Drafting and Strategies to Avoid Litigation

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CHARLES A. REDD is a partner in the St. Louis, Missouri, office of the law firm of STINSON LEONARD STREET LLP. Mr. Redd concentrates his practice in estate planning, estate and trust administration and estate and trust-related litigation. Prior to joining Stinson, Mr. Redd was a partner in and Vice Chairman of the Trusts & Estates Practice Group at the law firm of SNR Denton US LLP (now Dentons US LLP). Mr. Redd was also previously a partner in the law firm of Armstrong, Teasdale, Schlafly & Davis (now Armstrong Teasdale LLP) and was Chairman of that firm's Trusts & Estates Department. He was previously employed as a Trust Administrator by First Wisconsin Trust Company (now U.S. Bank, N.A.), Milwaukee, Wisconsin, and as an Assistant Counsel by Centerre Trust Company of St. Louis (now U.S. Trust, Bank of America Private Wealth Management).

Mr. Redd has extensive experience and expertise in: (a) the drafting of wills, trust instruments, durable powers of attorney, marital agreements and other estate planning documents; (b) pre- and post-death tax planning for individuals, trusts and estates; (c) preparation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (d) representation and filing of estate tax returns, gift tax returns and fiduciary income tax returns; (e) representation of individual and corporate fiduciaries and (f) litigation in the Probate Division and other equity divisions of the Circuit Court. Mr. Redd has worked on estates and estate planning projects, some involving assets valued at over a billion dollars, and has successfully handled numerous estate tax, gift tax and generation-skipping transfer tax matters, will and trust construction cases, will contests, contests of trust agreements, alleged breach of fiduciary duty cases and other types of cases involving estates and trusts.

Mr. Redd is a member of the State Bar of Wisconsin, The Missouri Bar (Probate and Trust Committee), the Illinois State Bar Association (Section on Trusts and Estates), The Bar Association of Metropolitan St. Louis (Probate and Trust Section, member and past chairman) and the Estate Planning Council of St. Louis.

Mr. Redd was Chairman of the Missouri Bar's Health Care Durable Power of Attorney Subcommittee, and he played a significant role in the drafting and enactment of the Missouri Durable Power of Attorney for Health Care Act. In 1991, Mr. Redd received The Missouri Bar President's Award. Mr. Redd was the principal draftsman of the recently enacted Missouri Family Trust Company Act.

Mr. Redd is an elected member of The American Law Institute and a Fellow of The American College of Trust and Estate Counsel (Past Missouri State Chair; Past Regent; Communications Committee (Past Chair); Estate and Gift Tax Committee; and Fiduciary Litigation Committee). He was an adjunct professor of law (Estate Planning) at Northwestern University School of Law for fifteen years. He serves as Co-Chair of the Editorial Advisory Board of, and writes a regular column in, TRUSTS & ESTATES magazine. Mr. Redd is listed in The Best Lawyers in America and is nationally ranked by Chambers USA in its "Wealth Management" category. He frequently writes and lectures nationally on topics in the trusts and estates field.

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Table of Contents

Drafting and Strategies to Avoid Litigation

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A. Marital Agreements

Marital agreements have become increasingly popular, in part because of higher-than-ever divorce rates, the corresponding subsequent marriage, increase in same-sex marriages and expanded statutory provisions benefitting surviving spouses in some states. For example, the laws of some states grant a surviving spouse the right to share in the decedent's estate, including certain assets that were transferred during life or transferred outside the terms of the Will, regardless of whether the decedent made a provision for the surviving spouse in the Will. *See, e.g.*, Va. Code § 64.2-302. It is not unusual for a client (particularly a wealthy one) to seek to have his or her spouse or intended spouse waive, in a premarital or postmarital agreement, his or her statutory rights to help ensure that the wealthy client's tax-driven and non-tax-driven goals will not be disrupted.

