

Notice? My Trust Beneficiaries Don't Need No Stinkin' Notice!

Question: What do Tennessee and Utah have in common? Answer: A profound bias toward allowing folks who create trusts to control who gets what information about the trust. Tennessee may be marvelously forward-thinking or dangerously backward on this issue, but we are clearly not in the mainstream. Regardless, Tennessee lawyers have trust drafting options available almost nowhere else.

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The common law has always imposed a duty on fiduciaries to provide information to beneficiaries. The Uniform Trust Code (UTC), adopted in about 23 states including Tennessee, includes duties: (1) to keep beneficiaries reasonably informed about the trust and of the material facts necessary for them to protect their interests; (2) to respond promptly to a beneficiary's request for information on the trust administration; and (3) to furnish certain required notice.[1]

Yet Tennessee's version of the UTC (TUTC) allows trustors to limit any or all of these notice requirements, or even completely to deny beneficiaries any information at all.[2] Some ability to limit notice was contemplated by the drafters of the UTC,[3] but the Tennessee legislature, as a matter of policy,[4] granted far more latitude to deny information than anything the UTC drafters had provided for.[5] Only Utah's version of the UTC appears also to allow trustors to waive all three types of notice provisions.[6]

Why would anyone want to limit notice? Our clients create trusts for many reasons, such as tax savings, asset protection, or spendthrift protection, but in almost all cases a primary purpose is to provide for the best interests of the beneficiaries. Trustors might well believe that a beneficiary's full awareness of the extent and type of assets within a trust is not in that beneficiary's best interest, perhaps because of youth, or spendthrift tendencies, or because of the sensitive nature of a business interest owned by the trust. Or the trustor may not want an ex-spouse (or anyone else outside a protected class, such as immediate family) to obtain trust information. Thus, some degree of beneficiary ignorance may be a material purpose of the trustor.

Can Tennessee trust beneficiaries really be kept completely in the dark? Apparently yes, under the relevant notice portions of TUTC. This raises two serious concerns. First, as a practical matter, lack of accountability can too easily facilitate trustee malfeasance. Second, as a legal matter, waiver of all duty to account may negate the very existence of a trust. If a purported trustee is not accountable to any beneficiary, such trustee may simply be considered the fee simple owner, free of trust. At least one commentator has sharply criticized TUTC and similar versions of the UTC in other states for this reason.[7]

However, chancery courts in Tennessee have inherent equity jurisdiction[8] over all matters involving fiduciaries, and TUTC explicitly provides that "the power of the court to take action and exercise jurisdiction as necessary in the interest of justice"[9] is non-waivable by the trust instrument.[10] Accordingly, there is little doubt that any chancellor would find that every trustee must be accountable to someone somewhere, and if not to a beneficiary, then to the court. Thus any

Sample Form #1 – Maximum Secrecy

It is a material purpose of the Trustor that the beneficiaries hereof be kept uninformed of the extent and nature of the trust assets herein until such time or times as are specifically set forth within this instrument. Therefore, in accordance with *Tenn. Code Ann.* §35-15-813(e), the Trustee is directed not to provide any reports, notice, information, or accountings of any kind to any beneficiary of this trust under any circumstance, except as specifically required for income tax reporting purposes or under other federal or state law, or except as the Trustee shall in its sole and absolute discretion determine is for the best interests of the beneficiaries, both individually and as a class.

In accordance with *Tenn. Code Ann.* §35-15-303(7), the Trustee shall provide all reports, notice, and accountings that would otherwise normally be provided to beneficiaries to the Trust Protector, hereinafter designated, who shall receive such information and take such actions on behalf of the beneficiaries as the Trust Protector shall deem appropriate. However, the Trust Protector shall not further disclose to any beneficiary any information provided to the Trust Protector.

The Trust Protector shall be John Doe, or if he is for any reason unable or unwilling to act, Jane Doe, or if there is any further vacancy in the office, by a person appointed by the Trustor, if living and competent, otherwise by the chief manager, managing partner, or president of the law firm of Rapp Carr Rountree & Hurt, or its successor law firm. No beneficiary of the trust, nor any person who is a "related or subordinate party" as to any beneficiary of the trust, as defined in Internal Revenue Code §672(c), shall serve as the Trust Protector.

