

# **The Connecticut Uniform Trust Code**

by

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## **I. Introduction**

The Connecticut Uniform Trust Code (or “CUTC”) was introduced for the second time, but again “died” without being enacted, in this recent legislative session as Senate Bill 977. The CUTC is based upon the “pure” Uniform Trust Code (“UTC”), which was approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) on August 3, 2000, and is the first effort by the Uniform Law Commissioners to provide the states with a comprehensive model for codifying their law on trusts. As of May, 2003, the UTC had been enacted by Kansas, Wyoming, New Mexico, Nebraska and Arizona, with enactments expected soon in the District of Columbia and Alabama. See the Commissioner’s website, [www.nccusl.org](http://www.nccusl.org), for downloads and updated information.

## **II. Overview**

### **A. Participants in Study and Drafting Process**

The UTC was officially drafted by a committee consisting of Uniform Law Commissioners, who are appointed by the governors or legislatures of their respective states. Its Reporter, Professor David English, of the University of Missouri Law School, carried out the drafting committee’s decisions on a day-to-day level and prepared the various drafts.

The CUTC is a modified version of the UTC. We faced a difficult task in tailoring the UTC for Connecticut, since we are one of only six states with a highly supervised probate system. Beginning in 1999, the Connecticut Bar Association’s Estates and Probate Section’s Uniform Laws Subcommittee (co-chaired by Deborah J. Tedford and Suzanne Brown Walsh) studied the UTC for one year, article by article. Professor English assisted this endeavor and attended two all day study sessions, in 2000 and 2001. Representatives of the Family Law and Elder Law Sections and at least one Connecticut bank also participated in the process.

After that lengthy period of study and discussion, a conference committee consisting of Probate Judges Dan Caruso, Kevin O’Grady and Paul Knierim and subcommittee members Debby Tedford, Suzy Walsh and Mary Ackerly met during the summer of 2001 to address the concerns of the Connecticut Probate assembly. Subsequently, a small Connecticut

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<sup>1</sup> This summary is based on one written by David M. English, Reporter, Uniform Trust Code; W.F. Fratcher Missouri Endowed Professor of Law, University of Missouri-Columbia. I have modified it substantially in some sections; less in others. Any errors, however, are mine.

drafting committee (Mary Ackerly, Brad Gallant, Debby Tedford, Terry Tuthill and Suzy Walsh) met several times to make the revisions called for by interested parties, to tailor the CUTC to Connecticut law and to address the policy concerns of our executive committee members. In addition, the Connecticut drafting committee held two sessions devoted to the CUTC's application to special needs trusts. The CUTC was reviewed to ensure that it would not adversely affect any trusts established for disabled and elderly beneficiaries, an issue of particular concern to the Elder Law Section of the CBA. Professor English helped the drafting committee throughout the process.

## **B. Reasons for the UTC**

Despite the increased use of trusts in recent years, the trust law in Connecticut has not kept pace. Many gaps exist between the statutes and reported cases. For example, presently there is no statute of limitation on trust contests in Connecticut, nor is there a procedure for filing claims against revocable trusts. Specialized acts such as the Uniform Prudent Investor and Principal and Income Acts provide certainty with many of the financial and distribution issues involving trusts. However, we are often left to rely upon the Restatement of Trusts and the treatises by Scott and Bogert, sources which fail to address numerous practical issues and often fail to provide sufficient guidance. In addition, this type of research is more expensive and difficult for small law firm practitioners.

The CUTC will establish clear rules on trust law in Connecticut. Once the UTC is adopted nationwide, corporate fiduciaries will benefit from consistent laws to administer trusts in numerous jurisdictions. In fact, corporate fiduciaries in Wyoming have already begun to use the UTC in their marketing materials.

## **C. Organization**

The CUTC is broad and covers most topics relating to trusts. Some of its provisions have already been enacted in Connecticut: Article 3, Virtual Representation, has been codified as C.G.S. § 45a-487a through 487f; Article 9, the Uniform Prudent Investor Act, is at C.G.S. § 45a-541 to 541l; and the removal provision, Section 706(b), is at C.G.S. § 45a-242.

