

NOTES

Agents in Secrecy: The Use of Information Surrogates in Trust Administration

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I. INTRODUCTION

Trusting another to look after one's best interest when money is at stake is difficult in many different situations. This is true in the area of trust administration as well. As with most areas of law and regulation, trust law addresses this concern primarily through the requirement of information disclosure. Information disclosure to trust beneficiaries has become a heated issue among trust scholars and practitioners. Interestingly, as fundamental as disclosure may be in trust administration, the duty to disclose is not precisely defined at common law and is far from uniform. This creates a profusion of problems for trustees who operate in multiple jurisdictions,¹ or who are attempting to fulfill fiduciary or administrative duties that are not clearly defined. States recently have mentioned this desirability for clarity and uniformity when modifying their own trust laws. Additionally, litigation against trustees is on the rise.² While there are many reasons for this recent uptick in litigation,³ the chance that a trustee will violate her obligations as a fiduciary, and therefore be subject to litigation, increases when the trustee fails to fully understand her duties.⁴ This is especially true in an area of law as complex and varied as a trustee's duty to disclose trust information to its beneficiaries.

Underlying the difficulties in a trustee's attempt to fulfill this duty are two fundamental and seemingly opposing principles of trust law. On the one hand, "trust law typically accord[s] a trust settlor nearly unfettered latitude to determine which trust terms and restrictions would benefit her chosen beneficiaries . . ."⁵ This principle advocates for a system of default rules that would allow a settlor to prohibit information disclosure and protect the trust funds against attack by immature or rival beneficiaries. On the other hand, "[i]t is an accepted principle of trust law that a private trust exists to

1. Dana G. Fitzsimons, Jr., *Navigating the Trustee's Duty to Disclose*, 23 PROB. & PROP., Jan.–Feb. 2009, at 40, 41.

2. *Id.* at 40.

3. For example, a Special Committee Report to the New Jersey Legislature advocating for adoption of the UTC recognized the greater use of trusts in recent years and the "consequent rise in the number of day-to-day questions involving trusts" coupled with "a recognition that the trust law in many States is thin." N.J. LAW REVISION COMM'N, FINAL REPORT RELATING TO UNIFORM TRUST CODE 7 (2008), available at www.lawrev.state.nj.us/utc/utcFR060908.doc. The Report advocated for adoption of the UTC to provide comprehensive guidance in the face of rising litigation. *Id.*

4. Fitzsimons, *supra* note 1, at 40.

5. Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1168 (2008).

benefit the beneficiaries thereof.”⁶ Once a settlor has placed assets into a trust, she has relinquished control over these assets. This principle supports mandating information disclosure to trust beneficiaries, the holders of equitable title in the trust assets. Traditionally, as a result of these two principles, settlors could construct the terms of their trusts with great discretion, but were required under common law to provide at a minimum information reasonably related to the beneficiary’s interest in enforcing her rights under the trust.⁷

Just how a trustee should administer a trust in which a settlor has prohibited disclosure to beneficiaries is an issue under debate, particularly after the creation of the Uniform Trust Code (“UTC” or the “Code”).⁸ Since 2000, when the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated the UTC, twenty-three jurisdictions have adopted portions of the UTC.⁹ Interestingly, no state has adopted the Code’s provisions on the duty to inform verbatim. Rather, the enacting states have modified those provisions in various ways, with the result that no two states’ provisions on the duty to inform are precisely the same.¹⁰ These deviations, which typically decrease the amount of mandatory information disclosure, indicate reluctance by state legislatures to completely accept the UTC’s guidance regarding mandatory trust information disclosure.

This Note focuses on the duty to disclose as it applies to irrevocable trusts. An irrevocable trust is a trust in which the settlor has relinquished the right to terminate the trust and, therefore, has completely passed legal title on to the trustee.¹¹ The UTC sections that have incited so much debate over nondisclosure only apply to irrevocable trusts. This Note does not address revocable trusts

6. *Id.* at 1166.

7. RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959) (“Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.”).

8. Kevin D. Millard, *The Trustee’s Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 374–75 (2005) (“[T]here remains considerable uncertainty and disagreement about the duty to inform and report, and about the extent to which the duty is or should be mandatory.”).

9. Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Missouri, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, D.C., and Wyoming. The UTC has also been recently introduced in New Jersey, with adoption pending.

10. See *infra* Part II; see also Millard, *supra* note 8, at 383.

11. BLACK’S LAW DICTIONARY 1651 (9th ed. 2009).

because of the nearly uncontested principle—also present in the UTC—that a trustee of a revocable trust is answerable only to the settlor and complete nondisclosure to beneficiaries is therefore permissible.¹² Part II of this Note reviews the development of the duty to disclose, beginning with the traditional common law requirement that settlors provide at least some information to beneficiaries, then examines the approach of the UTC, and finally looks to how states have reacted to the UTC in their own enactment of a duty to inform. Part III analyzes the policy concerns behind mandating disclosure, on the one hand, and permitting nondisclosure, on the other. States have addressed these policy concerns in different ways, and the result is that there is not a uniform body of trust law on this important issue.

Finally, Part IV concludes that a surrogate should be appointed to receive trust information on behalf of the beneficiaries. While the majority of relevant scholarship concludes that beneficiaries are put at too great a risk when settlors prohibit disclosure to beneficiaries, the current scholarship does not account for the trend in UTC states of allowing settlors to override mandatory disclosure. Given the great number of states that have reduced or eliminated mandatory trust information disclosure, this Note observes that advocacy of information disclosure alone has not sufficed to persuade states to adopt the UTC's position. Therefore, this Note explores and advocates for a solution that would require disclosure in all irrevocable trusts, but would allow a settlor to avoid that disclosure to the beneficiaries themselves. The appointment of a surrogate to receive the information instead of the beneficiaries allows the surrogate to ensure that the interests of the beneficiaries are protected, but gives a settlor the right to prohibit the trustee from disclosing information directly to the beneficiaries, thus maintaining the settlor's personal privacy as well as the confidentiality of the trust assets. By addressing the policy

12. *But see* J.P. Morgan Chase Bank, N.A. v. Longmeyer, 275 S.W.3d 697, 701–02 (Ky. 2009) (holding that the trustee for a *revocable* trust had an affirmative duty to inform the remainder beneficiaries of their removal). The *Longmeyer* decision came as a surprise to many who labored under the generally accepted principle of trust law that the trustee of a revocable trust was answerable only to the settlor of the trust up until the moment the settlor became incapacitated or the trust became irrevocable. Although this is a big step forward in beneficiary's rights, there is a likelihood that future litigation will sidestep the *Longmeyer* decision by limiting its holding to its extraordinary facts. *See* Turney P. Berry, David M. English & Dana G. Fitzsimons, Jr., *Longmeyer Exposes (or Creates) Uncertainty About the Duty to Inform Remainder Beneficiaries of a Revocable Trust*, 35 AM. C. TR. & EST. COUNS. 125, 126 (2009) (discussing the effect the holding will have on trust law and the extent to which future courts may limit its effect); *cf.* Turney P. Berry, David M. English & Dana G. Fitzsimons, Jr., *Disclose. Disclose! Disclose?: Longmeyer Distorts the Trustee's Duty to Inform Trust Beneficiaries*, 24 PROB. & PROP., July–Aug. 2010, at 12 (“The court was aware, but seemingly unconcerned, that its ruling would come as a surprise to clients and lawyers alike . . .”).

concerns on both sides of the debate, this solution provides the most direct path toward promoting information disclosure and encouraging trust law uniformity, as advocated by the drafters of the UTC.

II. DEVELOPMENT OF THE PRESENT CONFLICT

Trust law is a creation of English common law and has developed with great diversity among the various states, leading to complications and confusion for parties administering trusts in different states. This Part describes the development of the duty to inform in trust administration. Specifically, Subpart A will first look at the common law requirements, which existed until the development of the UTC in 2000. Subpart B will then present the balance chosen by the drafters of the UTC and describe the Code's relevant provisions. Finally, Subpart C will look to the current state of the duty to inform in those states that have adopted portions of the UTC. Identifying those sections of the UTC that a state has chosen *not* to adopt is informative when analyzing whether the UTC has found the right balance in the policy debate between trust privacy and protection for the beneficiaries' interests.

A. The Traditional Common Law Principle

From the creation of the trust instrument in the United States, the body of trust law has been governed primarily by common law. Historically, the settlor's intent is "the defining force in trust law."¹³ With a few exceptions, the settlor was at liberty to decide which trust terms and administration methods would best fulfill her intention for her chosen beneficiaries.¹⁴ This key principle would seem to support a settlor's complete right to prohibit a trustee from disclosing any information to beneficiaries. However, judicial decisions over the years established patterns regarding the trustee's duty to provide information to beneficiaries.

Under the most basic principle, a beneficiary of an irrevocable trust is always entitled to information about the trust that is reasonably necessary to allow the beneficiary to enforce the trust, even if the terms of the trust restrict disclosure.¹⁵ This traditional

13. Cooper, *supra* note 5, at 1171.

14. *Id.* at 1171–72.

15. See RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959) ("Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress

principle requires that the existence of the trust itself must always be disclosed¹⁶—if a beneficiary does not know that a trust even exists for her benefit, then she will not be able to enforce that trust. The basic fact that a trust exists, however, is not normally sufficient. The trustee must also periodically provide beneficiaries information regarding the administration and condition of the trust.¹⁷ Without this information about the method of administration, the beneficiaries may remain unaware of breaches of fiduciary duty until it is too late to obtain relief.

While the duty to inform is normally triggered when a beneficiary requests information from the trustee, the duty is present even without such a request if deemed to be necessary to protect the beneficiary from a third party.¹⁸ For example, if the beneficiary is about to sell her interest in a trust to a third party, and the trustee is aware that the beneficiary's interest in that trust is more valuable than the beneficiary realizes (and could justify demanding a higher price from the third party), then the trustee is obligated to inform the beneficiary of this information.¹⁹ Additionally, the duty to inform is not limited to current beneficiaries, but also runs "to future beneficiaries regardless of whether [the future beneficiaries'] interests are vested or contingent."²⁰ In order to fulfill the duty to inform, a trustee is required to provide a full copy of the trust instrument to the beneficiaries, not merely those portions that directly relate to a particular beneficiary.²¹

A quick look at the different manner in which trust law treats revocable, as opposed to irrevocable trusts, explains the concern for beneficiaries' rights. Although this Note focuses on irrevocable trusts,

a breach of duty."); *see also* Millard, *supra* note 8, at 374 (discussing the purpose for a common law duty to disclose).

