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UTC's Duty to Inform and Report at 20 – How Mandatory is Transparency?

*Mel M. Justak**
*Anne-Marie Rhodes***

In trust administration, there is often a tugging contest between a settlor's or trustee's desire to limit certain information being released to beneficiaries and beneficiaries' desire for total transparency. While the reasons for limiting information are varied, a common one is autonomy, sometimes emanating from the settlor's or trustee's concern that such information may be harmful to the beneficiary or the family dynamic. Nowhere is this tension more apparent than the interplay between Uniform Trust Code (UTC) Sections 105 (Default and Mandatory Rules) and 813 (Duty to Inform and Report).

I. UTC FRAMEWORK

Section 813 favors beneficiary transparency. It directs the trustee, *inter alia*, to provide to (i) any beneficiary (including a remainder beneficiary) upon request a copy of the trust instrument¹ and (ii) beneficiaries currently eligible to receive distributions of income or principal, and to other beneficiaries upon request, at least annually, a report of the trust's property, liabilities, receipts and disbursements.² Further, a trustee's duty includes notifying qualified beneficiaries of the trust's existence, the settlor's identity, and the rights of beneficiaries to receive reports and to request a copy of the trust instrument.³ In a significant departure from trust law norms, Sections 105(b)(8) and 105(b)(9) originally provided that certain trustee notice requirements to beneficiaries age 25 and older and the duty to promptly respond to beneficiary requests for information were mandatory and non-waivable by the settlor.⁴ Comments to Section 813 note the duty to keep beneficiaries

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¹ UNIF. TRUST CODE § 813(b)(1) (UNIF. LAW COMM'N 2010); *see generally id.* § 103(3).

² *Id.* § 813(c).

³ *Id.* § 813(b)(3).

⁴ *Id.* § 105(b)(8)-(9); *see infra* note 10 and accompanying text.

informed is a fundamental trustee duty as beneficiaries must be able to protect their interests and the trust.⁵ Consequently, if a beneficiary requests a copy of the trust, the trustee must provide a complete copy, not just the portions the trustee deems relevant to that beneficiary.⁶

Even with recognizing this fundamental duty to inform, the original UTC nevertheless attempted to balance the rights of beneficiaries with the desires of settlors and trustees in the application of this duty. For example, limiting the mandatory notice requirement to beneficiaries age 25 and older is a tacit acknowledgment that it may not be in the best interests of younger beneficiaries (or their parents or guardians) to learn of a trust's existence. While Section 105(b)(9) provides that a trust cannot waive the trustee's duty to respond to beneficiaries' requests for reasonably relevant information,⁷ Section 105 does not make the duty to provide a copy of the entire trust or to notify the beneficiaries of their rights to request it mandatory in all instances. Finally, Section 813(c)'s requirement to provide current beneficiaries with annual trustee's reports is not mandatory under Section 105; yet Section 105(b)(8) requires the mandatory notice to beneficiaries to include a beneficiary's right to request annual trustee's reports.⁸ Viewing the UTC solely through the lens of Section 105 suggests the default rule is transparency for beneficiaries. Yet because settlors may waive Section 813 so that most information, including annual trustee's reports, will only be provided following a beneficiary's specific request, that transparency is structurally undercut. Moreover, a settlor could arguably stipulate the trustee not provide the information - even with a beneficiary's specific request - if, as Section 813(a) provides, such request is not necessary to enable the beneficiary to protect his interest.⁹

Overall, the original UTC appeared to put interrelated, procedural burdens on all parties. A settlor must affirmatively draft around the waivable disclosure requirements when creating a trust. A trustee must send beneficiaries notice of the trust's existence and their rights to request certain trust information. A beneficiary must actually request that information from the trustee in order to receive it. This structural pathway to mitigate the impact of UTC rules on reporting was not sufficient

⁵ UNIF. TRUST CODE § 813 cmt. para. 1.

⁶ *Id.* § 813 cmt. para. 4.

⁷ *Id.* § 105(b)(9).