The Trustee shall resist any effort by any beneficiary to obtain any such information, and all expenses of resisting such efforts shall be paid by the Trust. In the event that any court requires notice or disclosure, including any information to the Trust Protector, the Trustee shall seek to make such information available to the court only if the information remains protected from disclosure to the beneficiaries of the trust and the content is sealed by court order.

The Trust Protector shall have fiduciary duties to the beneficiaries, but shall not be liable for any acts or omissions except in the event of willful misconduct or gross negligence committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. The Trustor acknowledges that he has read and understood this exculpatory provision and believes it to be fair under the circumstances.

Both the Trustee and the Trust Protector shall be indemnified by the Trust for all expenses incurred in carrying out their respective duties under this paragraph.

fear that a trustor's complete waiver of notice negates the existence of a trust seems unfounded, but the existence of a trust relationship in such case is saved only by the less than explicit assumption that some accounting must be required somewhere.[11]

A trustor who desires minimum reporting should be able to minimize the risk of both trustee malfeasance and court intervention on behalf of a petitioning beneficiary by naming a third party (often called a Trust Protector) to receive notice on behalf of a beneficiary, a technique explicitly sanctioned by TUTC.[12] If the Trust Protector is not himself a fiduciary as to the beneficiaries, however, the court might still find that the beneficiaries are not adequately protected and require a court accounting upon beneficiary demand. Thus the optimum solution may be to require that the Trust Protector be a fiduciary but to add a broad exculpatory clause, similar to the type of exculpation allowed to trustees under TUTC,[13] limiting liability to gross negligence or intentional misconduct.

If a court were to order disclosure, the trustee should be indemnified for defending the action, and the trust instrument could require to the extent possible that all disclosures to the court be sealed by further court order, in order to accomplish the trust purposes while still recognizing and deferring to the court's inherent equity jurisdiction.

Consider the proposed form at left (Sample Form #1), where the goal is maximum secrecy.

Of course, maximum secrecy is not always the goal, and trust clauses may be drafted for other, more limited purposes. The following forms address several potential scenarios and generally provide for trustee discretion for maximum flexibility (trust your trustee) rather than mandatory withholding of information.

Continued on page 32

Sample Form #2 — Encourage Productivity

The Trustee, in its sole and absolute discretion, is authorized not to provide any reports, notice, information, or accountings of any kind, to any beneficiary under the age of 25, nor even to inform the beneficiary of the existence of this trust if possible. It is a material purpose of the Trustor to encourage the beneficiary's self-sufficiency and productivity, it being the Trustor's belief that such information could be counter-productive in accomplishing such purpose.

Sample Form #3 – Non-Disclosure Beyond Spouse

During the life of my wife, the Trustee of this Credit Shelter Trust is authorized not to provide any reports, notice, information, or accountings to any person other than (1) my wife or (2) any person to whom my wife directs that such notice shall be provided, including any agent under a power of attorney for my wife after my wife is no longer able to manage her financial affairs, as determined in the Trustee's sole and absolute discretion. It is a material purpose of the Trustor that his wife be the primary beneficiary of this trust during her life, free from interference or pressure from any other beneficiaries.

Sample Form #4 – Non-Disclosure to Unrelated Parties

The Trustee, in its sole and absolute discretion, is authorized not to provide any reports, notice, information, or accountings to any beneficiary who is not a direct descendant of the Trustor. It is a material purpose of the Trustor that beneficiaries who are not descendants have no influence over the Trustee's actions and as little influence as possible over the Trustor's descendants' actions in dealing with the Trustee.

Sample Form #5 – Non-Disclosure of Specific Assets to Beneficiaries

The Trustee, in its sole and absolute discretion, is authorized not to provide any information to any beneficiary about the underlying investments of this trust. It is a material purpose of the Trustor for the investments to be managed by the Trustee without review or interference by the beneficiaries, whose investment expertise is limited and whose knowledge of the investments would be more likely to cause nuisance than to be productive.