16. RESTATEMENT (THIRD) OF TRUSTS § 82(a) (2003).

17. RESTATEMENT (SECOND) OF TRUSTS § 173 (1959).

18. *Id.* § 173 cmt. d (The trustee "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest."); Fitzsimons, *supra* note 1, at 41.

19. RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. d (1959).

20. Fitzsimons, *supra* note 1, at 41; *see also* RESTATEMENT (SECOND) OF TRUSTS § 172, cmt. c (1959) ("The trustee may be compelled to account not only by a beneficiary presently entitled to the payment of income or principal, but also by a beneficiary who will be or may be entitled to receive income or principal in the future. This is true even though the interest of the beneficiary is contingent.").

21. *See* Taylor v. Nationsbank Corp., 481 S.E.2d 358, 362 (N.C. Ct. App. 1997) (holding that "absent an explicit provision in the trust to the contrary . . . trust beneficiaries are entitled to view the trust instrument from which their interest is derived"); Fletcher v. Fletcher, 480 S.E.2d 488, 492 (Va. 1997) (holding that the beneficiary was entitled to view the trust instruments in their entirety).

it is worth noting that different rules apply to revocable trusts. As long as a trust remains revocable and the settlor is alive and not incapacitated, “the trustee generally owes a duty only to report to the settlor and should generally not report to any other beneficiaries without the settlor’s consent.”²² Therefore, the general disclosure principles listed above did not extend at common law to the administration of a revocable trust.²³ This distinction between the disclosure requirements for irrevocable and revocable trusts clarifies the dispositive issue: trust assets exist entirely for the beneficiaries’ benefit. In the case of an irrevocable trust, the settlor no longer has any beneficial interest in the trust assets. Therefore, while the settlor’s intent when she created the trust is fundamental to the administration of the trust, her interests are no longer the most important ones once the trust becomes irrevocable. For this reason, an optimal information disclosure rule will be one that protects the beneficiaries’ rights.

Common law principles continue to evolve regarding a trustee’s duty to provide information. The Restatement (Third) of Trusts revised the trustee’s duty to provide information to beneficiaries, making the duty more specific.²⁴ Case law has also produced a trend that strengthens the duty to inform.²⁵ In sum, “the history of the duty to inform shows that Anglo-American trust law has regularly recognized a duty in the trustee to provide information to the trust’s beneficiaries.”²⁶ This principle was recognized and codified in the UTC in 2000.²⁷

B. The Development of the Uniform Trust Code

Greater use of trusts and the related rise in the amount of litigation involving trust administration led NCCUSL to analyze the

22. Fitzsimons, *supra* note 1, at 42.

23. *But see supra* note 12 and accompanying text.

24. *See* RESTATEMENT (THIRD) OF TRUSTS § 82 reporter’s notes (2003) (“The black letter of Subsection (2) of this Section is similar in substance to the black letter of Restatement Second, Trusts § 173, although the other aspects of this Section reflect needs or trends that were not expressly recognized in the prior edition . . .”).

25. *See supra* note 12 and accompanying text.

26. T.P. Gallanis, *The Trustee’s Duty to Inform*, 85 N.C. L. REV. 1595, 1615 (2007).

27. UNIF. TRUST CODE § 813(a) (amended 2005) (“A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”).

state of trust law in the early 1990s.²⁸ NCCUSL found that trust law in most states was thin, with many gaps between the few statutes and reported cases, and that previous attempts at uniform acts relating to trusts, while numerous, were fragmentary.²⁹ NCCUSL recognized a need for a uniform body of trust law that would “update, fill out, and systemize the American law of trusts.”³⁰

A uniform body of trust law among the states is beneficial for trustees and the beneficiaries who rely upon them. Although family members are regularly appointed as trustees, an increasing number of settlors have chosen to appoint the more expensive, but often more reliable and professional, institutional trustee. These institutions routinely administer trusts that are governed by the laws of different states. These trustees must constantly keep themselves apprised of the differing trust laws in each state that govern one or more of the trustee’s trusts to ensure compliance. Further, beneficiaries of trusts are spread all over the world and are receiving legal advice in those differing jurisdictions on how to best protect their interests. In recognition of this need for uniformity, NCCUSL created what is now known as the Uniform Trust Code.³¹

The UTC codified many of the common law principles regarding the duty to provide information.³² The UTC was drafted in close coordination with the new revision of the Restatement (Third) of Trusts and parallels that Restatement’s strong disclosure duties.³³ Although the UTC follows the common law tradition of generally providing default rules that apply only to the extent the settlor does not provide otherwise in the instrument,³⁴ section 105 of the UTC specifically prohibits the settlor from waiving certain of the trustee’s obligations by listing fourteen unwaivable duties.³⁵ The unwaivable duties relating to information disclosure are specifically outlined in

28. See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 144 (2002) (discussing the impetus for the NCCUSL’s creation of the UTC).

29. *Id.*

30. *Id.*

31. UNIF. TRUST CODE (2000). The UTC was amended in 2001, 2003, 2004, and 2005.

32. See, e.g., UNIF. TRUST CODE § 105(b) (amended 2005) (codifying the common law principle that the terms of the trust should prevail unless a given exception applies).

33. See English, *supra* note 28, at 148 (“The UTC was drafted in close coordination with this revision of the *Restatement of Trusts* to the extent that a significant minority, if not majority, of the UTC provisions could be described as a codification of the *Restatement*.”).

34. See, e.g., UNIF. TRUST CODE § 105(a) (“Except as otherwise provided in the terms of the trust . . .”).

35. See *id.* § 105(b) (“The terms of the trust prevail over any provision of this Code *except . . .*”) (emphasis added).

UTC section 813, which imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements.³⁶ For one, the settlor may not override the trustee's duty to notify qualified beneficiaries of an irrevocable trust who have attained twenty-five years of age³⁷ of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports.³⁸ Additionally, a settlor may not eliminate the trustee's duty to respond to the information request of a beneficiary of an irrevocable trust.³⁹

The effect of mandating portions of the disclosure duties listed in section 813 is that, with respect to beneficiaries age twenty-five and older, a settlor may dispense with all of the requirements of section 813 except for the duties to inform the beneficiaries of the existence of the trust and of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared.⁴⁰ Among the specific section 813 requirements that a settlor *may* waive are the duty to provide a beneficiary upon request with a copy of the trust instrument⁴¹ and the requirement that the trustee provide annual reports to the qualified beneficiaries.⁴² However, the 2006 comments to section 105, which outlines the default and mandatory rules, note that the trustee may be required to furnish a copy of the entire trust instrument and prepare an annual report in a particular case, if such information is requested by a beneficiary and is reasonably related to the trust's administration.⁴³ Thus, while section 105 seems to allow a trustee to avoid providing a copy of the trust to a beneficiary, in certain circumstances, if a copy is requested, the trustee would be required to provide it. While these comments

36. Beyond those mandatory duties listed below, the discretionary, but recommended, disclosure duties of a trustee include the general duty to keep the qualified beneficiaries of a trust reasonably informed about the administration of the trust and to respond to a request for information reasonably related to the administration of the trust, the duty to furnish a copy of the entire trust instrument upon request, the duty to notify qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation, and the duty to send annual reports of the trust property, liabilities, receipts, and disbursements. *Id.* § 813.

37. This age requirement recognizes that settlors may have reasons for wanting to keep a young beneficiary from discovering her interest in a trust. For example, a settlor may not want a beneficiary who is trying to decide whether to go to college to allow a potentially large trust interest to dissuade her from furthering her education.

38. UNIF. TRUST CODE § 105(b)(8). "Qualified beneficiary" is defined by the UTC to be a beneficiary who is currently a distributee of trust income or who would be if either the current distributees or the trust instrument terminated. *Id.* § 103(13).

39. *Id.* § 105(b)(9).

40. *Id.* § 105 cmt.

41. *Id.* § 813(b)(1).

42. *Id.* § 813(c).

43. *Id.* § 105 cmt.

under section 105 seem to conflict with the provision of section 813, when in doubt, the UTC favors disclosure to beneficiaries as the better policy.⁴⁴

According to David English, the Reporter for the UTC, the extent to which the settlor may waive the disclosure requirements was the most discussed issue both during the drafting of the UTC and after its adoption by NCCUSL.⁴⁵ The UTC seeks to “increase trustee accountability, while at the same time reliev[e] the trustee of the undue burden of having to identify and notify those holding truly remote interests.”⁴⁶ English acknowledged that the UTC provisions were a compromise with which both sides of the debate would not be satisfied.⁴⁷ English also noted that the waiver restrictions in section 105 of the disclosure duties would lead to a direct conflict between the goal of effectuating settlor intent and the goal of making certain the beneficiaries have sufficient information to enforce their rights.⁴⁸ Although it has not taken the extreme position of completely mandatory disclosure, the UTC has chosen a rule that falls primarily on the side of disclosure.

Four of the first ten jurisdictions to enact the UTC deleted entirely the sections that mandate information disclosure.⁴⁹ This reaction is precisely what English had predicted.⁵⁰ In response to this diverse reaction to mandatory disclosure, the UTC was modified in 2004 by bracketing those subsections to indicate that the adopting state may choose to make disclosure the default option, rather than make it mandatory.⁵¹ This does not appear to indicate a change in policy within the UTC. Rather, it merely recognizes that enacting states are in fierce dispute regarding the adoption of those subsections. In some sense, while making its own position on mandatory disclosure clear, the UTC abandoned its attempt to establish a truly uniform disclosure requirement among the states. In doing so, it moved away from the very purpose of its six-year quest: to create a *Uniform Trust Code* that is universally recognized and adopted.

44. English, *supra* note 28, at 199–200.

45. Millard, *supra* note 8, at 374–75 (discussing English, *supra* note 28, at 202).

46. English, *supra* note 28, at 200.

47. *Id.* at 203.

48. *Id.*

49. Alan Newman, *Elder Law: The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 677 (2005).

50. See *id.* at 202 (“Early indications are that some of the states that will enact the UTC will modify the waiver provision.”).