Generally, a premarital agreement may specify the rights of the parties in any property, the modification or elimination of spousal support, the handling of a life insurance policy and most other matters not in violation of public policy. However, the agreement must be voluntary, not unconscionable when signed, and there must be certain financial disclosures between the parties. Uniform Premarital Agreement Act ("UPAA") § 6.

1. Lack of Voluntariness

A premarital or postmarital agreement may be challenged on the basis that a spouse did not enter into the agreement voluntarily because of duress or undue influence. Because the UPAA does not define the term "voluntary," courts look to case law and a variety of factors to determine whether the agreement was entered into voluntarily. *See* Tedford, "Sex and Elderlaw," ACTEC FALL MEETING (2016); Bucher " I Do, Act II: Planning it Right the Second Time Around," ACTEC ANNUAL MEETING (2010).

The risks of undue influence may be greater with a premarital or postmarital agreement than with a Will because of the nature of the fiduciary relationship between spouses in negotiating and executing this type of contract. As discussed below, there are certain actions that can be taken during the preparation of a premarital or postmarital agreement to reduce the risk of a claim that the agreement was not entered into voluntarily.

2. Unconscionability and Failure to Disclose

In the context of negotiations between spouses, unconscionability includes overreaching, concealment of assets and sharp dealing not consistent with the obligations of spouses to deal fairly with each other. UPAA § 6, cmt.

The financial disclosure test is satisfied if before execution of the agreement the spouse seeking enforcement was: (a) provided a fair and reasonable disclosure of the property or financial obligations of the other party; (b) voluntarily and expressly waived in writing any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; or (c) had, or reasonably could have had, adequate knowledge of the property or financial obligations of the other party. The UPAA does not define "fair and reasonable" disclosure.

3. Minimizing the Risks of Litigation Regarding the Validity of Premarital and Postmarital Agreements

The following are suggestions, but not requirements, under the UPAA. *See* Moorman, Newlon & Ornduff, "The Wonder Years: Advising Clients at the Beginning of the Journey," ACTEC SUMMER MEETING (2014); Bucher, *supra*.

Separate Counsel. If each party agrees to separate representation (and the wealthier spouse should insist that the less wealthy spouse have separate counsel), include in the agreement the name of each lawyer, and have both lawyers sign the agreement indicating they explained the agreement to their respective clients and believe their clients understand the agreement they are making.

Timing of the Agreement. The lawyer should plan the negotiations and other meetings related to the agreement, as well as its execution, well in advance of the wedding. A claimant will then have more difficulty proving duress or undue influence.

Disclosure. The lawyer should assist the client in completing a comprehensive list of assets (with corresponding values) and financial obligations of the client, attach the list to (or refer to it in) the agreement, have the client review the list carefully to ensure it is accurate and have the other party to the agreement sign it signifying his or her receipt of and satisfaction with it.

Refer Specifically to Rights Being Waived. To the extent the agreement is not specific as to the marital rights being waived, they may not be waived. *See, e.g., Bauer v. Piercy*, 912 S.W.2d 457 (Ky. Ct. App. 1995).

Recitals. Recitals are useful because each spouse (and counsel) will have read these recitals before execution, making it more difficult to claim later that the facts and circumstances described in the recitals were untrue or did not exist.

Provide Incentives to Avoid Litigation. A provision can be included to require the person who breaches the agreement to pay the attorney's fees incurred by the other party in seeking enforcement of the agreement.

B. Cohabitation Agreements

For unmarried couples, cohabitation or domestic partner agreements provide protections similar to a marital agreement in the event of separation or death. Cohabitation or domestic

partner agreements are particularly important because, unless cohabitants define their relationship in a written contract, the law will not ordinarily recognize the relationship in the event of a separation or death of a party. Thus, a cohabitation agreement can help secure the legal rights of parties who are in a relationship ostensibly similar to marriage, define the extent of such rights in accordance with the parties' intent and help minimize any disputes upon a break-up or the death of a party.