Article 1 (CUTC Sections 1 through 12), in addition to providing definitions, addresses topics such as the ability of a trust instrument to override the Code's provisions, the validity of choice of law provisions and the law to govern in the absence of such a provision, and the procedure for transferring the principal place of administration to another jurisdiction. Article 2 (CUTC Sections 13 through 15) addresses judicial proceedings concerning trusts. As previously noted, Article 3 (CUTC Sections 16 through 20) was enacted in substantially unmodified form and is at C.G.S. § 45a-487a through f; and then it was reformatted slightly to "fit" into the CUTC. Article 4 (CUTC Sections 21 through 37) prescribes the requirements for creating, modifying and terminating trusts. The provisions on the creation of trusts largely track traditional doctrine; while the provisions relating to modification and termination liberalize the prevailing law. Article 5 (CUTC Sections 38 through 44) covers spendthrift provisions and rights of creditors, both of the settlor and beneficiaries. Article 6 (CUTC Sections 45 through 48) collects the special rules relating to revocable trusts, including the standard of capacity, the procedure for revocation or modification, and the statute of limitations on contests.

Article 7 (CUTC Sections 49 through 57) concerns the office of Trustee, specifying numerous procedural rules that apply absent special provision in the trust. Included are the rules on Trustee acceptance, the rights and obligations of co-Trustees, the procedure for resignation, the grounds for removal, the methods for appointing successors, and Trustee compensation.

Article 8 (CUTC Sections 58 through 70) details the duties and powers of the Trustee. The specified duties of the Trustee, like the duty of loyalty, were drafted to conform with the Uniform Prudent Investor Act. The Uniform Prudent Investor Act prescribes a Trustee's responsibilities with regard to the management and investment of trust property. The UTC expands on these acts by also specifying the Trustee's obligation to provide information to beneficiaries. Parts of the Connecticut Prudent Investor Act, C.G.S. § 541 to 541I, are included in the CUTC where they have been modified. Identical sections were left in the Prudent Investor Act. And, although we suggested a revision to the duty of loyalty in 45a-541e, we could not make it in the CUTC because the that provision applies to other fiduciaries by virtue of 45a-203. Therefore, it is not included in the CUTC. Article 10 (CUTC Sections 71 through 82) addresses the liability of Trustees and rights of beneficiaries, and encourages Trustees and third persons to engage in commercial transactions as if no trust was involved.

Some of the CUTC's effective date provisions are prospective, where the drafters felt it would be unfair to apply new rules to existing trusts.

### **III. Summary of CUTC Substantive Provisions and Mechanics**

#### **A. Default and Mandatory Rules (Section 105; CUTC Section 5)**

Most of American trust law consists of rules that may be overridden by the settlor of the trust. Nowhere before, however, has there been a compilation of the principles of law that are *not* subject to the settlor's control or waiver. These mandatory rules are in CUTC Section 5, and are:

1. The requirements for creating a trust;
2. The rights of third parties in their dealings with the Trustee;
3. The power of the court to take certain actions, such as to modify or terminate a trust, to require or dispense with bonds, to adjust a Trustee's compensation that is unreasonably low or high, or to take any action necessary in the interests of justice;
4. A Trustee's obligation to act in good faith, and in accordance with the purposes of the trust;
5. The probate court's authority to supervise testamentary trusts;
6. The Trustee's duties under Section 66 to keep the qualified adult beneficiaries of court supervised trusts generally informed of matters relating to the trust's administration and to otherwise notify them as specified in that Section; and

7. With respect to formerly revocable trusts, to notify the qualified beneficiaries of their rights under 66(b)(3) after the settlor's death, and to respond to a qualified beneficiary's request for information reasonably related to the trust's administration under 66(a)(2).

The limits on the settlor's ability to waive the Trustee's duty to inform the beneficiaries are described in detail below in III (B).

### **B. Information to Beneficiaries (Section 813; CUTC Section 66)**

In default of an overriding provision in the trust, the CUTC generally requires Trustees to keep trust beneficiaries reasonably informed about the trust's administration. All of these various duties are contained in CUTC Section 66. The CUTC also contains a set of rules governing whether the notice provisions can be waived by the Settlor in the trust instrument (these are called non-mandatory or default provisions) or whether they are mandatory, non-waivable ones. The rules which determine whether a given notice provision can be waived or not are contained in Section 5(b), as described above. Thus, both sections have to be read together in order to determine whether a notice obligation exists in a given situation, or whether it has been effectively waived in the instrument. The notice provisions in the CUTC are mostly waivable, meaning that if they are overridden by the settlor in post-enactment documents, they do not apply at all. (The notice provisions do not apply to pre-enactment documents.) Above all, Trustees and drafters must remember that even a waivable provision of the CUTC will apply unless the Settlor has affirmatively changed it with a contrary provision in the trust instrument.

CUTC Section 66 is based upon the Restatement of Trusts, 2d, Section 173, which has been followed by courts in almost all jurisdictions considering the issue. That section says that a trustee must, upon a beneficiary's request at reasonable times, provide "complete and accurate information" about the trust and its assets. CUTC Section 66(b)(3) expands this duty with respect to formerly revocable trusts, by requiring the trustee to notify the qualified<sup>2</sup> beneficiaries of the trust's existence when the trust becomes irrevocable.