51. UNIF. TRUST CODE § 105(b)(8)–(9) (amended 2005).

C. The Chosen Disclosure Regimes in UTC States

Because of the variance among states adopting the UTC, a lack of uniformity remains regarding information disclosure. At the time this Note was written, twenty-three jurisdictions had adopted the UTC.⁵² As mentioned above, no state has adopted both UTC sections 813 and 105(b) verbatim. The result is that trustees who manage trusts governed by different states' trust laws⁵³ must constantly keep themselves apprised of the often vastly differing disclosure rules in each state. The fact that most state statutes restrict, rather than increase, the disclosure requirements of trusts indicates that the majority of enacting states felt that a settlor's right to prohibit information disclosure is more important than protecting the rights of uninformed beneficiaries. This highlights the difficulty of drafting a rule in this area that balances these competing policy goals in a way that is acceptable to both sides.

The various state law provisions regarding disclosure range from slight deviations from the UTC to exclusion of entire Code provisions. The most common and interesting alterations are outlined below.

1. Deviations from the General Duty to Inform and Report Under UTC Section 813(a)

UTC section 813(a) imposes the general duty to keep the qualified beneficiaries⁵⁴ informed about the administration of the trust and to respond to a request for information received from *any* beneficiary. Nearly half of the states that have enacted the UTC have departed from this first requirement. The majority of states that alter this section retain the first general duty to keep a qualified beneficiary informed of the administration of the trust, but limit the second duty to respond to a request for information from a *qualified* beneficiary, as defined in the relevant code.⁵⁵ Some other states take issue with the

52. See *supra* note 9 and accompanying text (detailing which states have adopted the UTC).

53. The settlor is free to choose and indicate in the trust which state's trust law will govern the trust instrument.

54. The specific requirements listed in the definition of a "qualified" beneficiary under the UTC are designed to exclude those beneficiaries whose interests are remote and contingent, and who thus are unlikely to have an interest in the day-to-day affairs of the trust. UNIF. TRUST CODE § 103(13) cmt.

55. Eleven out of the twenty-three UTC states impose this further restriction, including: Alabama, ALA. CODE § 19-3B-813(a)(2) (LexisNexis 2007); Florida, FLA. STAT. ANN. § 736.0813 (West 2010); Kansas, KAN. STAT. ANN. § 58a-813(a) (2005 & Supp. 2009); Maine, ME. REV. STAT.

general nature of the first part of the duty, preferring a list of specific duties.⁵⁶

2. Deviations from the Specific Duties Under UTC Section 813(b)

UTC section 813(b) requires the trustee to (1) furnish a copy of the trust instrument to any beneficiary upon request; (2) notify qualified beneficiaries within sixty days of acceptance of trusteeship of the trustee's name, address, and telephone number; (3) notify qualified beneficiaries within sixty days of the creation of an irrevocable trust, or the date that a revocable trust becomes irrevocable, of the trust's existence, of the identity of the settlor(s), of the right to request a copy of the trust instrument, and of the right to a trustee's report; and to (4) notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation. As with the duties in section 813(a), some states again limit the applicability of these specific duties to *qualified* beneficiaries only.⁵⁷ Pennsylvania goes one step further and only requires these notifications after a settlor of a revocable or *irrevocable* trust has died or has been adjudicated incapacitated.⁵⁸

Interestingly, despite the tendency of many states to restrict the duty to disclose to a greater extent than does the UTC, only three states have deviated from the common law principle codified in the UTC which allows a beneficiary to receive a copy of the trust instrument in its entirety. These three states limit the duty to furnish a copy of the trust instrument to a beneficiary to those provisions of the trust that describe the beneficiary's interests, as opposed to furnishing a copy of the entire instrument.⁵⁹ This seems to indicate

ANN. tit. 18-B, § 813.1 (Supp. 2010); Michigan, MICH. COMP. LAWS ANN. § 700.7814(1) (West 2010); New Hampshire, N.H. REV. STAT. ANN. § 564-B:8-813(b) (LexisNexis Supp. 2010); North Carolina, N.C. GEN. STAT. § 36C-8-813(a)(2) (2009); Tennessee, TENN. CODE ANN. § 35-15-813(a)(2) (Supp. 2010); Utah, UTAH CODE ANN. § 75-7-811(1) (Supp. 2010); Vermont, VT. STAT. ANN. tit. 14A, § 813(a) (Supp. 2010); and Wyoming, WYO. STAT. ANN. § 4-10-813(a) (2009).

56. N.C. GEN. STAT. § 36C-8-813(a) (2009); 20 PA. CONS. STAT. § 7780.3 (Supp. 2010).

57. The states that limit the duties in section 813(b) to qualified beneficiaries include: Kansas, KAN. STAT. ANN. § 58a-813(b)(1)-(5); Maine, ME. REV. STAT. ANN. tit. 18-b § 813.1; Michigan, MICH. COMP. LAWS ANN. § 700.7814(2); New Hampshire, N.H. REV. STAT. ANN. § 564-B:8-813(c)(1)-(3); and Wyoming, WYO. STAT. ANN. § 4-10-813(b). As noted earlier, although each state may slightly alter their own definition, "qualified beneficiary" is defined by the UTC to be a beneficiary who is currently a distributee of trust income or who would be if either the current distributees or the trust instrument terminated. UNIF. TRUST CODE § 103(13) (amended 2005).

58. 20 PA. CONS. STAT. § 7780.3(b)-(e).

59. ARIZ. REV. STAT. ANN. § 14-10813(B)(1), (3) (Supp. 2010); MICH. COMP. LAWS ANN. § 700.7814(2)(a); N.D. CENT. CODE § 59-16-13(2)(b) (2010).

that, where the trustee has the duty—whether mandatory or discretionary—to furnish a copy of the trust instrument, the majority of adopting states are reluctant to restrict the portions of the instrument that are available to the beneficiary. Presumably, these states find that if some information is going to be given to a beneficiary, that information needs to be complete.

3. Deviations from the Mandatory Aspects of the Duty to Inform Under UTC Subsections 105(b)(8), (9)

Over half of the UTC states have modified the section regarding the mandatory nature of the duty to inform such that a settlor can avoid any disclosure to the trust beneficiaries.⁶⁰ The overwhelming response is extremely informative in the search for a balance that will be acceptable to most, if not all, states.

As mentioned above, subsections (8) and (9) of UTC section 105(b) prohibit a settlor from eliminating (1) the trustee's duty to inform beneficiaries of an irrevocable trust who are at least twenty-five years old of the existence of the trust, the identity of the trustee, and the right to request trustee's reports; and (2) the trustee's duty to respond to a beneficiary's request for information, whatever her age. Eleven states, nearly half of the enacting jurisdictions, completely removed the UTC subsections that mandate disclosure, enabling the settlor to contract entirely out of disclosure to the trust beneficiaries. These states include Arkansas,⁶¹ Kansas,⁶² New Hampshire,⁶³ North Carolina,⁶⁴ North Dakota,⁶⁵ South Carolina,⁶⁶ Tennessee,⁶⁷ Utah,⁶⁸ Vermont,⁶⁹ Virginia,⁷⁰ and Wyoming.⁷¹ On the other end of the spectrum, only two states, Florida and Pennsylvania, make all aspects

60. As noted below, this effect is possible by either completely deleting the subsection that makes disclosure a mandatory duty of the trustee or allowing the settlor to designate a surrogate to receive information on behalf of the beneficiaries.

61. ARK. CODE ANN. § 28-73-105 (Supp. 2009).

62. KAN. STAT. ANN. § 58a-105.

63. N.H. REV. STAT. ANN. § 564-B:1-105 (LexisNexis Supp. 2010).

64. N.C. GEN. STAT. § 36C-1-105 (2009).

65. N.D. CENT. CODE § 59-09-05 (2010).

66. S.C. CODE ANN. § 62-7-105 (2009).

67. TENN. CODE ANN. § 35-15-105(b) (2007 & Supp. 2010).

68. UTAH CODE ANN. § 75-7-105(b) (Supp. 2010).

69. VT. STAT. ANN. tit. 14A, § 105 (Supp. 2010).

70. VA. CODE ANN. § 55-541.05(b) (2007).

71. WYO. STAT. ANN. § 4-10-105(b) (2009).

of the trustee's duty to inform and report to beneficiaries mandatory, not merely the two aspects required under the UTC.⁷²

A few states merely tweak the mandatory duties rather than take extreme stances. For example, Alabama⁷³ and Arizona⁷⁴ deleted the first mandatory duty under the UTC, requiring only the duty to provide trustee's reports upon request. Nebraska⁷⁵ limits the mandatory disclosure only to the more general duty to keep a beneficiary reasonably informed, similar to the common law requirement, and to the duty to respond to requests for information, rather than the more specific requirement of the UTC. Maine⁷⁶ and Missouri⁷⁷ limit the mandatory nature of the duty to respond to a beneficiary's request for information to a duty to respond to a request from a *qualified* beneficiary, rather than any beneficiary.

New Mexico adopted all of the language of the UTC's duty to inform and report,⁷⁸ including making the two specific duties mentioned above unwaivable. However, the New Mexico legislature made one important addition: if the trustee is a regulated financial services institution and the settlor makes a knowing waiver, all of the trustee's duties to inform, including those two specific duties mentioned above, can be waived by the settlor in the trust instrument.⁷⁹ The New Mexico approach suggests that the New Mexico legislature felt that the interests of the beneficiary would be well protected when a professional institutional trustee is appointed. Presumably, it found that the policy concerns behind requiring disclosure, particularly those relating to manipulation of a vulnerable settlor, either do not exist when a professional institutional trustee is appointed, or at least no longer outweigh policies favoring nondisclosure. Perhaps New Mexico finds institutional trustees more

72. FLA. STAT. ANN. § 736.0105(2)(r)-(t) (West 2010); 20 PA. CONS. STAT. § 7705(b)(8) (Supp. 2010).

73. See ALA. CODE § 19-3B-105(b)(8) (LexisNexis 2007) (describing duty to "respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust").

74. ARIZ. REV. STAT. ANN. § 14-10105(b)(8) (Supp. 2010).

75. See NEB. REV. STAT. § 30-3805(b)(8) (2008) (describing duty to "keep the qualified beneficiaries of the trust reasonably informed . . . to protect their interests" and "respond to the request of a qualified beneficiary . . . for trustee's reports and other information reasonably related to the administration of a trust").