While the scope and enforceability of marital agreements are generally governed by specific statutes, cohabitation agreements are almost exclusively governed by general contract principles. Thus, cohabitation agreements can be more flexible in their design. However, the consideration provided by each party should be explicitly stated. An agreement to pool earnings or for each party to provide business services is generally adequate. *See* Wolven, "The New Normal: Planning for the 'Modern Family'," 49TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING (2015).

C. Mediation and Arbitration Provisions

Alternative dispute resolution ("ADR"), such as mediation and arbitration, is generally available to parties if all parties consent or pursuant to a court order once a dispute is initiated. If implemented successfully, such procedures can help avoid the often extreme costs and delays of litigation. *See* Donovan & Martinsen, "Bridges to Peace When There is a Fight Over the Crystal," ACTEC HEART OF AMERICA REGIONAL MEETING (2017).

A Will or trust instrument may include a provision prescribing a procedure for mediation or arbitration to be used by interested parties if disputes arise. Statutes in Missouri, Florida, Arizona and New Hampshire provide that these provisions may be enforceable. A.R.S. § 14-10205; Fla. Stat. Ann. § 731.401; N.H. RSA § 564-B:1-111A; Section 456.2-205, RSMo. Florida's statute deals with arbitration clauses only. In the absence of an enabling statute, a Will or trust instrument provision mandating mediation or arbitration may not be enforceable. *See*, *e.g.*, *Schoeneberger v. Oelze*, No. 1 CA-CV 03-0490 (Ct. App. Ariz., August 31, 2004).

The applicable statutes of Florida, New Hampshire and Arizona prohibit the use of ADR if the dispute regards the validity of the instrument. In contrast, Missouri's statute allows for the use of ADR for a dispute regarding the validity of a trust if all interested parties consent. New Hampshire's statute also provides that ADR cannot be used to determine a trust's material purpose or to resolve any matter involving a charitable trust unless the director of charitable trusts expressly consents. The statutes in Arizona, Missouri and New Hampshire only deal with clauses in trust instruments and not Wills.

D. Drafting and Enforcing No Contest Clauses

1. Generally

No contest clauses—sometimes known as *in terrorem* or forfeiture clauses—seek to prevent contest of a Will or trust instrument by removing the beneficiary who challenges the provisions of the applicable instrument. Beneficiaries are motivated to challenge a Will or trust instrument because they stand to gain economically if successful in the challenge. A successful

challenge to the validity of a document will cause the decedent's estate or trust to pass intestate or pursuant to an earlier document that was not contested (or was not contested successfully). In some instances, a beneficiary may challenge the validity of only a portion of a document. If the beneficiary is successful, only that provision is eliminated, and the remainder of the Will or trust instrument continues in effect.

By using a no contest clause, testators and settlors seek to discourage beneficiaries from bringing challenges. If, however, a testator or settlor has completely removed a child or other individual whom the testator or settlor believes would challenge the Will or trust instrument, a no contest clause will not serve its purpose. In such a case, that child or other individual has nothing to lose by bringing a challenge. The use of no contest clauses is effective only when there is a sizeable enough gift to make the target beneficiary think twice about a challenge. A clause removing all descendants of a potential challenger may add further disincentive to challenge by making him or her consider whether the challenge is worth the potential loss both to him or her, individually, and to his or her descendants.

2. Types of No Contest Clauses

While the goal of all no contest clauses is to dissuade those who would challenge the Will or trust instrument, there are different types of challenges that might be targeted by a given type of no contest clause.

a. <u>To Prevent Challenge Regarding Validity of a Document</u>. Clauses relating to validity often encompass challenges to the document as a whole as well as challenges to specific provisions therein. The clause may be broad, excluding a beneficiary who contests, or cooperates with any other beneficiary who contests, any Will, trust instrument, power of appointment or any transfer of property by the testator or settlor. *See* Baker, "You *Can* Take it With You – Ensuring Compliance With Decedent's Wishes in an Era of Litigation and Flexibility," ACTEC ANNUAL MEETING (2016). Alternatively, the clause may be narrow, providing, for example, that "any action or proceeding…for the purpose of modifying, varying, setting aside or nullifying any provisions hereof relating to my Louisiana estate" shall disqualify such individual from taking the Louisiana estate under the provisions of the document. *Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. Ct. App. 2006). A challenge to the disposition of real estate owned by the decedent in a state other than Louisiana may trigger the application of the former clause, but not the latter, resulting in different outcomes.

