instrument.

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Model UTC - CT UTC
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**CONNECTICUT'S NEW GRANTOR TRUST INCOME TAX REIMBURSEMENT
STATUTE AND RELIANCE ON REVENUE RULING 2004-64 AS A SAFE HARBOR TO
A VERY ROCKY SHORELINE**

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Background

Grantor trust planning for irrevocable trusts has long been a vital tool for enhancing trust performance in a way that diminishes the grantor's gross taxable estate in favor of the trust beneficiaries without gift tax consequences by having the grantor become primarily and legally liable for the trust's income tax liabilities. The grantor trust rules were enacted long ago at a time when trust income tax rates were more favorable than individual income tax rates and thus those rules were strongly biased in favor of shifting income tax liability back to the grantor for those situations in which the grantor was deemed to have retained too many strings. However, after the Tax Reform Act of 1986 when trust income tax rates became severely compressed and individual rates and brackets became relatively more favorable than trust income tax rates and brackets, grantors became able to take advantage of those very same biases in shifting tax liability back to themselves as a method of lowering overall income tax liability. In addition to a lower income tax bill, Revenue Ruling 2004-64 confirmed that the grantor's payment of income tax on trust income attributed to the grantor did not result in gift tax consequences to the grantor. There was thus a "double-barreled" tax benefit to grantor trust status.

Due to the lack of the trust having an income tax identity separate from the grantor, grantor trust status also allows for desirable transactions between the grantor and the trust to occur without income tax consequences. Thus, it is possible for a trust to borrow from the grantor without interest income recognition and to rent property to a grantor without rental

income recognition and without the requirement to reduce basis for depreciation. It also is possible to sell and exchange assets between the grantor and a grantor trust without taxable gain recognition.

However, there may be times when a grantor of an irrevocable trust wishes that he or she did not have to pick-up the trust's income tax bill from the IRS. This might be the case in a year in which the trust experiences a particularly large capital gain event or if a trust's investment program has been so successful that the grantor no longer wishes to be saddled with the trust's associated income tax liabilities on an annual ongoing basis. Accordingly, in those cases where grantor trust status hinges on the commonly used grantor trust provision conferring the grantor with the right to substitute trust assets for other assets of equivalent value, it is possible for the grantor to irrevocably release that power with the result that grantor trust status is permanently turned off.¹

Recognizing that turning off grantor trust status permanently will be contrary to the best interests of the trust beneficiaries in those situations where the grantor would otherwise desire to continue grantor trust treatment in subsequent years, a provision that would allow a trustee to reimburse a grantor for a particularly large or unusual or infrequent income tax liability would be in everyone's best interests, provided that such a provision would not otherwise create negative side effects such as causing estate tax inclusion of trust assets or exposing trust assets to the grantor's creditors.

This is where reliance on the "safe harbor" language of Situation 3 of Revenue Ruling 2004-64 comes in. Revenue Ruling 2004-64 holds that the presence and exercise of a trustee's

¹ The estate planning practitioner should note that there may be other reasons why a trust is classified as a grantor trust under the tax rules and therefore should review both the tax rules and the trust terms to confirm that grantor trust treatment will be fully discontinued upon release of the substitution power.

fully discretionary income tax reimbursement power granted under the terms of a trust instrument will not result in a taxable gift by the grantor nor in estate inclusion of trust assets in the grantor's gross taxable estate as long as: (1) there is no pre-existing express or implied understanding regarding the trustee's exercise of the power on behalf of the grantor, (2) the grantor has no ability to remove the trustee and appoint himself (or, presumably, under the reasoning of Revenue Ruling 95-58, no ability to appoint a related or subordinate party) as trustee, or (3) local law does not treat the reimbursement power as an interest which subjects trust assets to the grantor's creditors. Although Revenue Ruling 2004-64 did not specifically enumerate any factors other than these three, the Ruling made it clear that the three enumerated factors were not an exclusive list and that estate tax inclusion of trust property could occur if the trustee's discretion to reimburse the grantor for income tax liability was combined with "other facts."