There are two notice provisions that are mandatory for inter vivos trusts: after the trust becomes irrevocable, its trustee has to notify the qualified beneficiaries who are at least 21 (including charities) of the existence of the trust, the identity of the trustee, their right to request a copy of the trust, and their rights, if any, to receive reports. We have agreed with the UTC's national drafters that for policy reasons, both individual and charitable remainder beneficiaries should receive this information after the trust becomes irrevocable. Otherwise, no one will be armed with the information necessary to enforce and protect the remainder beneficiaries' rights. Note that the duty to provide ongoing information or accounts, after the initial notice is given, is waivable, so beneficiaries would only be notified of that right if it has not been waived in the trust.

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<sup>2</sup> A "qualified" beneficiary, defined in CUTC Section 3(13), is a person who is entitled to current income or principal distributions or who would be entitled to mandatory or discretionary distributions if the trust terminated (or the current beneficiaries' interest terminated) on the "date the beneficiary's qualification is determined."

The second mandatory duty is the Trustee's duty to promptly respond to a qualified beneficiary's request for information reasonably related to the trust's administration. The Trustee may deny any requests that are unreasonable under the circumstances. This mirrors Restatement Section 173 and is the law of many jurisdictions. (There are over 90 cases cited under that Section.) *See e.g., Fletcher v. Fletcher*, 253 Va 30, 480 S.E. 2d 488 (1997); *Taylor v. Nations Bank Corp.*, 125 N.C. App. 515, 481 S.E. 2d 358 (1997).

There is no duty as to "day one" irrevocable trusts to notify the beneficiaries of the trust's creation, or of anything else, if the document waives these duties. And, as noted above, the Trustee's affirmative duty to provide periodic financial information (accounts) to the beneficiaries is waivable as to all trusts, as it is under existing Connecticut law.

To argue that the CUTC notice provisions abridge the privacy rights of settlors establishing credit shelter or marital trusts for surviving spouses is ludicrous. Clients wishing to leave assets to their spouses by means of a trust, no matter how generous its provisions, must recognize that they are vesting its remainder beneficiaries with an interest in the trust which entitles them, at a minimum, to know of its existence. Under present law, trust beneficiaries can compel trustees to provide information to them by means of an action for an accounting under C.G.S. § 45a-175(c).

The only Connecticut case on beneficiary right to information is a 1995 decision of the West Hartford Probate Court granting a beneficiary's request for a copy of a trust. The trustee had objected because the settlor, who was incapable, was still alive, but Judge Berman had little trouble dismissing the trustee's privacy argument and ordering that the information be provided.

### **C. Finality of Trustee's Actions**

1. *Accounts.* As in current law, a Trustee who requests and receives judicial approval of a Trustee's report forecloses claims by beneficiaries who receive notice of the hearing. Section 66(e). Of course, the beneficiaries have a thirty (30) day appeal period in which to appeal a probate court's approval of a Trustee's report.

2. *Distribution proposals.* Section 70 provides that upon termination or partial termination of an inter vivos trust, its Trustee may send a proposal for distribution to the trust's beneficiaries. If a beneficiary does not object within thirty (30) days (and the Trustee informed the beneficiary of the right and time allowed to object), the beneficiary's right to object to the Trustee's distribution proposal terminates.

3. *Distributions from terminating revocable trusts.* Trustees wishing to distribute the assets of terminating trusts may do so before the limitations period on contests expires, without liability, after sending notice to the qualified beneficiaries, under Section 48(b), as described in III.E, below.

**D. Trust Modification and Termination (Sections 410-417; CUTC Sections 30 through 37)**

New, long-term trusts are becoming more common, and the problems associated with trusts drafted more than twenty years ago are becoming more apparent. This has created the need for new rules that allow for a trust's termination or modification, even if neither one is provided in the trust itself. The CUTC provides increased flexibility without disturbing the principle that the primary objective of trust law is to carry out the settlor's intent. The following provisions will give us the ability, with court approval required in most cases, to modify or terminate a trust:

1. Noncharitable, irrevocable trusts can be modified or terminated under Section 31(a) without court approval when both the settlor and all beneficiaries consent, even if the modification or termination is inconsistent with a material trust purpose.

2. After the settlor's death, noncharitable, irrevocable trusts can be modified or terminated under Section 31(b) if a court concludes that such action is not inconsistent with a material purpose of the trust and the settlor's probable intent, and either all beneficiaries consent, or a court finds that the nonconsenting beneficiary's interest can be protected.