76. ME. REV. STAT. ANN. tit. 18-B, § 105(2)(I) (Supp. 2010).

77. MO. ANN. STAT. § 456.1-105(2)(9) (West 2007).

78. N.M. STAT. ANN. § 46A-8-813 (LexisNexis Supp. 2009).

79. *Id.* § 46A-8-813(F).

reliable since they are subject to regulation, unlike private trustees, and because they have reputational capital to protect.⁸⁰

The most interesting deviation from the mandatory nature of the duty to disclose was first adopted by Washington, D.C.⁸¹ and has since also been adopted by Maine,⁸² Missouri,⁸³ Ohio,⁸⁴ and Oregon.⁸⁵ Under this rule, a settlor may avoid the requirement for disclosure to qualified beneficiaries by designating a surrogate to receive any notice, information, and reports on behalf of the beneficiaries. The surrogate is then charged with protecting the interests of the beneficiaries. The appealing benefits of this approach are discussed in more depth below.

III. THE POLICY DEBATE

When a state adopts the UTC in recognition of the need for uniformity, but alters or omits a particular section, it usually does so only where the state comes to a different policy conclusion.⁸⁶ The policy arguments affecting trust disclosure can be separated into two distinct categories: those favoring mandatory disclosure and those opposing such a requirement. The UTC's drafters, as well as many legal scholars, favor mandatory disclosure as the better policy. However, as outlined above, the majority of deviations restrict rather than broaden the UTC duty to disclose. Therefore, the policy concerns that advocate discretionary disclosure cannot be offhandedly discarded in crafting a rule that has any hope of being adopted by most or all of the states. Until these concerns can be addressed and reconciled, trust law unification will remain elusive. This Part explores the dueling policy concerns that have caused the deviations from the UTC provisions.

80. See *infra* Part IV.B.3.

81. D.C. CODE ANN. § 19–1301.05(c)(3) (LexisNexis 2008).

82. ME. REV. STAT. ANN. tit. 18–B, § 105(3)(B).

83. MO. ANN. STAT. § 456.1–105(3). The Missouri Uniform Trust Code only allows a settlor to designate a surrogate to receive all mandatory notices as required by the statute, but still requires that a trustee respond to the request of a qualified beneficiary of an irrevocable trust for the trustee's reports and other information reasonably related to the administration of the trust. *Id.* § 456.1–105(2)(9).

84. OHIO REV. CODE ANN. § 5801.04(C) (West 2007).

85. OR. REV. STAT. § 130.020(3)(b) (2009).

86. See, e.g., David F. Powell, *The New Florida Trust Code: Part 1*, 80 FLA. BAR J., July–Aug. 2006, at 24, 24 (discussing Florida's adoption of the UTC); Valerie J. Vollmar, *The Oregon Uniform Trust Code and Comments*, 42 WILLAMETTE L. REV. 187, 188 (2006) (“The committee had two fundamental goals in drafting the Oregon Uniform Trust Code (the Code): (1) retain current Oregon law *absent a very good reason to change it*; and (2) promote uniformity among the states by adopting as much of the UTC as seemed desirable.”) (emphasis added).

A. Mandatory Disclosure

The arguments in favor of mandatory information disclosure can be broken down into those concerning the beneficiaries, the trustee, and the settlor, respectively. The key policy point in favor of mandatory disclosure relates to beneficiaries. It states that trust privacy denies beneficiaries the information they need to protect their beneficial interests in the trust and to ensure that the settlor's actual intentions are accomplished should a trustee deviate from that intent or otherwise mismanage the trust.⁸⁷ Although a court may require access to the trust instrument should the beneficiaries initiate litigation, failure to provide any trust information outside of litigation provides a significant hurdle for the beneficiaries, who may not be aware that a breach has even occurred. The logic is as basic as it gets: one cannot protect oneself against that which is unknown. Further, trustees must often interpret a settlor's intent when administering the trust, and if the beneficiaries also have a copy of the trust instrument, the beneficiaries can recognize when even a well-intentioned trustee simply got it wrong.

Another potential reason for requiring information disclosure to beneficiaries is that trust law allows settlors to name family members as trustees without much interference. States allow family members to be selected as trustees without imposing licensing requirements or other minimum standards. In contrast, there are numerous rules applicable to trust companies or other institutions acting as trustees. Given settlors' largely unfettered ability to choose a family member as a trustee, mandatory information disclosure to beneficiaries could be justified as a necessary safeguard against potential negligence and abuse in the absence of further regulation of the trustee's capabilities.⁸⁸ Regarding family-member trustees, sunlight is likely the best medicine.

From the trustee's perspective, trust privacy poisons the relationship between beneficiaries and trustees, causing suspicion of trustees and potentially leading to litigation.⁸⁹ For example, in

87. Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 595 (2008).

88. Donald D. Kozusko, *In Defense of Quiet Trusts*, TR. & EST., Mar. 2004, at 20, 21. The reality of this concern can be seen in New Mexico's version of the UTC described above, which requires disclosure unless the trustee is an institutional trustee, in which case the settlor can waive disclosure to the trust beneficiaries. N.M. STAT. ANN. § 46A-8-813(F) (LexisNexis Supp. 2009).

89. Foster, *supra* note 87, at 598. Trust privacy often puts the trustee in a position where he or she must deny a beneficiary's requests for funds or information without being able to explain why. *Id.*

Fletcher v. Fletcher, a decision by the Supreme Court of Virginia, the trust terms mandated that the trustee, a brother of the beneficiaries, keep the management of the trust confidential and directed the trustee to only provide the beneficiaries with certain portions of the trust.⁹⁰ When the beneficiaries' brother, the trustee, repeatedly stonewalled their information requests, the beneficiaries became concerned that the trustee was abusing his authority and felt compelled to seek judicial assistance.⁹¹

Similar to the suspicion of beneficiaries towards trustees who refuse to provide information, courts often take the view that trustees that conceal information from beneficiaries and act in secret are suspect.⁹² Accordingly, a defense to claims against the trustee regularly recognized by courts is that the trustee acted in good faith.⁹³ As mentioned above, surcharge litigation is on the rise and nondisclosure by a trustee, even if the terms of the trust disallow disclosure, can make defenses based on good faith more difficult to articulate.⁹⁴ Further, disclosure can facilitate obtaining a binding consent, release, or ratification of the trustee's actions from a beneficiary.⁹⁵

There is also a possibility that trust terms that disallow disclosure to beneficiaries may cause a trustee to violate another common provision of trust law: that which requires a trustee to act in good faith.⁹⁶ In contrast to the *defense* of good faith, which may be difficult to prove without disclosure, nondisclosure itself could potentially be the basis for a claim that the trustee violated her independent duty of good faith. If, acting consistently with the terms of the trust, the trustee denies the existence of a trust when questioned by a beneficiary (or otherwise misrepresents the terms of the trust or its assets), then arguably the trustee would not be acting in good faith with respect to the beneficiary, regardless of whether doing so was consistent with the settlor's intent.⁹⁷

90. *Fletcher v. Fletcher*, 480 S.E.2d 488, 490 (Va. 1997).

91. *Id.* ("This situation [of secrecy], along with other facts, according to the allegations, has resulted in 'an extremely strained relationship between' the brothers.")

92. Fitzsimons, *supra* note 1, at 41.

93. *Id.*

94. *See id.* at 40–41 ("Open disclosure of information is a clear indication of acting in good faith, and envisioning a prudent process that does not include communication is hard, if not impossible.")

95. *Id.* at 43.

96. *See, e.g.*, UNIF. TRUST CODE § 105(b)(2) (amended 2005) (making mandatory the trustee's duty to "act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries").

97. Newman, *supra* note 49, at 680.

A recent case in the North Carolina Court of Appeals, currently being appealed to the state's Supreme Court, highlights the potency of this concern. In *Wilson v. Wilson*, a settlor created a trust in accordance with North Carolina's Uniform Trust Code.⁹⁸ As noted above, North Carolina entirely removed the duty to keep beneficiaries informed from the list of mandatory duties.⁹⁹ The trustee acted entirely in accordance with the trust terms; however, the beneficiaries nevertheless sued the trustee, alleging that he had violated his duty of good faith by failing to provide them with an accounting of the trust.¹⁰⁰ The Court of Appeals chastised the trial court for "relying on the commentary to our statutes, which is not binding."¹⁰¹ The court then held that two other mandatory provisions acted together to require the trustee to provide the requested accounting. Those mandatory provisions included (1) the duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, and (2) the power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice.¹⁰² The court held that the accounting "was reasonably necessary to enforce [the beneficiaries'] rights under the trust, and therefore could not be legally withheld, notwithstanding the terms of the trust instrument."¹⁰³ Although North Carolina was the first state to impose such a holding, any trustee operating in a UTC state that allows complete nondisclosure risks similar liability.

Additionally, because the applicable statutes of limitations begin to run upon disclosure to beneficiaries, a trust that disallows disclosure removes the protections that a trustee has against delayed litigation.¹⁰⁴ Under the UTC, a one-year statute of limitations applies to claims of breaches of the trustee's fiduciary duties.¹⁰⁵ The one-year period begins to run on the date that the beneficiary receives a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for

98. *Wilson v. Wilson*, 690 S.E.2d 710, 711 (N.C. Ct. App. 2010).

99. See N.C. GEN. STAT. § 36C-1-105 (2009). The legislative comments to this section also expressly note that the duty to inform was intentionally omitted in order to allow a settlor to override this duty.

100. *Wilson*, 690 S.E.2d at 711-12.

101. *Id.* at 716.

102. *Id.* at 714 (citing N.C. GEN. STAT. § 36C-1-105(2), (9)).

103. *Id.* at 716.

104. Foster, *supra* note 87, at 599 ("When a settlor waives trustee duties to account to and inform beneficiaries, the trustee may ultimately pay the price for trust privacy. The trustee may lose . . . 'vital protection from belated claims by beneficiaries whose challenges might . . . have been barred by doctrines of laches or estoppel or by applicable statutes of limitation.'").