b. <u>To Prevent Challenge to Acts or Omissions of Fiduciaries</u>. Many clients are concerned that, while the beneficiaries may not disagree with the dispositive terms of the Will or trust instrument, the beneficiaries may develop a confrontational attitude toward the fiduciaries chosen by the client. Consequently, such clients sometimes insert clauses which provide that, if any beneficiary should challenge or attack the actions of an Executor or Trustee, such beneficiary and his or her descendants shall forfeit their share of the estate or trust.

3. Common Challenges and Impact on No Contest Clauses

Only two states, Florida and Indiana, render no contest clauses void by statute. See Fla. Stat. §§ 732.517, 736.1108; Ind. Code §§ 29-1-6-2, 30-4-2.1-3. Many other states strictly

construe no contest clauses, while others simply look to the plain language of the clause to determine whether the action at issue triggers the clause.

a. Suits to Construe as Contests. A suit to construe is widely viewed as a way of carrying out a testator's intent and should not be a violation of a no contest clause. *See, e.g.*, *Hicks v. Rushin*, 185 S.E.2d 390 (Ga. 1971); *Marx v. Rice*, 65 A.2d 48 (N.J. 1949). A suit to construe is a "search for the true meaning of a will" and is not a way to side step the testator's intention. *Hicks v. Rushin*, 185 S.E.2d 390 (Ga. 1971); *Upham v. Upham*, 200 S.W.2d 880 (Tex. Ct. App. 1947). In contrast, a no contest clause is triggered where a beneficiary is "attempting to set aside, contest or appeal from a decision sustaining the validity of an instrument." *In re Ervin's Estate*, 79 A.2d 264 (Pa. 1951).

Suits that determine rightful ownership of property are typically deemed suits to construe and, accordingly, not triggering actions. *See, e.g.*, *Meyer v. Benelli*, 415 P.2d 415 (Kan. 1966) *George v. George*, 141 S.W.2d 558 (Ky. 1940) (request to determine ownership in real estate brought by son not direct attempt to contest but to determine meaning of the Will and interest in the property). Claims by beneficiaries that indirectly request construction of a Will or trust instrument have also been found to be suits to construe and, therefore, outside the scope of a no contest clause. See *In the Matter of Estate of Ikuta*, 639 P.2d 400 (Haw. 1981).

b. Declaratory Judgment Actions as Contests. Claimants most commonly bring declaratory judgment or declaratory relief actions seeking either: (1) an interpretation of the Will or trust instrument; or (2) a determination of whether a proposed action would trigger the no contest clause.

1) Declaratory Judgment Action Seeking Interpretation. Not surprisingly, declaratory judgment actions seeking interpretation or construction of a Will or trust instrument, even in states with strict construction rules, are generally not deemed attacks on the document because they do not "challenge[ ] the will or any part of it." *Mazzola v. Myers*, 296 N.E.2d 481 (Mass. 1973); *see Di Portanova v. Monroe*, 229 S.W.3d 324 (Tex. Ct. App. 2006) (finding clause not triggered where guardian sought clarification regarding scope of trust distribution provisions).

2) Declaratory Judgment Action Seeking Determination Regarding Proposed Action. Statutes in Missouri, New Hampshire and Delaware expressly provide that no contest clauses are unenforceable against actions to determine whether a pending or proposed proceeding would constitute a contest that triggers the clause. *See* Del. Code Ann. tit. 12 § 3329; Section 456.4-420, RSMo.; N.H. Rev. Stat. Ann. §§ 551:22(III); 564-B:10-1014(c). Case law in other states has held that no contest clauses are unenforceable against such actions. *See, e.g.*, *In re Miller Osborne Perry Trust*, 831 N.W.2d 251 (Mich. Ct. App. 2013); *Krause v. Tullo*, 835 S.W.2d 488 (Mo. App. S.D. 1992).