3. Once terminated, the trust property is distributed as agreed to by the parties consenting to the termination. Section 31(d).

4. It is no longer automatically presumed that a spendthrift provision is a material purpose barring the beneficiaries from compelling termination of a trust. Section 31(c).

5. A court may not only modify a trust because of circumstances not anticipated by the settlor, but may also modify the trust's dispositive terms or even terminate the trust for those reasons. Section 32.

6. A trust may be reformed due to the settlor's mistake of fact or law even if the terms of the trust, as originally but mistakenly created, are unambiguous. Section 35.

7. To achieve the settlor's tax objectives, the court may modify the terms of the trust as long as the modification does not violate the settlor's probable intention. The court may also give the modification retroactive effect. Section 36.

8. After notifying the qualified beneficiaries, the Trustee may combine or divide a trust without court approval. Section 37.

9. The CUTC also authorizes the court to terminate an uneconomical trust, and allows a Trustee, without court approval, to terminate an inter vivos, noncharitable trust with a value of \$50,000 or less. Section 34. (Note: This limit may have to be raised to match that of H.B. 5515, if it is enacted.)

## **E. Revocable Trusts (Article 6; CUTC Sections 45 through 48)**

1. *Trusts now presumed to be revocable.* Section 46(a) reverses the common law presumption that trusts are irrevocable, by providing that a trust is revocable unless the terms of the trust expressly provide that the trust is irrevocable.

2. *Policy behind Article 6.* The revocable trust is often used as a substitute for a will. The CUTC in general reflects this by treating the revocable trust in most respects as the functional equivalent of a will, at least while the settlor is alive.

3. *Capacity to create a trust.* The capacity requirement of the settlor for creating a trust is the same as that for a will. Section 45. While the settlor is alive, all of the rights of the beneficiaries are controlled exclusively by the settlor. Section 47. Notices that would otherwise be given to the beneficiaries must instead be given to the settlor, and the settlor is authorized to give binding consents on a beneficiary's behalf. Access to the trust document is also within the settlor's control.

4. *Method of revocation.* Unless the trust specifically mandates an exclusive method of revocation, the CUTC provides that a trust may be revoked by any other method manifesting clear and convincing evidence of the settlor's intent. Section 46(c).

5. *Limitations period on trust contests.* In Connecticut, will contests are typically barred after a thirty (30) day appeal period following admission of the Will to probate. If notice of the hearing regarding the Will is defective, the period to contest admission of Will is extended to one (1) year. Connecticut, as with most states, currently has no limitation period on contest of a revocable trust. The CUTC provides one in Section 48(a), giving a potential contestant the earlier of 150 days following receipt of a notice or two years following the settlor's death to file a contest.

6. *Ability to distribute from a terminating trust.* To encourage expeditious distribution of trust assets, a Trustee who has not been notified that a contest has or will be filed is absolved from liability for making distributions before the contest period has expired, but only if the Trustee has notified the qualified beneficiaries of a formerly revocable trust as required in Section 66(b). Section 48(b). Liability in such cases is imposed solely on the distributees. Section 48(c).

## **F. Spendthrift Provisions, Discretionary Trusts and Creditors' Claims Against Revocable Trusts (Article 5; CUTC Sections 38 through 44)**

1. *Spendthrift provisions.* Spendthrift provisions, when effective, prohibit a creditor or assignee of a beneficiary from attaching the beneficiary's interest in a trust. Spendthrift provisions, of limited utility at best, are even less useful in Connecticut. Under C.G.S. § 52-321, protection from creditors is obtained only with a discretionary trust, or one whose income is expressly given for the beneficiary or his or her family's support. Even with that "spendthrift" protection, the creditor or assignee may make a claim when a distribution is actually made from a trust.

Even funds retained in a “spendthrift” trust are not always protected. Numerous exceptions to spendthrift protection are recognized, depending on the type of creditor, the category of beneficiary, or the time when the claim is made. The spendthrift provisions and the rights of a beneficiary’s creditors were among widely debated by the NCCUSL drafters and the Estates and Probate Section Executive Committee. The result is that the CUTC exceptions, like those in the pure Code, are those that almost certainly would be recognized by a court.

(a) A trust instrument must expressly state that the trust is a spendthrift trust for spendthrift protection to apply to the trust. The drafters specifically rejected the approach that all trusts are spendthrift by default unless the instrument provides otherwise.

(b) A restraint against claims by the creditors of a beneficiary is effective only if the beneficiary is also restrained from assigning the beneficiary’s interest. Section 39(a). The drafting committee concluded that it was inconsistent for a beneficiary to be able to transfer the beneficiary’s interest while at the same time denying the beneficiary’s creditors the right to reach the trust property for payment of their claims.