The Connecticut Grantor Trust Tax Reimbursement Statute

Connecticut's grantor trust tax reimbursement statute was included as Section 58 in Connecticut's version of the Uniform Trust Code Act. It provides as follows:

Sec. 58. (NEW) (*Effective January 1, 2020*) The settlor of an irrevocable trust shall not be deemed to have a beneficial interest in such trust merely because the trustee is authorized under the trust instrument or any other provision of law to (1) pay or reimburse the settlor for any tax on trust income or trust principal that is payable by the settlor under the law imposing such tax; or (2) pay any such tax directly to the taxing authorities. No creditor of the settlor of an irrevocable trust shall be entitled to reach any trust property based on the discretionary powers described in this section.

It is important for estate planning practitioners to note that the Connecticut statute resolves but one factor cited by Revenue Ruling 2004-64, which is that for Connecticut state law purposes the trustee's discretion to reimburse the grantor for income tax liability will not result in the trust being treated as a self-settled trust for purposes of creditor access under local (state)

law. Thus, inclusion could still result because of other factors listed by the IRS, including an implied or express agreement by the trustee to reimburse the grantor upon the grantor's request or the ability of the grantor to remove and replace the trustee with himself or with someone who would be considered to be related or subordinate and thus presumed to do the grantor's bidding.

Obviously, it is difficult for the estate planning professional to guard against the grantor having an express or implied arrangement with the trustee other than to strongly caution the grantor against making such arrangements and to point out that the IRS would view a pattern of tax reimbursements as evidence of the existence of such an arrangement. However, in terms of trustee removal and replacement, estate planning practitioners have long protected against imputed control by limiting grantors' removal and replacement powers to trustees that are not related or subordinate to the grantor within the meaning of the safe harbor provided by Revenue Ruling 95-58². At the very least, it seemed that the creditor access local law issue would be solved by a grantor trust reimbursement statute similar to the one enacted by Connecticut which in turn is similar to statutes previously enacted in at least 22 other states. Presumably, the Bankruptcy Code was not cited as an impediment by the IRS in 2004 because relevant federal law at that time was viewed as almost exclusively dependent upon state law definitions of debtors' interests in property. See In re: Mortensen, 2011 WL 5025249 (United States Bankruptcy Court, D. Alaska) at note 49.

² Revenue Ruling 95-58 holds that a removal and appointment power will not result in discretionary trustee powers being imputed to the grantor as long as the successor trustee must be one who is not "related or subordinate" to the grantor as that term is defined under Code Section 672(c).

Changes In the Federal Bankruptcy Law As Possibly Creating Creditor Access And Thus Resulting In Possible Estate Tax Inclusion

Revenue Ruling 2004-64 was issued by the IRS in 2004 and, as discussed above, a critical element of its focus in Situation 3 was whether local (state) law treated a tax reimbursement provision as equivalent to creating a self-settled trust which state law in turn would treat as trust accessible to the grantor's creditors, which in turn would result in estate tax inclusion. Federal law was not mentioned in the Ruling but it is worthwhile to note that the Bankruptcy Code was amended in 2005 (the year following the issuance of Revenue Ruling 2004-64) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act to add Section 548(e) which in relevant part provides a ten-year look back for self-settled trusts. Bankruptcy Code Section 548(e) is comprised of four elements that must all be present for the bankruptcy trustee to avoid transfers by the debtor within ten years before the debtor's bankruptcy petition is filed:

- such transfer was made to a self-settled trust or similar device
- such transfer was by the debtor
- the debtor is a beneficiary of such trust or similar device, and
- the debtor made such transfer with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

If this bankruptcy law provision is applicable to a property transfer made by a grantor to a trust with a tax reimbursement provision, it most likely is within the scope of the problematic "other facts" exception cited in Situation 3 of Revenue Ruling 2004-63 and thus estate tax inclusion would follow for transfers made within the ten-year period. An important question, therefore, is whether this provision of the Bankruptcy Code applies only if an insolvent or near insolvent grantor funds a trust with a tax reimbursement clause during a time a grantor has

known creditors on his horizon in complete disregard of their rights or whether the ten-year lookback period exists despite the existence of an extremely solvent grantor and an absence of then-known specific creditors. A review of some learned commentary on the Bankruptcy Code suggests that the answer is undeveloped in the context of the purposes behind Section 548(e).³ On the one hand, some commentary cites general bankruptcy law for the proposition that careful transfers while solvent and with no actual intent to defraud known creditors should result in no lookback. However, other commentary cites legislative history and notes that Bankruptcy Code Section 548(e) was enacted in 2005 specifically to combat the “self-settled trust loophole” created by five states that had just previously changed the long-standing and -- prior to that time -- uniform state law practice of not permitting grantors to insulate themselves from their own creditors by establishing self-settled trusts. Thus, the latter view is that the addition of Bankruptcy Code Section 548(e) was a federal reaction to state legislation overturning the common law rule that self-settled spendthrift trusts may be reached by creditors and thus by the bankruptcy trustee. The intent of the legislation, therefore, was to provide a federal law ten-year “override” to a growing and developing state law “gap.”⁴