E. Limitations on Disclosure of Information to Beneficiaries

Trustees have many duties to provide information and notice to beneficiaries. The failure to disclose can expose the Trustee to liability. Some settlors wish to limit the availability of information to beneficiaries. In such cases, the governing instrument must achieve the right

balance between the necessity for beneficiaries to have sufficient information to protect their interests and hold the Trustee accountable and a settlor's privilege to establish rules governing the disposition of his or her property at death.

1. The Uniform Trust Code Rules on Required Disclosures to Beneficiaries

The provisions of the Uniform Trust Code that codify the Trustee's duty to inform and report are among the UTC's most controversial portions and, as a result, have become the least uniform among jurisdictions that have enacted it. The UTC is a compilation of default rules and can be overridden by the terms of a governing trust instrument (except, of course, where expressly prohibited by a UTC provision as explained further below).

The UTC limits the persons to whom the duty to inform and report is owed in the case of most revocable trusts and trusts over which a beneficiary holds a power of withdrawal. With regard to a revocable trust, the Trustee owes duties exclusively to the settlor when the settlor has capacity to revoke the trust. In addition, a Trustee owes a duty to inform and report to any beneficiary who holds a power of withdrawal, as if such beneficiary is the settlor, to the extent of the property subject to the power. When these rules apply, the Trustee's duties under UTC § 813, discussed below, are owed to the settlor or the power holder, as the case may be. UTC § 603 and Comment.

UTC § 813 codifies and expands the Trustee's common law duty to keep beneficiaries informed when UTC § 603 does not apply. It imposes an affirmative obligation to keep "qualified beneficiaries" reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. The Trustee must also meet several specific notice requirements and submit annual reports. "Nonqualified beneficiaries," an undefined term, are entitled to information from the Trustee only upon their specific request.

UTC § 813 makes distinctions based upon the defined terms "beneficiary" and "qualified beneficiary" as well as the undefined terms "distributee" and "permissible distributee." "Beneficiary" under the UTC includes one holding a present or future interest, whether such interest is vested or contingent, including a person who holds a power of appointment over trust property in a capacity other than that of a Trustee. Some states have added a definition of "permissible distributee" that generally defines such person as a beneficiary that is currently eligible to receive any distribution from a trust. *See, e.g.*, Section 456.1-103(14), RSMo.; D.C. Code § 19-1301.03(10). A "qualified beneficiary" includes current beneficiaries, presumptive remainder beneficiaries and those beneficiaries who would be current beneficiaries if the interests of the current beneficiaries, but not the trust, terminated. UTC § 103(13).

Within sixty days after accepting a trusteeship, the Trustee must notify the qualified beneficiaries of the acceptance and of the Trustee's contact information. In addition, within sixty days after the date the Trustee acquires knowledge of the creation of an irrevocable trust, or that a formerly revocable trust has become irrevocable, the Trustee must notify the qualified beneficiaries of the trust's existence, of the identity of the settlor, of the right to request a copy of the trust instrument and of the right to a Trustee's report. UTC § 813. The obligation to provide the notices described in UTC § 813(b)(2) and (3) are determined at a single point in time – when the Trustee accepts the trust, when the irrevocable trust is created or when a formerly revocable

trust becomes irrevocable. Query whether, if a given beneficiary is not entitled to a notice at the time the Trustee becomes obligated to provide the notices required in UTC § 813(b)(2) and (3) (presumably because the trust agreement waived the duty to provide notice to beneficiaries who had not attained age 25 pursuant to UTC § 105(b)(8)), the Trustee should send a notice to such beneficiary within 60 days of such qualified beneficiary attaining age 25.