(c) Both the NCCUSL drafting committee and the Estates and Probate Section Executive Committee also concluded that it was undesirable to allow a settlor to create a trust, retain a beneficial interest, yet deny the settlor’s creditors the right to reach the trust. Consequently, the CUTC rejects the approach taken in the asset protection legislation enacted in Alaska and Delaware and, more recently, Rhode Island and Nevada. A creditor of the settlor can reach the settlor’s beneficial interest. Section 42(a)(2).

(d) The CUTC permits a child, spouse, or former spouse of a beneficiary to attach a non-discretionary spendthrift trust to collect on a court order for support. Section 40(b).

2. *Discretionary trusts.* If the beneficiary’s interest in a trust is discretionary, the child, spouse, or former spouse can collect only to the extent the Trustee has abused its discretion. If the Trustee has absolute discretion to withhold distributions to the beneficiary for any reason, a child, spouse or former spouse may be barred from collecting from the trust. Section 41. Creditors without special status are not allowed to collect from a discretionary trust.

3. *Status quo preserved for state claims.* Section 40(c) also creates an exception for claims by governmental units based on a specific state statute or federal law. Thus, other laws apply, rather than the CUTC, to determine, for instance, whether and to what extent the government can pierce a trust to collect for the costs of institutionalized care.

4. *Simplified claims procedure for revocable trusts.* Section 42(b) of the CUTC contains a simplified procedure for claims made against revocable trusts at the settlor’s death. It also incorporates the provisions of C.G.S. § 45a-365 dealing with the order of payment (or abatement) of claims, expenses and taxes. While these simplified claims procedures will be sufficient in many cases, Trustees dealing with contested claims or a potentially insolvent estate or trust will want to open a probate proceeding in order to use the more comprehensive claims law that is available for estates.

## **G. Representation (Article 3; CUTC Sections 16 through 20)**

1. *CUTC allows Trustees to take numerous actions with beneficiary notice or consent.* The CUTC strives to provide detailed rules for the administration of non-court supervised trusts. These are designed to decrease the matters that will have to be decided in the courts. For example, Trustees of inter vivos, and in some cases testamentary trusts, can take numerous actions unilaterally solely by notifying the beneficiaries. These actions include: (i) Transfer of an inter vivos trust's principal place of administration to or from another country or American state (Section 8(d)); (ii) Combination of separate trusts into one or the division of a single trust into two or more separate trusts (Section 37); (iii) Resignation of the Trustee of an inter vivos trust (Section 53); (iv) Submission of a Trustee's report (Section 66); and (v) Sending notice of proposed plans of distribution of inter vivos trusts (Section 70).

With the prior consent of the beneficiaries, Trustees can take other actions, such as: (i) Selection of a successor Trustee (Section 52); and (ii) Release of a Trustee from potential liability (Section 78).

2. *Virtual representation in lieu of actual notice or consent.* However, it may be difficult for Trustees to notify or obtain the consent of all of the beneficiaries. Trusts commonly last for decades, or even in perpetuity. The current beneficiaries of the trust are frequently minors or adults who lack capacity. Future beneficiaries may not yet be born. To achieve notice to or the consent of beneficiaries incapable of representing themselves, others must be empowered to act on their behalf. This is the function of rules on representation. Concepts of representation are not new, but the CUTC addresses the subject in more detail than previous efforts. The CUTC provides not only for representation by fiduciaries (guardians, conservators, personal representatives), but also for what is known as virtual representation, under which an otherwise unrepresented person (such as a child who may not yet be born) may be represented by another beneficiary with a similar beneficial interest. Section 19. Article 3, which as noted above is already existing law, describes the notice required to be given to the beneficiaries, not only for the matters detailed above, but also to settle any dispute whether in or out of court.

3. *When court approval is advisable.* Although the virtual representation provisions can be extraordinarily useful, they are not universal. Notice to and the consent of a representative is not binding if there is a conflict of interest between the representative and those ostensibly represented. If conflict of interest is a possibility, the practitioner should consider requesting the court to appoint a guardian ad litem to represent the otherwise unrepresented beneficiary.

## **H. Nonjudicial Settlements (Section 111; CUTC Section 11)**

The CUTC's nonjudicial settlement provision is in Section 11. Parties may enter into a nonjudicial settlement agreement concerning any matter involving an inter vivos trust, with two exceptions. Section 11(b). The CUTC contains two major exceptions to the nonjudicial settlement provision by requiring court approval to modify or terminate an irrevocable trust (see Article 4 and CUTC Section 11(b)). The settlement agreement can contain any term or condition that a court could properly approve. Section 11(c). Among the issues that

can be resolved by a nonjudicial settlement agreement are the interpretation or construction of the terms of the trust; approval of a Trustee's report or accounting; direction to a Trustee to refrain from performing a particular act or to grant a Trustee any necessary or desirable power; resignation or appointment of a Trustee and determination of a Trustee's compensation; transfer of a trust's principal place of administration; and liability of a Trustee for an action relating to the trust. Section 11(d).