105. UNIF. TRUST CODE § 1005(a) (amended 2005).

commencing a proceeding.¹⁰⁶ If a trustee does not send this report to a beneficiary because the trustee is bound by the terms of the trust that mandate nondisclosure, then the trustee loses the benefit of such a short statute of limitations on suits against her.

In cases where the one-year statute of limitations does not apply, a proceeding must be commenced by the beneficiary against a trustee for breach of trust within five years after the first of the following to occur: the (1) removal, (2) resignation, or (3) death of the trustee; the (4) termination of the affected beneficiary's interest in the trust; or the (5) termination of the trust.¹⁰⁷ However, until the occurrence of one of those five conditions, the trustee is vulnerable to litigation over events that may have occurred many years ago.¹⁰⁸ Thus disclosure can shorten the statute of limitations on actions against the trustee from five years, if not even longer, to one year. This is "a powerful risk management tool" for trustees and also seems to parallel the very purpose of having statutes of limitations.¹⁰⁹

Finally, mandatory disclosure could also benefit vulnerable settlors. While trusts are intended to protect settlors' estates from the high costs of probate, for settlors who are vulnerable to exploitation by a manipulative trustee, there may be no estate left to protect at death.¹¹⁰ "Living trust scams" have targeted and victimized millions of elderly or incapacitated Americans. These scams bait settlors with promises of reduced probate costs and increased privacy, but often result in the depletion of all or most of the victims' estates.¹¹¹ The scam artists, who convince the victims to authorize them as trustees of the victims' estates, "prey on older Americans' concerns that their estates will be subject to long and costly probate," and they often misrepresent the benefits and costs of creating a trust rather than a traditional will.¹¹² They also frequently claim affiliation or endorsement by trustworthy organizations such as the American

106. *Id.*

107. *Id.* § 1005(c).

108. The UTC comments explain that the principles of estoppel and laches still apply regardless of the provisions on statutes of limitations. *See id.* § 1005 & cmts. Aside from statutory and common law protections, in practice, knowledgeable trustees are likely to negotiate contractual protections as well, including indemnification or exculpation clauses in the trust instrument. The trustee can also, of course, raise its fees to compensate for this risk.

109. Fitzsimons, *supra* note 1, at 43.

110. Foster, *supra* note 87, at 585.

111. *Id.* at 585–86.

112. Press Release, FTC, FTC Testifies Before Senate Special Committee on Aging on Living Trust Scams (July 11, 2000), <http://www.ftc.gov/opa/2000/07/livingtrust.shtm> (quoting Elaine Kolish, Associate Director of the Bureau of Consumer Protection's Division of Enforcement at the FTC).

Association of Retired Persons (“AARP”) in order to put the individuals at ease and gain their confidence.¹¹³ While the concerns for beneficiaries and trustees are certainly more persuasive, this practical concern for vulnerable settlors also supports mandatory disclosure.

B. Discretionary Disclosure

If disclosure protects both beneficiaries and trustees and helps to make sure that the settlor’s intentions are accomplished, why, then, don’t all states mandate information disclosure, at least to the level required by the UTC?

The policy concerns that drive advocates of nondisclosure begin with the fundamental belief that trust privacy promotes the settlor’s control over property by protecting the assets that settlors leave to their chosen beneficiaries.¹¹⁴ Through control over the information that beneficiaries receive, settlors can preemptively insulate the trust from collateral attacks by displeased beneficiaries. Beneficiaries who disagree with the method of trust administration or the disbursement of assets have ample opportunities to object to the action or inaction of a trustee. Moreover, a beneficiary who is disappointed by the allocation of the trust assets could potentially cause significant distress for the trustee, incur costs or fees payable by the trust, and cause harm to the trust and other beneficiaries.¹¹⁵

Advocates of permitting nondisclosure to beneficiaries argue that the settlor’s intent ought to prevail over the beneficiary’s desire or need for information about the trust.¹¹⁶ Donald Kozusko has noted that it is “inconsistent with a respect for private property to prohibit quiet trusts by specifying what trustees must disclose, even if it contradicts a settlor’s best judgment.”¹¹⁷ The trust assets, after all, were originally the assets of the settlor. During the settlor’s lifetime, she would have been free to give some or all of her belongings to a relative or other party without any legal obligation to tell that person

113. *Id.* These scam artists also use gifts to soften up their victims and false documents to lead them to believe that their savings are not currently safe in the bank. See Consumer Affairs, *California Sues “Living Trust Mill”*, Feb. 23, 2005, http://www.consumeraffairs.com/news04/2005/ca_living_trust.html (describing suit by California AG against Family First for defrauding senior citizens); Sue Chan, *Beware Living Trust Scams*, CBS NEWS, Mar. 14, 2003, <http://www.cbsnews.com/stories/2003/03/14/eveningnews/consumer/main544102.shtml> (describing the scam by Alliance for Mature Americans in California).

114. Foster, *supra* note 87, at 572.

115. Richard L. Lyon & Kevin M. Murphy, *Trust Wars—Clashes Between Trustees and Beneficiaries*, 42 MD. B.J. 14, 16 (2009).

116. Millard, *supra* note 8, at 392.

117. Kozusko, *supra* note 88, at 22.

the manner in which that property had been managed. According to these scholars, while there certainly are other concerns in the administration of an irrevocable trust,¹¹⁸ the settlor's preferred method of disposition of trust assets should still reign supreme.

Individuals often utilize trusts rather than wills because of the privacy that trusts allow the decedent at death. Wills are public record. Any attempt by an individual to, for example, leave support for an illegitimate child or a more favored proportion of the estate for a favorite child becomes public knowledge for everyone, not only family, to discover. For many people, posthumous "exposure to publicity of their own personality is distasteful, if not abhorrent."¹¹⁹ Thus, the ability of trust instruments to avoid the public filings of probate and maintain the privacy of the deceased, along with the amount and type of wealth in the trust, the decedent's personal quirks, preferences among her children, and any secret love-children, makes trusts an attractive substitute to the traditional will.

Utilizing a trust rather than a will does not guarantee privacy, however. Beneficiaries may be indiscrete regarding the trust information or lose a copy of the instrument, either inadvertently or as a result of theft. Thus, those that turn to the trust rather than the will for its privacy benefits may desire to prohibit information disclosure to the beneficiaries to ensure that privacy. As my father has said, *the best-kept secret is the secret kept best*. In other words, if you don't want trust information to be known beyond the beneficiaries, do not tell anyone, including the beneficiaries.

Allowance of nondisclosure terms can also protect the trust property. Settlers who are concerned about litigious beneficiaries may desire to prohibit disclosure. This would provide the settlor with more control over her legacy by discouraging potential challenges to trusts. The money that would otherwise be expended in defending trusts goes where the "settlers intended—to beneficiaries rather than lawyers."¹²⁰

Further, knowledge of an interest in a trust may encourage certain types of beneficiaries to "take up a life of ease rather than work and be productive citizens."¹²¹ Warren Buffett has famously been

118. As opposed to the gift given during life, the assets dispersed in a trust belong to the trust until they are distributed to the beneficiaries, not to the original grantor or settlor. Further, the settlor of an irrevocable trust, who is often deceased by the time of the distribution of the trust assets, no longer has the power to alter the method of asset management, while the grantor of a lifetime gift can continually change the investment strategy of her assets until the point of gifting them, thus allowing for economic, financial, or other situational changes.

119. Foster, *supra* note 87, at 569 (quoting *Rudd v. Searls*, 160 N.E. 882, 886 (Mass. 1928)).

120. *Id.* at 572–73.

121. Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, 17 PROB. & PROP., Mar.–Apr. 2003, at 18, 20; see also *Marshall & Ilsley Trust Co. v.*

quoted as saying that he wants to give his children just “enough money so that they would feel that they could do anything, but not so much that they would feel like doing nothing.”¹²² Beneficiaries may decide not to be the productive citizens they would otherwise become. The belief, whether accurate or illusionary, in their financial security as trust beneficiaries may also incentivize them to take otherwise ill-advised financial risks in their investments or other lifestyle choices. A settlor may wish to keep the knowledge of a trust interest private in order to avoid discouraging any efforts at self-advancement that might be made by the beneficiary. Even the UTC, which favors disclosure, appears to recognize this concern by permitting nondisclosure to beneficiaries that have not reached the age of twenty-five.

Although mandatory disclosure offers trustees the protection of a shorter statute of limitations on potential claims, allowance of nondisclosure also provides significant benefits for trustees. Recently, trust reforms have favored beneficiary rights. In this “era of beneficiary empowerment,” nondisclosure terms may be attractive to trustees because beneficiaries who are not informed about their interests in a trust are less likely to second-guess trustee decisions or insist on an active role in trust management.¹²³

In addition to the personal privacy concerns of the settlor, there are also strong concerns that mandating disclosure could expose beneficiaries to serious safety risks.¹²⁴ The most famous example of this safety concern followed the 1974 kidnapping of newspaper heiress Patty Hearst. Although the kidnapers, the Symbionese Liberation Army (“SLA”), ultimately sought attention perhaps even more than money, it was the wealth of Patty’s family that made her a target in the first place.¹²⁵ Patty’s grandfather, William Randolph Hearst, a

Woodward, 848 N.E.2d 1175, 1183–84 (Ind. Ct. App. 2006) (recognizing the privacy concerns noted by Kartiganer and Young and holding that, while beneficiaries in Indiana are entitled to an accounting of the trust, this right is limited to those remote contingent beneficiaries who are *named* in the trust document).

122. This well-known sentiment by Warren Buffett has often been repeated by Buffett throughout his lifetime. *See, e.g.*, Richard I. Kirkland, Jr., *Should You Leave It All to the Children?*, FORTUNE, Sept. 29, 1986, at 18; Interview by Charlie Rose with Warren Buffett (June 26, 2006), <http://www.charlierose.com/view/interview/345>.

123. *See* Foster, *supra* note 87, at 575 (calling trust privacy a “buffer between beneficiary and trustee”); Kozusko, *supra* note 88, at 22 (“Indeed, today’s prevailing public policy calls for fewer trust rules, not more detailed rights that increase compliance costs and invite legal challenges.”).