In addition to annual reporting requirements, the Trustee must promptly respond to any beneficiary's (not just a qualified beneficiary's) request for information, unless such request is unreasonable under the circumstances. UTC § 813.

The Comment to UTC § 813 states that providing a beneficiary with a copy of the annual report ordinarily satisfies a Trustee's affirmative duty to keep the beneficiaries reasonably informed and that a Trustee is not ordinarily obligated to furnish information to a beneficiary in the absence of a specific request. However, the Comment also states that a Trustee may be required to give the beneficiaries advance notice of a non-routine transaction that significantly affects the trust estate and the beneficiaries' interests.

2. UTC Modifications in Enacting Jurisdictions

Jurisdictions that have enacted the UTC have done so with numerous modifications, especially with regard to UTC § 813 and the definition of terms used in that Section. For example, Kansas modified the definition of "qualified beneficiary" to mean only a beneficiary who either is eligible to receive mandatory or discretionary distributions of trust income or principal, or would be so eligible if the trust terminated on the date qualified beneficiary status is determined. KSA § 58a-103(12). The Utah definition includes the current mandatory and permissible distributees, and the presumptive remainder beneficiaries, but excludes the UTC's intermediate class of successor beneficiaries who would become distributees or permissible distributees if the interests of the current beneficiaries, but not the trust, terminated. Utah Code Ann. § 75-7-103(h); *see, also*, 18-B MRSA § 103.12; Wyo. Stat. Ann. § 4-10-103(a)(xv).

With regard to which beneficiaries are entitled to information, the Kansas statute provides that the duty to inform and report is owed only to the surviving spouse so long as the surviving spouse is a qualified beneficiary or holds any power of appointment over the entire trust estate and where all other qualified beneficiaries are issue of the surviving spouse. KSA § 58a-813. The statute will apply, for example, to a trust created for the benefit of a surviving spouse, with the remainder to the descendants of the settlor and the settlor's spouse. Thus, this statute will benefit a settlor who does not want his or her children or other descendants to know about the trust until after the deaths of both spouses. Ohio law may have the same effect in many instances because the trustee's affirmative duties under its version of UTC § 813 are limited to only current beneficiaries. R.C. § 5808.13.

Some jurisdictions further limit the duty to provide information. For example, in Oregon, if the settlor's spouse survives the settlor, the duty to provide information is owed to only the surviving spouse if the surviving spouse is financially capable, the surviving spouse is the only permissible distributee of the trust and all of the other qualified beneficiaries of the trust are descendants of the surviving spouse. ORS § 130.710. In Missouri, the settlor may designate by one or more permissible distributees to receive notification of the existence of the trust and of the

right to request Trustee's reports and other information reasonably related to the administration of the trust in lieu of providing the notice, information or reports to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee. Section 456.1-105.3, RSMo.

3. Variations in UTC States Regarding Disclosures That Can be Limited By a Governing Instrument

Like most provisions of the UTC, those setting forth the Trustee's duty to inform and report may be restricted in their effect, or in some instances eliminated, by appropriate provisions in the trust instrument. For example, a trust provision can validly waive the requirement that a beneficiary be furnished with a copy of the entire trust instrument.

Among the provisions that cannot be waived, however, are the Trustee's obligation, under UTC § 813, to notify the qualified beneficiaries who are age twenty-five or older of the existence of an irrevocable trust, of the identity of the Trustee and the right to request Trustee reports. UTC § 105. Also, regardless of the beneficiary's age, the trust instrument may not waive the Trustee's obligation to respond to a request of a beneficiary of an irrevocable trust for a Trustee's report and other information reasonably related to the trust's administration. UTC § 105. Thus, the settlor may, by the terms of the trust, modify or waive the duty to provide annual reports to the qualified beneficiaries. The settlor may also waive the duty to advise a beneficiary under the age of twenty-five of the existence of the trust, the identity of the Trustee and the beneficiary's right to request the Trustee's reports.