#### **I. Charitable Trusts (CUTC Section 33)**

Charitable gifts may be made in numerous ways. The donor may create and transfer property to a non-profit corporation. The donor may make an outright gift to charity in the donor's will. The donor may transfer property directly to a charity but subject its use to various restrictions. Finally, the donor may create a charitable trust.

Charitable gifts must have a charitable purpose, a concept which has evolved over the centuries as society has changed. The law governing charitable gifts also has evolved regarding what is to be done upon failure of a charitable purpose. Where permissible, the court will apply the doctrine of *cy pres* to reform the gift to better carry out the settlor's charitable purposes. Historically, if the settlor's charitable purpose is deemed specific rather than general, however, the charitable gift fails and the property is returned to the settlor or the settlor's successors in interest.

The CUTC liberalizes the doctrine of *cy pres* in a way believed more likely to carry out the typical settlor's intent. First, it expands the opportunities for the court to apply *cy pres*. Section 33(a). The court may apply *cy pres* not only if the original plan becomes impossible or unlawful, but also if it becomes impracticable or wasteful. Section 32(b). Second, the UTC creates a presumption in favor of general charitable intent. In applying *cy pres*, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide.

#### **J. Animal Trusts (CUTC Section 28)**

Presently, trusts for animals are simply honorary ones, because animal beneficiaries cannot enforce them. Section 28 validates animal trusts, by allowing the settlor or a court to appoint a person to enforce the trust. The trust may benefit only an animal or animals alive or in gestation at the settlor's death.

#### **K. Successor Trustees, Resignations and Removal of Trustees, and Delegation Among Co-Trustees (Article 7; CUTC Sections 49 through 57)**

The CUTC specifies numerous rules relating to a change in Trustee, where the trust instrument fails to anticipate and address a particular circumstance.

1. *Appointing successors.* The CUTC provides that a successor Trustee may be appointed by a procedure or person specified in the trust, by unanimous agreement of the qualified beneficiaries or by the court, in that order. Section 52(c). Under Section 51(b), a vacancy is not created by the resignation or removal of a co-Trustee. Unless the trust terms

require a successor co-Trustee be appointed, the remaining Trustee or co-Trustees may continue to act for the trust without appointment of a successor.

2. *Resignation of Trustee.* Section 53(a) copies a provision commonly found in trust instruments that allows a Trustee of an inter vivos trust to resign by giving notice to the qualified beneficiaries.

3. *Removal of Trustee.* We have already enacted the UTC's removal provision, CUTC Section 54(b), in Connecticut as C.G.S. § 45a-242, as amended by Public Act 01-114. Before its amendment, 45a-242 allowed removal only for breach of duty or other fault. This standard gives great weight to the settlor's particular selection of Trustee. Because trust instruments typically place weight on a Trustee's judgment and exercise of discretion, the particular Trustee selected becomes an important term of the trust, a term which should not easily be changed.

The revised Connecticut statute and Section 54(b) follow traditional doctrine by authorizing a Trustee to be removed for acts of misconduct or other disqualification. Acts of misconduct or other disqualification justifying removal of the Trustee include serious breach of trust, unfitness, and unwillingness or persistent failure to effectively perform the function. A Trustee may also be removed due to lack of cooperation among co-Trustees. Removal for serious breach of trust or lack of cooperation among the co-Trustees requires no additional findings. Removal for unfitness, unwillingness or persistent failure to effectively administer the trust requires an additional finding by the court that removal would best serve the interests of the beneficiaries. "Interests of the beneficiaries," which is defined in Section 3, means the beneficial interests provided in the terms of the trust, and not what the beneficiaries might want.

In addition, where the personal link between the settlor and Trustee has been broken, under C.G.S. § 45a-242 and Section 54(b), the Trustee can be removed for reasons other than misconduct or lack of fitness. The new law also allows the court to consider whether there has been a substantial change of circumstances or if removal is unanimously requested by the qualified beneficiaries. However, in neither case may the Trustee be removed unless the court also concludes that the selection of the particular Trustee was not a material purpose of the trust, that removal of the Trustee would best serve the interests of the beneficiaries, and that a suitable co-Trustee or successor Trustee is available. Our version of Section 54(b) was modified to reflect Public Act 01-114, enacted in 2001, which contains a provision prohibiting discrimination against national banks in removal proceedings.