A case can be made that the existence of an income tax reimbursement provision should not trigger Bankruptcy Code Section 548(e) because the purpose of a tax reimbursement provision is the very antithesis of an intent to “hinder, delay or defraud” because the purpose of the clause is to make *more assets rather than fewer* available to a specific creditor (i.e., the IRS) and to facilitate such creditor payment by permitting the trustee of the trust to make direct payment. Simple math demonstrates that the goal of establishing a gifting trust is donative intent

³ For a thorough discussion of the cases and commentators’ views on this issue, see Spero, Asset Protection: Legal Planning, Strategies and Forms, ¶6.09 Fraudulent Transfers and Self-Settled Trusts in Bankruptcy (September 2019) and Collier on Bankruptcy ¶548.07.

⁴ See Collier on Bankruptcy ¶548.07

and no one gives away substantial assets to intended beneficiaries retaining only a possibility of receiving back on occasion a fraction of trust taxable income in order to shelter assets for oneself. There thus could be no actual intent to “hinder, delay or defraud.” This is a very compelling argument and the one to which the author subscribes.

On the other hand, a possible contrary view is that the dollars are fungible and that there is no strict tracing of the reimbursement proceeds. Another way of interpreting the reimbursement provision to make clear an improper underlying purpose would be if the provision were drafted as simply permitting fully discretionary distributions to the grantor up to an amount that just happens to be set at the grantor’s marginal federal and state income tax rates on trust income taking into account the 3.8% tax on net investment income. At maximum marginal rates, this percentage could be as high as 40.8% for ordinary income and 23.8% for long term capital gains, plus 6.99% for Connecticut income tax purposes.

So, with this uncertainty in the background, what is the estate planning practitioner to do?

There would appear to be three options:

- (1) Forego using income tax reimbursement clauses and avoid all risk;
- (2) Take the position that Bankruptcy Code Section 548(e) is not triggered unless it is in anticipation of known creditors and use an income tax reimbursement clause only after disclosure of the risks to the client; or
- (3) Take position number (2) above and in addition impose as a condition precedent to an income tax reimbursement provision the requirement that the trustee’s reimbursement power not result in estate tax inclusion risk.⁵

The author provides the attached sample provision as language which attempts to take the third alternative.

⁵ An expected IRS challenge to such a clause would be that such a clause is an impermissible tax savings clause under the reasoning of Procter v. Commissioner, 142 F.2d 824 (8th Cir.). However, the reasoning of Procter can be addressed by drafting the limiting provision as a condition precedent rather than as a divesting condition subsequent.

Sample Provision

Section _____. **Power to Reimburse For Settlor's Income Taxes.** If the Settlor is treated as the owner of all or any part of any trust created hereunder under Subpart E, Part 1, Subchapter J, Chapter 1 of the Code, the Independent Trustee may, in the Independent Trustee's sole, absolute and uncontrolled discretion, reimburse the Settlor for any amount of the Settlor's personal income tax liability attributable to the inclusion of such trust's income, capital gains, deductions and credits in the determination of the Settlor's taxable income. The Independent Trustee may pay such amount to the Settlor directly or to the taxing authorities. No policy of insurance on the Settlor's life, if any is held in a trust from which the Settlor is reimbursed, nor its cash value nor the proceeds of any loan secured by an interest in the policy, may be used for such payment. The Settlor's wife, if then serving as an Independent Trustee, shall not have the authority provided under this Section. The Independent Trustee is authorized to irrevocably release this power at any time. Notwithstanding the foregoing, the Trustee shall have no authority under this Section that would result in an increase in any estate, gift, inheritance, generation-skipping transfer or other tax payable because of the existence of the power provided hereunder as distinguished from the exercise of the power.