Some jurisdictions essentially follow the UTC in making the two specific duties above non-waivable. *See, e.g.*, D.C. Code 19-1301.05; N.M. Stat. Ann. § 46A-1-105.B; Section 456.1-105, RSMo. Note, however, that although these statutes allow for the trust terms to waive the duty to give notice in certain circumstances, the trust terms cannot waive the Trustee's duty to *respond* to requests for Trustee reports. However, as indicated in the previous section concerning the modifications by enacting jurisdictions to UTC § 813, several jurisdictions have modified UTC § 105 as well in their enactment of the UTC. Several jurisdictions, including Kansas, Tennessee, North Carolina, Utah and Wyoming, have deleted one or both of the UTC provisions that made these duties non-waivable. KSA § 58a-105; Tenn. Code Ann. § 35-15-105; Utah Code Ann. § 75-7-105; Wyo. Stat. Ann. § 4-10-105; NCGSA § 36C-1-105. Thus, apparently, a settlor who creates a trust governed by the law of one of these states is free to modify or entirely waive the duty to inform and report. In contrast, Pennsylvania provides that the entire section dealing with a trustee's duty to inform and report (20 Pa. C.S.A. § 7780.3) is non-waivable. 20 Pa. C.S.A. § 7705.

UTC § 1006 provides that a Trustee who acts in "reasonable reliance" on the terms of a trust instrument is not liable for a breach of trust to the extent the breach resulted from the reliance. This release from liability should protect a Trustee from liability when the trust instrument waives or restricts, within the parameters allowed under the UTC, the duty to inform or report.

4. Restatements, Case Law and Non-UTC State Law

a. <u>The Restatements and Case Law</u>. The Trustee owes a duty to disclose information to the beneficiaries of the trust. Restatement of the Law, Third, Trusts § 82 (2007) states that:

> (1) Except as provided in § 74 (revocable trusts) or as permissibly modified by the terms of the trust, a Trustee has a duty: (a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship; (b) to inform beneficiaries of significant changes in their beneficiary status; and (c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests.
>
> (2) Except as provided in § 74 or as permissibly modified by the terms of the trust, a Trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings.

See, also, Restatement of the Law, Second, Trusts § 173 (1957), Duty to Furnish Information (Trustee must provide accurate information to the beneficiary upon request and allow the beneficiary to inspect trust records). However, pursuant to Comment d to Restatement 2d, § 173, the Trustee is not under a duty to the beneficiary to furnish information to him in the absence of a request for such information. Of course, in the Trustee's regular dealings with the beneficiary, the Trustee is under a duty to communicate all material facts in connection with any transaction which the Trustee knows or should know.

Restatement 3d § 82, comment a(1), discussing the term "fairly representative" beneficiaries, states that "the [T]rustee's duty under this requirement is to make a good-faith effort to select and inform a limited number of beneficiaries whose interests and concerns are fairly representative of - *i.e.*, likely to coincide with - those of the trust's beneficiaries generally, thereby affording a reasonable opportunity for monitoring the Trustee's duty of impartiality as well as faithful, prudent administration of the trust." The Comment also provides that, usually, the Trustee's duty can be met by providing the required information to current beneficiaries and to those who would become current beneficiaries if the interests of one of the current beneficiaries were to terminate. Comment e points out that the requirement under Subsection (2) is not limited to representative beneficiaries but applies to any beneficiary's request for information, subject to reasonable restrictions in the trust instrument.

In *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002), the settlor established five trusts, four of which were for the benefit of his four children, while the other trust was for the primary benefit of his wife. The Trustees were to provide the children with the income necessary to maintain the children's accustomed standard of living. The wife's trust was to provide income not only to the

wife but also to all of the settlor's descendants and their spouses. One of the children, Hank, who became estranged from the family, believed that he was only a remainder beneficiary of the wife's trust. The Trustees never informed Hank about the actual terms of the trust instrument, even though all the Trustees knew that all of the children were current income beneficiaries of the wife's trust. Consequently, Hank never received any distributions from the wife's trust, but all the other children did. When Hank found out that he was a current beneficiary, he filed suit against the Trustees, seeking, among other remedies, make-up distributions from the trust and removal and surcharge of the Trustees.