124. Foster, *supra* note 87, at 576.

125. For accounts and analysis of the kidnapping of Patty Hearst, her involvement in crimes committed by the SLA, and her subsequent trial, see generally, DAVID BOULTON, *THE MAKING OF TANIA HEARST* (1975), and WILLIAM GRAEBNER, *PATTY’S GOT A GUN: PATRICIA HEARST IN 1970S AMERICA* (2008).

newspaper tycoon and multimillionaire, left a substantial fortune to his family in a testamentary trust, whose terms were public record.¹²⁶ While Patty's relationship to her grandfather and his wealth were commonly known, other relatives revealed in the trust could also have been at risk. After Patty's kidnapping, the trustees of this trust petitioned California's probate court to seal the Estate of Hearst probate files on the grounds that "use of the material in the probate files would expose many hitherto unnoticed persons as members of the family and reveal the locations of their homes and properties . . ." ¹²⁷ The trustees' petition failed, however, due to the court's emphasis on the public's right to access probate records.¹²⁸ Although the trustees were not successful in California, similar arguments have worked in different cases.¹²⁹

These very real safety concerns, in addition to the settlor's privacy wishes, create strong incentives for states to enact trust codes that allow settlors the option to waive information disclosure. The fact that the majority of adopting states limited rather than expanded the duty to inform indicates that any uniform law must allow for some kind of nondisclosure to beneficiaries. However, the beneficiaries' need to have access to sufficient information to protect their interests cannot be ignored.

IV. INFORMATION SURROGATES: A COMPROMISE

The UTC is intended to promote uniformity in trust law among the states, but uniformity has not been achieved with respect to the issue of information disclosure. The departure in most states from the UTC's stance on disclosure indicates that the drafters did not strike the right balance between settlors' desire for secrecy and beneficiaries' need for information. The variations among state trust laws demonstrate that many jurisdictions have concluded that the benefits of nondisclosure outweigh the benefits of mandatory disclosure. However, as the majority of legal scholarship—as well as the UTC—

126. Although, as mentioned above, trusts are not required to go through the public probate process, if the trust is created in the will document (such trusts are referred to as "testamentary trusts"), then the existence of that trust, the property to be distributed through that trust, and the beneficiaries of the trust are also part of the public probate record.

127. *In re Estate of Hearst*, 136 Cal. Rptr. 821, 822–23 (Ct. App. 1977).

128. *Id.* at 825. However, a temporary seal was placed on the records. Although this seal was intended to be temporary, the records have remained under this "temporary" seal for over thirty years. Nicole LaPorte, *Trust Issues Tear at Hearst*, DAILY VARIETY, Apr. 27, 2005, at 10.

129. For example, a probate judge in Detroit "sealed the will of Martha Jean 'The Queen' Steinberg to prevent 'souvenir hunters and other opportunists' from pillaging her property." David Josar, *Radio Host's Will Sealed by Judge*, DETROIT NEWS, Apr. 25, 2000, at 6D.

has established, beneficiaries' need for information sufficient to protect their interests is simply too great to ignore completely.¹³⁰ Thus, there is a need for a body of trust law that would both allow a settlor to shape the manner and method of disclosure in order to meet the specific needs of each set of circumstances¹³¹ and also ensure that, no matter what level of disclosure the trust allows beneficiaries, the rights and interests of the trust beneficiaries are protected.

This Part advocates an administrative structure that allows the settlor to designate a surrogate to receive information in lieu of providing that information directly to the beneficiaries. This Part will also discuss the alternative of appointing an institutional trustee in lieu of a surrogate. While there are questions about the surrogate's own potential liability, the surrogate option provides the best solution to the disclosure debate. This option addresses concerns regarding both beneficiaries' rights and settlor privacy. The surrogate approach allows a settlor to structure her trust according to her individual circumstances without the need to shop around among the states for the most favorable trust law and an appropriate trustee who is familiar with the trust law of the chosen state. This Part also suggests that states that would otherwise completely delete mandatory disclosure requirements from their trust laws should instead consider the surrogate approach, or require appointment of an institutional trustee, to ensure that even those beneficiaries of trusts in states that prefer nondisclosure are protected.

A. The Surrogate Approach

An administrative structure already exists that presents a solution to the disclosure dilemma.¹³² This approach provides settlors

130. *See supra* Part II.A.

131. As noted earlier, the many situations that may call for either restricted or nonexistent disclosure can include concerns of protecting the trust assets from over-litigious beneficiaries, protecting the beneficiaries themselves from thieves or even from each other, and protecting the privacy, and therefore the legacy, of the settlor.

132. English law has also recognized the dueling disclosure interests in trust administration and has developed its own solution. Under English trust law, the beneficiaries of a trust have an absolute right to copies of the entire trust instrument. However, the settlor of a trust may create "wish letters" which are private communications between the settlor and the trustee, which communicate to the trustee the manner in which the settlor desires that the trustee exercise her discretion. This mechanism and its purposes are explored in the recent decision of the High Court in *Breakspear v. Ackland*. [2008] EWHC (Ch) 220 [32] (Eng.). The court notes that the wish letter may have two advantages: (1) "it preserves flexibility for the trustees in responding to changes in the beneficiaries' circumstances which are not or cannot be foreseen by the settlor"; and (2) "[the] advantage may be summarized in the word confidentiality." *Id.* at [6]. Particularly, the court notes that the settlor may wish to have a confidential "written expression of facts,

with the option to maintain secrecy of any or all trust terms, including even the existence of a trust, from certain or all beneficiaries, while still insuring that the beneficiaries' interests are protected. First created in Washington, D.C.,¹³³ this system allows a settlor to avoid the requirement for disclosure by designating a surrogate to protect the interests of the beneficiaries and to receive any notice, information, and reports on their behalf. Maine,¹³⁴ Missouri,¹³⁵ Ohio,¹³⁶ and Oregon¹³⁷ have all followed this approach and have adopted versions of the surrogate structure, evidencing the appeal of this system.

The typical statute creating the surrogate option is similar to UTC section 105, which outlines the default and mandatory rules of the Code. Where the two systems diverge, however, is that UTC section 105 does not allow waiver of UTC section 813 duties to (1) notify qualified beneficiaries of an irrevocable trust, the identity of the trustee, and of their right to request trustee's reports, and (2) respond to information requests.¹³⁸ In contrast, the typical state statute creating a surrogate option provides that the trust *may* override these particular section 813 duties, at least in situations where the trust instrument designates a person, including a beneficiary, to act in good faith to protect the interests of those beneficiaries who are not receiving reports or other information required under section 813.

For example, the Maine Uniform Trust Code provides that trust terms may prevail over the trustee's otherwise mandatory disclosure duties in one of two ways. First, these duties may be avoided where the terms of the trust waive these duties with respect to all qualified beneficiaries except the settlor's spouse during the

beliefs, expectations, concerns and (occasionally) prejudices about the beneficiaries which . . . might be hurtful . . . to include in a document which the beneficiaries had a right to inspect." *Id.* The court upholds the confidentiality of these wish letters against the demand by the beneficiaries of the trust in question to see them. *Id.* at [52]. The court did, however, recognize that where the wish letter contains "relevant background material" which is the subject of litigation, then the wish letter may become disclosable, regardless of its confidentiality. *Id.* at [61].

This English solution to the disclosure problem is an interesting study; however, the wish letter structure is outside the scope of this Note, which seeks a solution to the disclosure problem within the American trust law structure.

133. D.C. CODE ANN. § 19-1301.05(e)(3) (LexisNexis 2008).

134. ME. REV. STAT. ANN. tit. 18-B, § 105(3)(B) (Supp. 2010).

135. MO. ANN. STAT. § 456.1-105(3) (West 2007).

136. OHIO REV. CODE ANN. § 5801.04(C) (West 2007).

137. OR. REV. STAT. § 130.020(3) (2009).

138. UNIF. TRUST CODE § 105(b)(8)-(9) (amended 2005).

settlor's or the spouse's lifetime.¹³⁹ Second, these duties may be waived if the trust designates a surrogate to receive information on behalf of the beneficiary. Specifically, the duties are waived if the trust terms:

Designat[e] a person or persons, any of whom may or may not be a beneficiary, to act in good faith to protect the interests of the qualified beneficiaries who are not receiving notice, information or reports and to receive any notice, information or reports required under section 813, subsection 1 or 2 in lieu of providing such notice, information or reports to the qualified beneficiaries.¹⁴⁰

Thus, Maine provides for a surrogate option that provides the same mandatory disclosure required under the UTC, but shifts the trustee's duty to report to a representative—the surrogate—rather than to the beneficiaries.

The Missouri Uniform Trust Code, which also utilizes the surrogate option, offers a more compromising approach that still requires disclosure to beneficiaries in certain circumstances. Missouri does not make it possible to waive all duties of disclosure to beneficiaries. Rather, the Missouri Uniform Trust Code only allows a settlor to designate a surrogate to receive all mandatory notices as required by the statute,¹⁴¹ but still requires that a trustee respond to the request of a qualified beneficiary for the trustee's reports and other information reasonably related to the administration of the trust.¹⁴² Therefore, if a beneficiary discovers the existence of the trust and requests information, the trustee may be required to provide that information if it is "reasonably related to the administration of the trust."¹⁴³

139. ME. REV. STAT. ANN. tit. 18-B, § 105(3)(A). The purpose behind allowing nondisclosure when the settlor's spouse is still alive and receiving information is unclear. While it is true that the decedent's spouse may have similar motives as the decedent regarding the desire to maintain the decedent's privacy, it is not true that the spouse will always have the beneficiaries' best interests in mind. Therefore, it is unclear why Maine allows this exception from mandatory disclosure and from the surrogate alternative. What is further unnerving is that, by distinguishing the spouse exception from the surrogate exception, Maine appears to be excepting spouses from the duties which Maine imposes on a surrogate, including the duty to act in good faith.

140. *Id.* § 105(3)(B).

141. MO. ANN. STAT. § 456.1-105(3) (West 2007). These mandatory notices include the duty of a trustee of an irrevocable trust to notify each qualified beneficiary who has attained the age of twenty-one years of the existence of the trust and the duty to *inform* each qualified beneficiary of their right to request trustee's reports. *Id.* § 456.1-105.2(8).

142. *Id.* § 456.1-105(2)(9).