4. *Delegation among co-Trustees.* Unlike the pure UTC, the CUTC expressly allows a Trustee to delegate to a co-Trustee, except for functions that the trust expressly requests be performed jointly. Such delegations, unless irrevocable, can be revoked. Section 51(e).

## **L. Duties and Powers of Trustee (Article 8; CUTC Sections 58 through 70)**

1. *Article 8 builds on the Prudent Investor Act.* Many of the provisions of the Connecticut Uniform Prudent Investor Act (Sections 45a-541 et. seq.) are duplicated in

CUTC Sections 58 through 70. Some of the CUTC provisions, such as Section 59(f), expand Prudent Investor.

2. *Conflict avoidance for corporate fiduciaries.* A potential conflict of interest may arise where a Trustee is also an owner of or affiliated with a company that provides services to a trust in addition to the services provided by the Trustee. For example, a Trustee may be an accountant, investment advisor, lawyer, banker or trust officer. In addition to a Trustee's services as Trustee, the company with which the Trustee is connected may provide accounting, brokerage, legal, insurance or other related services to the trust. Typically this arrangement is beneficial to the trust beneficiaries for reasons including increased efficiency and better oversight by the Trustee. The following transactions are presumed not to be affected by a conflict of interest between the Trustee's personal and fiduciary interests, if the transaction and the investment made pursuant to it comply with the Prudent Investor Act:

(a) Investments by a Trustee of trust property in securities of an investment company to which the Trustee or its affiliates provide services in a capacity other than as Trustee;

(b) An investment by a Trustee of trust property in an insurance contract purchased from an insurance agent owned by, or affiliated with the Trustee, or its affiliate; and

(c) The placing of security transactions by a Trustee through a securities broker that is part of the same company as the Trustee, is owned by the Trustee or is affiliated with the Trustee. Section 59(f). Presently, no Connecticut statute permits corporate Trustees to invest in their proprietary funds and receive compensation from both the fund and the trust. Section 59(f) would authorize this.

3. *Default list of powers.* Section 69 contains a specific list of powers that are an updated version of the Uniform Trustee Powers Act, including coverage of such topics as authority to manage environmental hazards. It supplements, but does not replace, Connecticut's existing Fiduciary Powers Act, found in C.G.S. §§ 45a-434 and 235. In addition, Section 68 confirms the rule that the Trustee all powers confirmed upon Trustees in the UTC, common law, or in other statutes.

#### **M. Remedies for Breach of Trust (Article 10; CUTC Sections 71 through 82)**

The CUTC contains comprehensive remedies for breach of trust. The measure of damages for breach of trust is designed to restore the beneficiaries to the position they would have been in had the breach not occurred. But it also serves another purpose - to prevent the Trustee from profiting from the breach. Consequently, the Trustee is liable for the greater of the profit made by the Trustee or harm caused to the beneficiaries. Section 72. Also provided are a series of non-monetary remedies, including such actions as recovery of trust assets misappropriated by a Trustee. Section 71. Unlike the pure UTC, the CUTC does not change the American rule on the payment of a litigant's fees in lawsuits involving trusts, because the Connecticut drafters deleted Section 1004.

**N. Limitations on Trustee's Liability (Article 10; CUTC Sections 71 through 82)**

The CUTC contains a series of provisions limiting a Trustee's exposure to liability.

1. *Limitation of suits for breach of contract.* Following the sending of a Trustee's annual or other report, a beneficiary must commence an action for breach of trust within one year but only if the report adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time limit. Section 74. A beneficiary who has consented to a Trustee's action is also precluded from suing for breach of trust unless the Trustee's improper conduct caused the beneficiary to consent or the beneficiary was unaware of the beneficiary's rights or the material facts. Section 78.

2. *Exculpatory provisions.* A settlor may absolve a Trustee from potential liability, but such an exculpatory provision is not enforceable in all circumstances. An exculpatory term cannot be used to immunize a Trustee for breach of trust if the breach was committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. Even absent bad faith or reckless indifference, the term is unenforceable if it was inserted as a result of the abuse of a confidential or fiduciary relationship between the Trustee and settlor. The exculpatory clause would be enforceable, however, if it was inserted by the settlor to provide protection to the Trustee for a stated purpose. Thus, for example, where a settlor intends that stock in a family business or a vacation home be retained, the Trustee is protected from claims against lack of diversification or unproductive assets. Section 77.