The Trustees argued that the provisions of the trust instrument gave them nearly unfettered discretion in handling trust assets. As to any distribution, the trust agreement gave the Trustees the discretion to decide the amount of the distribution, the recipient of the distribution and whether the distribution would be from income or principal. The trust also relieved the Trustees from personal liability except for acts constituting gross negligence.

The court found, however, that these provisions were not relevant to the Trustees' fiduciary duty to inform beneficiaries of the basic terms of the trust. Relying on the Restatement 2d, the court believed that the Trustees should have informed Hank that he was a current income beneficiary, especially when Hank repeatedly attempted to obtain information from the Trustees regarding the wife's trust. The court came to this conclusion despite the facts that the successor Trustees reasonably assumed that notification had already been given and the Trustees had distributed millions of dollars to Hank from his own trust. Furthermore, the court refused to uphold a provision in the trust agreement that stated that a Trustee's decision was not reviewable by a court. The court consequently affirmed the Chancery Court's surcharge of the Trustees, along with make-up distributions, removal of the Trustees and other remedies.

In *Boyce Family Trust v. Snyder*, 128 S.W.3d 630 (Mo.App. E.D. 2004), the Trustee entered into an agreement to buy a supermarket that the Trustee owned individually. The beneficiaries agreed to the transaction. The Trustee, however, failed to disclose to the beneficiaries detrimental information relevant to the sale and downplayed potential problems with the store's performance. The court held that the Trustee was liable for breach of fiduciary duty. The court emphasized that the Trustee had a duty to inform the beneficiaries of all facts known to him so that the beneficiaries, when considering whether to consent to the Trustee's purchase of the supermarket, could have made an informed decision.

The terms of the trust instrument can modify a beneficiary's ability to obtain information concerning a trust. Use of such provisions in the trust instrument, however, is limited. Comment a(2) to Restatement 3d § 82 states that:

> [A]lthough subject to modification by trust provision, the duty to provide information to certain beneficiaries . . . may not be dispensed with entirely or to a degree or for a time that would unduly interfere with the underlying purposes or effectiveness of the information requirements.

Provisions stating that the Trustee shall have no liability for failure to disclose information to beneficiaries will not be interpreted as broadly as its language indicates. Restatement 3d § 83, Comment d, states that such provisions do not eliminate the Trustee's duty

"to furnish information in accordance with the rules (and qualifications) stated in § 82; nor does it dispense with the duty to maintain records in some reasonable form…."

b. Other State Statutory Law. Several states (other than those that have enacted the UTC) have enacted statutes regarding a Trustee's required disclosures to beneficiaries. California, for example, provides that the Trustee has a duty to: (1) keep the beneficiaries of the trust reasonably informed of the trust and its administration; (2) provide, upon reasonable request by a beneficiary, a report of the trust's transactions; (3) provide prompt notice to the beneficiaries when the trust becomes irrevocable and whenever there is a change of Trustee; (4) provide, upon the request of any beneficiary or an heir of the settlor, a copy of the trust instrument when the trust becomes irrevocable; and (5) provide annual accountings to the current beneficiaries. Many of these requirements cannot effectively be waived by the settlor in the trust instrument. Cal. Prob. Code §§ 16060; 16061; 16061.5; 16061.7; 16062.

See, also 12 Del. Code § 3303(a) (giving a settlor the ability to limit or eliminate the Trustee's duty to disclose trust information to beneficiaries); Rev. Code WA § 11.100.140 (the Trustee must provide written notice to income beneficiaries for "significant non-routine transactions" unless there is a "compelling circumstance" for not disclosing the transaction); *Conran v. Seafirst Bank*, 89 Wash.App. 1005 (1998); *Flohr v. Flohr*, 111 Wash.App. 1004 (2002).