⁸ *Id.* § 105(b)(8); *But cf. id.* § 813. It appears the right to request annual trustee's reports falls under UTC Section 813(a) as the type of information a trustee must provide a beneficiary upon request.

⁹ *Contra Wilson v. Wilson*, 690 S.E.2d 710, 716 (N.C. Ct. App. 2010) (ordering accounting to a trust beneficiary although settlor specifically waived that right consistent with North Carolina statute; holding that a provision of trust accounting was necessary to protect the beneficiary's interest).

to overcome objections. In 2004, Sections 105(b)(8) and (9) were placed within brackets signaling their now optional status “out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting . . . and . . . there is little chance that the states will enact (the sections) with any uniformity.”¹⁰

II. UTC AS ENACTED

As of mid-July 2019, 34 states and the District of Columbia have adopted the UTC.¹¹ In theory, the adoption of the UTC by two-thirds of the states would lead to more efficient and smoother trust administration across jurisdictions. Beneficiaries would have comfort knowing that most jurisdictions acknowledge their rights to information upon their request. Mobile settlors would not have to think as much about differing beneficiary rights among the states they may reside in from time to time. The reality, however, is different. As the 2004 amendments predicted, the contest between privacy and transparency continues and is reflected in the wide-ranging manner in which Sections 105 and 813 have been implemented among the adopting states. Some states have omitted the mandate entirely, some have expanded the duty, and some have moderated the duty.

In at least fourteen of the adopting jurisdictions, Sections 105(b)(8) and 105(b)(9) were omitted entirely.¹² Consequently, in those jurisdictions, Section 813’s duty to inform and report is a default rule that can be waived or modified by the trust instrument. These states allow a settlor, through careful drafting of the trust instrument, to eliminate the requirement to inform a beneficiary of the trust’s existence and, further,

¹⁰ UNIF. TRUST CODE § 105 cmt. para. 17 (UNIF. LAW COMM’N 2010).

¹¹ Illinois’s version of the UTC became law July 12, 2019 and will be effective January 1, 2020. The enacting jurisdictions listed on the ULC’s website are Alabama, Arizona, Arkansas, Colorado, Connecticut, D.C., Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Trust Code*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> (last visited Nov. 2, 2019).

¹² ARK. CODE ANN. § 28-73-105 (2019); KAN. STAT. ANN. § 58A-105 (2019); MASS. GEN. LAWS ch. 203E, § 105 (2019); MINN. STAT. § 501C.0105 (2019); N.H. REV. STAT. ANN. § 564-B:1-105 (2019); N.C. GEN. STAT. § 36C-1-105 (2018); N.D. CENT. CODE § 59-09-05 (2007); S.C. CODE ANN. § 62-7-105 (2019); TENN. CODE ANN. § 35-15-105 (2019); UTAH CODE ANN. § 75-7-105 (LexisNexis 2019); VT. STAT. ANN. tit. 14A, § 105 (2019); VA. CODE ANN. § 64.2-703 (2019); W. VA. CODE § 44D-1-105 (2019); WYO. STAT. ANN. § 4-10-105 (2019).

to severely curtail the rights of beneficiaries to request information if they learn of the trust's existence from another source.¹³

At the other end of the spectrum, some states require the trustee to provide more information than that mandated by the UTC. Illinois and Florida, for example, provide the mandatory notice to qualified beneficiaries must include a statement that such qualified beneficiaries (which include remainder beneficiaries) are entitled to request a complete copy of the trust instrument.¹⁴ Florida also expands the class of beneficiaries who must receive annual accountings to include all qualified beneficiaries.