3. *Trustees may reasonably rely on trust instruments.* A Trustee is entitled to rely on the trust instrument. While the entire terms of a trust are normally contained in the trust instrument, extrinsic evidence may be admissible to clarify ambiguities, many of which may not be apparent from a reading of the instrument. Also, grounds may exist, such as reformation due to a mistake of fact or law, resulting in the reformation of apparently unambiguous terms. To enable a Trustee to administer a trust with some dispatch and without concern that reliance on the language of the trust instrument is misplaced, the CUTC provides that a Trustee is not liable for a breach of trust to the extent the breach resulted from reasonable reliance on the trust instrument. Section 75.

4. *Trustees entitled to reasonably rely on family relationships and status.* A Trustee is also entitled to rely on reasonable inferences as to a beneficiary's family or other status. Whenever the happening of an event (including marriage, divorce, performance of education requirements, or death) affects the administration or distribution of the trust, a Trustee who exercised reasonable care to determine that the event occurred is not liable for any loss attributable to lack of knowledge. Section 76.

5. *Certification.* To protect the privacy of the settlor and beneficiaries, Section 82 authorizes Trustees to provide, and permits third persons to rely on, written certifications by the Trustee as to the Trustee's authority. The Trustee need not provide the third person with a complete copy of the trust instrument.

**O. Determining the Trust’s Principal Place of Administration (Section 108; CUTC Section 8)**

1. *Why the place of administration should be specified in a trust.*

Determining a trust’s principal place of administration is important for several reasons. Situs may determine which state’s income tax applies to the trust. It will establish which court has primary jurisdiction concerning trust administrative matters. A trust’s principal place of administration also makes it more likely that the particular jurisdiction’s law will govern the trust.

2. *The CUTC helps Trustees determine where the trust is located.*

As trust administration has become more complex, determining a trust’s principal place of administration has become more difficult. Co-Trustees may be located in different states, or a corporate Trustee’s personal trust officers may be located in one state, its investment division in another, and its operations facilities yet somewhere else. Also, a variety of non-Trustees, such as advisors and trust protectors, may play a role in the trust’s administration. The result is that no single rule would address all of these situations, therefore, the CUTC does not attempt to define principal place of administration. Instead, Section 8 assists in determining the situs of an inter vivos trust in a particular jurisdiction.

3. *Settlors can designate where trusts are to be administered in most cases.*

A provision in the trust terms designating the principal place of administration is valid and controlling as long as a Trustee’s principal place of business is located in or a Trustee is a resident of the designated jurisdiction, or all or part of the trust’s administration occurs in the designated place. Section 8(a).

4. *Trustees can transfer the principal place of administration even if the trust is silent.*

For trust instruments failing to address the subject, the CUTC specifies a procedure for transferring the principal place of administration. The transfer must facilitate the trust’s administration, and the Trustee must inform the qualified beneficiaries of the transfer at least sixty days in advance. “Qualified beneficiary,” a term which is defined in Section 3, excludes a beneficiary with a remote remainder interest. The CUTC was modified by deleting provisions giving the qualified beneficiaries the unconditional right to block transfers. The transfer has to be in the beneficiaries’ interests under Section 8(b) and they have the right to remove a Trustee in Section 54, so the beneficiaries’ interests are adequately protected from abuse. If the transfer involves the appointment of a new Trustee, the requirements for the appointment of a successor Trustee, either under the trust instrument or the UTC, must first be satisfied before the transfer can occur. Section 8(b)-(f).

**P. Effective Date**

In general, the CUTC will apply to all trusts, including those created and funded prior to the effective date. In fairness to settlors, some of whom created and funded irrevocable trusts based on existing law, some of the CUTC rules and provisions that would change that law will be prospective.

The prospective provisions appear as carve outs, and include: the notice provisions; the added rights given to spouses and former spouses in Article 5; creditors' rights against "will substitute" revocable trusts at the settlor's death under Section 42(a)(3); and the extension of the period in gross in Section 29(1) from 21 to 90 years.

#### **IV. Conclusion**

The UTC has already been enacted in five states and is presently being studied in approximately 30 others. The result of these numerous enactments will be one uniform approach to trust law in the United States. The current Connecticut statutory trust law is disorganized, woefully inadequate and has developed on a piecemeal basis over the years in response to specific problems, as opposed to being drafted as a comprehensive code. Every year trustees and beneficiaries of Connecticut trusts are forced to spend substantial amounts of money for legal advice to determine Connecticut law, if any, on issues affecting trusts. All too often there is no statutory law, and trustees and beneficiaries have little choice but to rely on expensive legal opinions based on common law principles or seek a judicial solution. The CUTC answers most questions and resolves issues that have plagued Connecticut attorneys for years. In addition, the CUTC provides a framework for resolving problems presented by poorly drafted trust documents or substantially changed circumstances.

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