The bottom line is that in Tennessee, and almost only in Tennessee, our clients creating trusts have enormous flexibility to define the amount of notice to beneficiaries that they believe best accomplishes the trust purposes, limited only by the creativity of the client and the draftsman on the one hand and by the practical risks and the ultimate jurisdiction of courts of equity on the other. Here is an opportunity to tailor documents in ways our clients may highly appreciate.[14]

Notes

1. See *Tenn. Code Ann.* §35-15-813(a) and (b), which reads in relevant part as follows:

> *(a)(1) A trustee shall keep the beneficiaries of the trust who are current mandatory or permissible distributees of trust income or principal, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.*
>
> *(2) Unless unreasonable under the circumstances, a trustee shall respond in a reasonable amount of time to a qualified beneficiary's request for information related to the administration of the trust.*
>
> *(b) The trustee of an irrevocable or non-grantor trust within sixty (60) days after the acceptance and funding of a trust … shall notify each current income beneficiary and each vested ultimate beneficiary of a remainder interest that the trust has been established. [Detailed notice requirements follow.]*

2. See *Tenn. Code Ann.* §35-15-813(e), which reads as follows: *(e) Subsections (a) and (b)* ***shall not apply*** [bold added for emphasis] *to the extent that the terms of the trust provide otherwise or the settlor of the trust directs otherwise in a writing delivered to the trustee.*

3. The Uniform Trust Code, as adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which was the basis for Tennessee's adoption, contained no exception for a trustor's waiver in the equivalent section 813, although UTC sections 105(b)(8) and (9) allow a trustor to waive notice under somewhat limited circumstances, especially if a beneficiary is under age 25. The Tennessee version as enacted by the legislature imposes no limit on waiver of notice under either section 105 or 813.

4. The official comments to *Tenn. Code Ann.* §35-15-813 adopted by the legislature broadly proclaim: "The amendment allows the settlor to waive the requirement that a trustee keep the beneficiaries informed and respond to requests for information." There is no further limitation or clarification.

5. Note that the statute does not even require that a restriction on notice be in the trust instrument itself; it can be in a separate writing from the trustor delivered to the trustee. This raises an interesting question whether a trustor may now create such a separate writing to be effective for a trust created long before. The answer seems to be that a separate writing can control with a trust created on or after July 1, 2004, but not before. See *Tenn. Code Ann.* §35-15-813(f), which reads as follows: "*(f) Subdivision (a)(1) and subsection (b) do not apply to a trust created under a trust agreement that became irrevocable before July 1, 2004. Trust law in effect prior to July 1, 2004, regarding the subject matter of subdivision (a)(1) and subsection (b) shall continue to apply to those trusts.*"

6. See Utah Code §75-7-811. New Mexico also allows the trustor to waive all three types of notice requirements, but only if the trustee is a corporate fiduciary and the waiver is

Civil Justice Act *continued from page 26*

teaching hospitals, as well as listed facilities and professional business organizations. *Tenn. Code Ann.* § 29-26-101(a).

28. *Tenn. Code Ann.* § 29-26-101(a)(4).

29. *Tenn. Code Ann.* § 29-26-101(c).

30. *Tenn. Code Ann.* § 29-26-101(d).

31. *Tenn. Code Ann.* §§ 29-26-115, -121, and -122.

32. *Tenn. Code Ann.* § 20-5-113.

33. *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593 (Tenn. 1999).

34. *Banks v. Elks Pride Club*, 301 S.W.3d 214, 219-20 (Tenn. 2010).

35. *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694 (Tenn. Ct. App. 1999).

36. *Tenn. Code Ann.* § 29-39-101.

37. *Tenn. Code Ann.* § 29-39-101(a).

38. *Tenn. Code Ann.* § 29-39-102(a)(1).

39. *Tenn. Code Ann.* § 29-39-101(b).

40. *Tenn. Code Ann.* § 29-39-102(a)(2).

41. *Tenn. Code Ann.* § 29-39-102(b).

42. *Tenn. Code Ann.* § 29-39-102(e). In the wrongful death context, an interesting question may arise in that loss of consortium has been interpreted as part of the decedent's pecuniary value of the life, *Jordan*, 984 S.W.2d 593, and the limitation in the Act applies only to "nonpecuniary losses." *Tenn. Code Ann.* § 29-39-101(b) and -102(a)(2). This question may be settled by *Tenn. Code Ann.* § 29-39-102(n) ("The limitations of noneconomic damages in § 29-39-102 shall apply to restrict such recoveries in all civil actions notwithstanding conflicting statutes or common law.").