Many states take more moderate approaches in balancing the interests of the parties. Alabama allows the trust to waive or modify the notice requirements to beneficiaries but retains Section 105(b)(9)'s mandate that trustees respond to beneficiaries' requests for information.¹⁵ Ohio allows a trustee to send a redacted trust instrument to the beneficiary unless the beneficiary specifically requests an entire copy of such instrument, subject to settlor waiver or modification when creating the trust.¹⁶ In Michigan, the trustee must send trust information to the beneficiary upon request but the trust document may be redacted to include only provisions relevant to that beneficiary's interest.¹⁷ A number of jurisdictions retain the UTC's mandatory duty to inform and report but provide that information could be directed to a surrogate whom the settlor appoints in the trust document.¹⁸ Using a surrogate may be

¹³ Many commentators have concerns that eliminating the duty to inform threatens the existence of the trust in the first instance if there is no trustee accountability. See Kevin D. Millard, *The Trustee's Duty to Inform and Report under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 392-96 (2005); T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595, 1623-25 (2007). "A trust so private that it lacks beneficiary enforcement and trustee accountability is effectively no trust at all." Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 619 (2008). That concern is not shared by all. See John S. Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow – A Practical Tax-Based Solution*, 82 MISS. L.J. 597, 615-16 (2013).

¹⁴ See Ill. Trust Code, Pub. L. No. 101-0048, 2019 Ill. Legis. Serv. §§ 105(b)(10), 813.1(b)(1) (West) (effective Jan. 1, 2020). See also FLA. STAT. § 736.0105(r)-(s) (2019). The definitions of "qualified beneficiary" can be found at 760 ILL. COMP. STAT. 3/103(30) (effective Jan. 1, 2020) and FLA. STAT. § 736.0103(16), respectively.

¹⁵ ALA. CODE § 19-3B-105(b)(8) (2019).

¹⁶ OHIO REV. CODE ANN. § 5808.13(B)(1) (LexisNexis 2019).

¹⁷ See MICH. COMP. LAWS §§ 700.7105(2)(h)(i), 700.7814(2)(a) (2019).

¹⁸ See generally D.C. CODE § 19-1301.05(c) (2019); FLA. STAT. § 736.0306(1), (3)(a); ME. STAT. tit. 18-B, § 105(1), (3)(b) (2019); MO. REV. STAT. § 456.1-105(3) (2019); OHIO REV. CODE ANN. § 5801.04(C); OR. REV. STAT. § 130.020(4) (2019); 20 PA. CONS. STAT. § 7780.3(k) (2019).

akin to using a trust protector; unfortunately, like the trust protector, “crucial questions” in practice remain unanswered.¹⁹

It is abundantly clear uniformity in the duty to inform and report remains aspirational.

III. SHOULD UNIFORMITY BE THE GOAL?

What is one to make of the UTC’s original mandatory duty to inform and report now with 20 years of experience? The utility of Uniform Laws is apparent – they increase efficiency by standardizing law. Efficiency, however, is a norm of commerce, not of families. It is therefore hardly surprising the UTC has not achieved uniformity.

Settlors of trusts for family members make personal judgments informed by their life experiences as well as by their interactions with their family members. They make decisions they deem appropriate under their circumstances, fully recognizing that some may be deemed unwise by those looking in from the outside. Limiting settlors’ abilities to make those individualized determinations has proven contentious. Given the pushback, the UTC wisely recognized that for this issue, which speaks very directly to personal family concerns, trust law may not be a one-size-fits-all statutory commodity.²⁰ The UTC’s recognition of states’ customizing certain provisions is not new.

States have always had the ability to modify Uniform Laws; indeed flexibility in adopting a Uniform Law, such as the UTC, is a feature often highlighted by the Uniform Law Commission. Jurisdictions taking different approaches on the duty to inform and report is consistent with this tradition. Similarly, settlors have also always had choices to make in the disposition of their property. As wealth has become more mobile, it is commonplace for a settlor to affirmatively choose a jurisdiction as the governing law for a trust based on a number of factors. The variety of approaches states have adopted on the duty to inform and report may just be another factor for informed settlors to consider. In doing so, settlors retain for now the ability to determine for themselves the approach that works best for them and their families.

¹⁹ Gallanis, *supra* note 13, at 1625.

²⁰ See John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069, 1081-82 (2007) (noting the role the trust banking industry had in promoting the UTC).