143. *Id.*

B. Giving Shape to the Surrogate Form

While the surrogate structure has gained favor in several states, it has generally been dismissed by trust scholars. The biggest criticism appears to be the failure of states to define the specific responsibilities of the surrogate to the beneficiaries.¹⁴⁴ For example, Professor Alan Newman notes that the Washington, D.C. Uniform Trust Code does not provide whether reporting to a surrogate is sufficient to start the running of the statute of limitations on any potential claims by the beneficiaries against the trustee.¹⁴⁵ Other questions that have been raised include whether the surrogate could bring an action on behalf of the beneficiaries against the trustee for breach of fiduciary duty and the manner in which the beneficiaries could maintain an action against the surrogate with respect to the surrogate's duty to act in good faith to protect the beneficiaries' interests.¹⁴⁶ While the lack of guidance for the functioning of the surrogate model is a serious flaw, it can be overcome.

1. The Specific Responsibilities of an Information Surrogate

The first logical administrative issue is determining the standards of conduct that should be applicable to the surrogate that ensure that the surrogate fulfills her duties and is held accountable.¹⁴⁷

144. Newman, *supra* note 49, at 680.

145. *Id.* at 681.

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

147. One group of scholars has recommended the following language be included in the trust instrument in order to designate the surrogate:

The Settlor understands that notice concerning this trust to certain beneficiaries is necessary to permit them to protect their rights and that these rights may otherwise be seriously compromised. On the other hand, the Settlor believes that it is in the beneficiaries' best interests not to know about the trust in order to allow the beneficiaries to make their own way in the world and thereby to strengthen their character.

Accordingly, the Settlor directs that all notice required to be provided to any beneficiary be provided to the Settlor's brother John or, if he is not available, as hereinafter defined, to the Settlor's sister Mary or, if she is not so available, to the then partner in charge of the law firm, or any of its successors, that prepared this Agreement. The person so designated shall receive notice in a non-fiduciary capacity and is directed not to communicate any information about this trust, including its existence, to any beneficiary, unless the person so designated cannot articulate a reasonable basis for deciding not to communicate such information.

The person so designated shall be entitled to all costs associated with reviewing or retaining professional advisors to review information provided by the Trustee, and such costs shall be a charge against the trust. Nevertheless, no duty is imposed on such person, whether or not such person undertakes any inquiry or ignores all information provided.

The appropriate standard of conduct could be imported from the trustee's standard, already operable in trust law, of good faith, as well as other fiduciary duties. More specific standards of conduct from preexisting sections of the UTC can also be extended to apply to the surrogate.

Several state statutes provide that the applicable standard when creating the surrogate option is the standard of "good faith."¹⁴⁸ The standard of good faith is the same standard to which the trustees are held.¹⁴⁹ While this standard could have different meanings in different contexts, those statutes that have instituted the surrogate option almost certainly contemplate that this term will have the same meaning for both trustees and surrogates. This also suggests that a surrogate will be held to the same fiduciary standards that apply to trustees including the duties of prudence, loyalty, and impartiality.¹⁵⁰ While the UTC and the Restatement discuss fiduciary duties in language specific to trustees, the surrogate would also have similar fiduciary duties. For example, a surrogate must act prudently when making decisions on behalf of the beneficiaries, with loyalty to the beneficiaries' interests (refraining from pursuing or choosing not to pursue a claim for the surrogate's own benefit), and impartially when exercising her power, particularly when one surrogate has been designated to act on behalf of several beneficiaries.

Guidance regarding the responsibilities of the surrogate can also be found in the specific language of the UTC. As Kozusko points out, UTC section 808, which addresses persons or institutions with the power to direct the actions of the trustee,¹⁵¹ allows settlors to provide for specialized fiduciaries and to provide standards of liability for such

Steven M. Fast, et al., *Drafting to Excess*, SJ001 ALI-ABA 109, 125–26 (2003). Because this suggestion purports to relieve the surrogate from all duties, seemingly including the duty to act in good faith, this approach is not pursued in this Note.

148. ME. REV. STAT. ANN. tit. 18–B, § 105(3)(B) (Supp. 2010); OHIO REV. CODE ANN. § 5801.04(C) (West 2007); OR. REV. STAT. § 130.020(3)(b) (2009).

149. Section 808 of the UTC states the affirmative duty of the trustee to act in good faith and the comments to that section and section 801 reference the long standing history of a trustee's fiduciary duties as explained in sections 164 through 169 of the Restatement (Second) of Trusts. UNIF. TRUST CODE § 801 cmt. (amended 2005). Section 169 states the general duty of a trustee to administer the trust. Courts have interpreted this section to require the trustee to administer the trust *in good faith* in order to comply with her fiduciary duties. See, e.g., *In re Hartzell's Will*, 192 N.E.2d 697, 706 (Ill. App. Ct. 1963) (“[The trustee] is held to a high standard of conduct and must exercise the utmost or highest good faith in the administration of the trust.”).

150. RESTATEMENT (THIRD) OF TRUSTS § 70 cmt. a (2003). The exact fiduciary duties and responsibilities of the trustee are outlined in chapters 15–17 of the Restatement (Third) of Trusts. These duties are also outlined in sections 801–817 in the UTC.

151. UNIF. TRUST CODE § 808 (amended 2005).

fiduciaries.¹⁵² While that section is directed at the use of trust protectors and advisors¹⁵³ rather than surrogates, the section can provide guidance on the manner in which a trustee should deal with a person who owes fiduciary duties to the beneficiaries.

As a threshold matter, section 808 discusses the interaction of a trustee with an individual who has “the power to direct” certain actions of the trustee. This section provides one of the few instances in the UTC where the duties of a third party are discussed in the context of this party’s interaction with a trustee. The powers of the surrogate could not exceed the powers of a beneficiary to act on perceived breaches of the trustee’s fiduciary duties. Therefore, the extent to which a surrogate’s “power” could be deemed a “power to direct” sufficient to bring the surrogate under section 808 is unclear.

A person who falls under section 808’s umbrella—a person “who hold[s] a power to direct”—is required to “act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.”¹⁵⁴ While the responsibilities of persons with powers to direct and the responsibilities of surrogates are different, the similarity of this “good faith” requirement to that mentioned for surrogates in the trust code statutes of Maine, Ohio, and Oregon supports section 808’s extension to the administration of the surrogate system. Section 808 further states that “the holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.”¹⁵⁵ The standards of conduct and level of liability outlined in section 808 fit comfortably with the expectations of a surrogate. Therefore, it is practical to extend the section to cover surrogates.

In addition to specifying the requirements of someone with a power to direct, section 808 also addresses the responsibilities of a trustee while interacting with a person who has the power to direct. Section 808 instructs that the trustee shall not act in accordance with the exercise of power by such a person if the trustee knows the attempted exercise would constitute a serious breach of a fiduciary

152. Kozusko, *supra* note 88, at 22. Section 808(b) of the UTC provides:

If the terms of the trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

UNIF. TRUST CODE § 808(b).

153. UNIF. TRUST CODE § 808 cmt.

154. *Id.* § 808(d).

155. *Id.*

duty.¹⁵⁶ This requirement would also be appropriately extended to the trustee's duties when interacting with a surrogate.

The trust code for a state can easily be revised to provide that the fiduciary standards present in other areas of trust law are equally applicable to information surrogates. This revision can be done in several ways. The various sections that outline the trustee's fiduciary duties can be broadened to also address those of the surrogate. For example, the state's equivalent of section 813 could be rewritten as follows:

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests. *If an information surrogate receives information on behalf of two or more beneficiaries, the surrogate shall act impartially in ensuring that all the beneficiaries' respective interests are protected.*¹⁵⁷

However, this approach would require numerous changes because many of the statutory provisions are written to address the specific duties of a trustee and may need to be entirely rewritten to cover the duties of a surrogate.

A better approach would be to redraft section 808 to cover those persons with "powers to direct" as well as information surrogates. This revision would require minimal effort on the part of the state legislatures and would smooth the transition to the surrogate approach. Compared to the previous example, only a subject addition would need to be included. To illustrate, section 808(d) could be altered to read:

(d) *An information surrogate or* a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The *information surrogate or* holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.¹⁵⁸

Even if a state chose to leave the section unrevised the surrogate structure could still operate. For example, where the trust law in a given state does not make reference to the responsibilities and potential liability of an information surrogate, the trust instrument could be drafted to make these standards clear, or the court could choose to apply fiduciary law standards should any litigation occur.

156. *Id.* § 808(b).

157. *See id.* § 803 (proposed additions are italicized).

158. *See id.* § 808 (proposed additions are italicized).

2. Statute of Limitations for Actions Against the Trustee and the Standing of the Surrogate to Bring Actions on Behalf of the Beneficiaries

Existing trust law is also competent to deal with any perceived statute of limitations ambiguities for claims against the trustee. Most states' trust codes provide that the statute of limitations begins to run when the beneficiary or a representative of the beneficiary receives a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding.¹⁵⁹ The question is whether a surrogate acts as a representative, or the functional equivalent of a representative, of a beneficiary for the purposes of the statute of limitations.¹⁶⁰

Some states have found simple ways to resolve this issue. The Maine Uniform Trust Code indicates that when surrogates are designated to receive information on behalf of certain or all beneficiaries, those surrogates are "deemed to be representatives of the qualified beneficiaries not receiving notice, information or reports for the purposes of the time limitation for a beneficiary to commence an action against the trustee for breach of trust . . ."¹⁶¹ The Ohio Trust Code also clarifies this issue by explicitly stating that the statute of limitations begins upon receipt of notice by the beneficiary, its representative, or a *beneficiary surrogate*.¹⁶² The advantages of having an explicit provision that establishes that the surrogate acts as a representative for the purposes of starting the statute of limitations are evident. That those trust codes and the UTC do not define "representative" indicates that the term is not limited and can easily include the surrogate. The comments to the Code, discussed below, bolster this conclusion by suggesting the breadth of the term. The failure of Washington, D.C.'s, Missouri's, and Oregon's trust laws to clarify this point is unfortunate, but not fatal to the functioning of the surrogate system.

With respect to the surrogate's ability to take action on behalf of beneficiaries, the comments to the UTC provide some guidance. While the UTC's drafters may not have predicted the creation of the surrogate approach, their official comments suggest that, had they incorporated the surrogate approach to the uniform code, a surrogate would have clear standing to bring actions against the trustee on

159. *See, e.g., id.* § 1005(a).

160. The UTC does not define the term "representative" nor elaborate on who can fulfill that role.

161. ME. REV. STAT. ANN. tit. 18-B, § 105(3)(B) (Supp. 2010).

162. OHIO REV. CODE ANN. § 5810.05(A) (West 2007).

behalf of the beneficiaries. Section 1001 of the UTC states that “[a] violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust.”¹⁶³ The official comments to this section provide that “a person who may represent the beneficiary’s interest under Article 3 would have standing to bring a petition on behalf of the person represented.”¹⁶⁴ Article 3 of the UTC outlines the responsibilities and appointment of representatives for beneficiaries of a trust. The comments to section 315, titled “Appointment of Representative,” state that the term “representative” was used rather than “guardian ad litem” to emphasize that a representative in trust law serves a different role. The comments further indicate that a representative can be appointed to *receive a notice on a beneficiary’s behalf*.¹⁶⁵ The drafters’ general comment to Article 3 also emphasizes that “[s]ettlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.”¹⁶⁶ Much of this language appears to be directed toward representatives of beneficiaries who are not deemed to be “qualified beneficiaries” due to age or remote interest and therefore are not entitled to information and reports from the trustee. However, this language is broad enough to extend to the relationship between a surrogate and a beneficiary, establishing that a surrogate would have standing to bring actions on behalf of the beneficiaries. As Anne O’Brien noted, “the [general] Comment seems to bless the approach of crafting representation provisions into the terms of a particular trust itself, that is to say, naming an individual or individuals who can receive information and reports on behalf of the beneficiary and thereby represent and bind the beneficiary.”¹⁶⁷

3. Potential Actions by the Beneficiaries Against the Surrogate

Two other important issues concerning the information surrogate deserve further analysis. First, the length of the statute of limitations for an action by the beneficiary against the *surrogate* for breach of the duty of good faith is not referenced in any of the state

163. UNIF. TRUST CODE § 1001(a).

164. *Id.* cmt.

165. *Id.* § 315 cmt. Further, although Tennessee has not adopted the surrogate approach, Tennessee amended its uniform trust provision on appointment of a representative to state explicitly that “[a] person designated by the settlor in the trust instrument or in a writing delivered to the trustee to represent the beneficiaries of the trust may represent and bind such beneficiaries.” TENN. CODE ANN. § 35-15-303(7) (Supp. 2010).

166. *Id.* art. 3 cmt.

167. Anne J. O’Brien, *The Trustee’s Duty to Provide Information to Beneficiaries: When Can the Settlor Say “Don’t Ask, Won’t Tell”?*, at 5-22 to 5-23. (2006 Heckerling Inst. on Estate Planning, Jan. 11, 2006).

codes that have adopted the surrogate approach. Second, the manner in which the beneficiary can discover a breach is unclear. However, in practice, neither of these problems appears unsolvable.

None of the state trust codes allowing use of a surrogate indicates what the statute of limitations is for actions by the beneficiary against the surrogate. While this may seem to present a problem, a court can choose to apply the same statute of limitations currently outlined in the trust code that applies to actions against the trustee or the default statute of limitations in that jurisdiction. Under the UTC, the statute of limitations does not begin to run until the breach of trust is discovered in situations where information is not provided to beneficiaries. It is likely that the same rule would be applied by the courts in actions against surrogates. This possibility may make it difficult for a settlor to find an individual willing to act as surrogate under the trust, or at least make the appointment expensive. However, because this knowledge will be factored into the contract price for appointment, it is not clear if this would be unfair to the surrogate, particularly one who has no intention of acting in bad faith.

More troublesome is the failure of the five states with surrogate options to create a system that regularly monitors the actions of the surrogate to ensure that she is acting in good faith to protect the beneficiaries' interests with the information she receives. In practice, beneficiaries may discover evidence suggesting a breach of good faith by trustees even without mandated disclosure. For example, in a trust that limits disclosure to beneficiaries in any one of the ten states that currently allow waiver of all information disclosure, a beneficiary can discover the actions of trustees in a variety of ways: (1) the beneficiary may receive a trust distribution at odds with expectations; (2) the beneficiary may see other family members receiving greater amounts than the beneficiary is receiving; (3) if the existence of the trust is known, the trustee may be responding oddly to requests for information, thus raising the beneficiary's suspicion; or (4) information about the trust may simply be leaked from the trustee. While the actions of information surrogates might also be discovered incidentally, this is not as likely to occur since the role of the surrogate is much less active than that of a trustee. While beneficiaries may "bump up against" the truth of a breach of good faith by a surrogate, the legal system should not rely on such luck to ensure fairness.

The vulnerability of beneficiaries to a surrogate who breaches her fiduciary duties can be greatly lessened by a requirement that the surrogate be a regulated financial institution. This approach is already evident in New Mexico's trust law. As mentioned above, New

Mexico mandates the same disclosure duties as the UTC. However, if the trustee is a regulated financial services institution and the settlor makes a knowing waiver, *all* of the trustee's duties to inform can be waived by the settlor in the trust instrument.¹⁶⁸ Thus, the New Mexico legislature concluded that a beneficiary is not at risk when the surrogate is a financial institution, and that as a result the policy concerns that would advocate mandating disclosure are not as strong. This conclusion seems correct.

The requirement of an institutional surrogate can be indicated by defining the term "surrogate" to require that the designated surrogate be a financial institution, or by placing that requirement directly in the provision that allows the surrogate's appointment. Under this system, the same regulated institutions that often act as trustees would also be acting as surrogates in unrelated trusts. Therefore, not only would they be competent to monitor for breaches in the trustees' duties, but they would also be interested in performing their duties in a professional manner and enhancing their reputations as professional fiduciaries.

Alternatively, for many of the same reasons, the beneficiaries' interests would be protected in a trust that prohibits disclosure where a financial services institution has been appointed as trustee. This is precisely the position of the New Mexico trust code. However, a jurisdiction that only allows a settlor to prohibit disclosure when an institutional trustee is appointed may not be sufficient. There are many reasons that a settlor may prefer to appoint an individual as a trustee, rather than an institution. For example, an individual may not be as constrained as a regulated financial institution in the type of investments that the trustee will consider. Or, the settlor may simply prefer that a close relative administer the trust for her beneficiaries.

The precise definition of what types of institutions would satisfy the requirement for a "financial services institution" sufficient to be appointed as a surrogate or institutional trustee is beyond the scope of this Note. Generally speaking, the definition should require that the institution have a certain amount of assets under management in a fiduciary capacity. This would ensure that the institution would be competent to serve as trustee or surrogate for a trust in which disclosure to beneficiaries is prohibited.

The greatest weakness of the institutional surrogate alternative is that it would likely be expensive. However, if the settlor has determined that an individual should be the trustee and the disclosure of information should be limited or prohibited, the settlor

168. N.M. STAT. ANN. § 46A-8-813 (LexisNexis Supp. 2009).

should bear the cost of those decisions. If an institutional trustee is appointed, the statute should allow information to be withheld. Therefore, where a trustee is a regulated financial services institution, a surrogate should not be required in order for the settlor to prohibit disclosure. However, if an individual serves as trustee and the trust instrument limits or prohibits disclosure, the public policy concerns behind the argument for full disclosure should require the appointment of a financial institution as a surrogate to avoid disclosure to the beneficiaries.

The requirement of an institutional fiduciary, including an institutional surrogate, reduces the vulnerability of beneficiaries. Even with the remaining ambiguity regarding the surrogate's own liability, the surrogate option provides the most appealing solution to the disclosure debate. It addresses both sides of the debate and allows a settlor to structure her trust in the particular manner needed in her individual circumstances.

V. CONCLUSION

The debate over the extent and mandatory nature of a trustee's duty to provide beneficiaries with information is a contentious one. Two fundamental and well-established standards in trust law are at issue. First, settlors have broad latitude to construct their trusts as they see fit. Second, trusts exist solely for the benefit of the beneficiaries thereof. While these two principles have coexisted for many years, the complexities of their interaction in trust disclosure could be sidestepped in common law judicial decisions where the equities in a particular case made one of the principles yell slightly louder than the other.

The codification and unification of trust law in the UTC made this ad hoc dance less possible. The time had come to choose sides. With uniformity in mind, the drafters of the UTC constructed the trustee's duty to inform as a partially waivable duty, but with certain responsibilities that the settlor could not waive. The UTC was attempting to find a compromise between the strong policies mandating information disclosure and a settlor's freedom to choose the manner in which she wants to dispose of her property, including in secrecy.

While the drafters of the UTC are correct that access to information is essential to beneficiaries, not all states were ready to impose such constraints on individuals' ability to choose the terms of their trust. The surrogate structure offers the most readily accessible solution to the disclosure debate that will protect the beneficiaries'

interest while still allowing contract freedom for settlors, which is valued highly by many states. The initial surrogate approach in Washington, D.C. does not provide much explicit guidance regarding the exact responsibilities, authority, or liability of the surrogate. But while these issues are very important, they are not as ambiguous as they might at first seem.

Reconciling existing trust law principles and the more refined versions of the surrogate approach outlined above can provide answers to these concerns. At least one proponent of allowing nondisclosure has proposed that the current lack of guidance should not distract legislatures from adopting the surrogate approach. As Donald Kozusko has articulated, “[i]f accountability can be managed by other means, does it still make sense to thwart a settlor’s desire to minimize disclosure to beneficiaries?”¹⁶⁹ Kozusko proposes that the surrogate structure creates opportunities to design what he calls “quiet trusts” to satisfy many legitimate objectives, but without tolerating mismanagement.¹⁷⁰

The surrogate ensures that the trustee remains accountable for her actions. In addition, use of a surrogate allows the settlor to prevent the disclosure of information if the settlor so desires. Therefore, a closer look by the states at the surrogate structure is warranted in light of its ability to bridge the gap between trust scholars and the UTC, on the one hand, and the majority of UTC-enacting states that eliminated the mandatory disclosure requirement, on the other. This Note began that process. This is not a trust panacea—there are still ambiguous aspects of the liability the surrogate may face in the event of a breach of the duty of good faith. Nevertheless, this approach could increase the number of states that would enact disclosure requirements for someone who has the beneficiary’s interests in mind, thereby also promoting the uniformity so important to trust law.

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169. Kozusko, *supra* note 88, at 21.

170. *Id.*

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