43. *Tenn. Code Ann.* § 29-39-102(c) and -102(d). Other exceptions in this category include: (1) spinal cord injury resulting in paraplegia or quadriplegia; (2) amputation of two hands, two feet, or one of each; and (3) third degree burns over 40% or more of the body as a whole or third degree burns up to 40% or more of the face. *Tenn. Code Ann.* § 29-39-102(d). If the existence of a "catastrophic loss or injury" is disputed, the trier of fact determines the existence by special verdict. *Tenn. Code Ann.* §§ 29-39-102(f) and -103(b).

44. *Tenn. Code Ann.* § 29-39-102(g).

45. *Tenn. Code Ann.* § 29-39-102(j).

46. *Tenn. Code Ann.* § 29-39-102(h).

47. *Tenn. Code Ann.* § 29-39-102(i).

48. *Tenn. Code Ann.* § 29-39-103(a).

49. *Tenn. Code Ann.* § 29-39-103(a)(1).

50. *Tenn. Code Ann.* § 29-39-103(a)(2).

51. *Tenn. Code Ann.* § 29-39-103(c).

52. *Id.*

53. *Id.*

54. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992)

55. *Id.* at 902.

56. See *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. 2008).

57. See *Doe v. Linder Const. Co. Inc.,* 845 S.W.2d 173, 185 (Tenn. 1992)(Daughtery, J., dissenting).

58. *Tenn. Code Ann.* §29-39-104(a)(1)-(2).

59. *Id.*

60. *Tenn. Code Ann.* § 29-39-104(a)(7)(A)-(C).

61. Section 22 of the Act provides for severability of the exceptions to the punitive damages caps, if the exceptions would make the caps unconstitutional.

62. *Tenn. Code Ann.* § 29-39-104(a)(5).

63. *Tenn. Code Ann.* § 29-39-104(a)(6).

64. *Tenn. Code Ann.* § 29-39-104(a)(4).

65. *Id.*

66. *Tenn. Code Ann.* § 29-39-104(c).

67. *Tenn. Code Ann.* § 29-39-104(d).

68. *Tenn. Code Ann.* § 29-39-104(d)(2) (Notably, the New Jersey Superior Court, applying the language of a similarly worded statutory limitation on punitive awards in cases involving an FDA approved pharmaceutical held that pursuant to the United States Supreme Court's opinion in *Buckman Co. v. Plaintiffs' Legal Comm*, 531 U.S. 341 (2001) the award of punitive damages that met those standards would be preempted. See *McDarby v. Merk & Co. Inc.*, 449 A.2d 223, 276 (N.J. Super. 2008).)

69. *Tenn. Code Ann.* § 29-39-104(a)(9).

Continued on page 39

"conspicuous." See NMSA §46A-8-813(F).

7. Kevin D. Millard, "The Trustee's Duty to Inform and Report Under the Uniform Trust Code," 42 *Real Property, Probate and Trust Journal* 373 (Summer 2005), at 395.

8. See *Tenn. Code Ann.* §16-11-103, which reads in relevant part as follows: "*The chancery court has exclusive original jurisdiction of all cases of an equitable nature.*"

9. See *Tenn. Code Ann.* §35-15-105(b)(11).

10. Query whether, even if the power of the court cannot be waived by the trust instrument, it can be waived by a separate writing from the settlor of the trust, as permitted under *Tenn. Code Ann.* §35-15-813(e). The author doubts that the courts would interpret the statute in that manner, but the statutory interpretation is not clear.

11. A trustee of a trust where the trustor has waived all notice to beneficiaries might be concerned that the statute of limitations for potential fiduciary breaches does not begin to run until the beneficiaries have actual notice. One wonders whether some trustees, especially corporate trustees, might refuse to serve where such a waiver provision is included in the trust instrument, or whether instead some trustees might disobey the waiver and provide notice anyway to manage the trustees' own risks. Or a trustee might petition the court to appoint a "representative" to whom notice can be sent on behalf of the beneficiaries under *Tenn. Code Ann.* §35-15-305.

12. See *Tenn. Code Ann.* §35-15-303(7), which reads as follows: "*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.*"

13. See *Tenn. Code Ann.* §35-15-1008.

14. As one commentator remarked about the unique Tennessee version of notice under the TUTC, "This is another instance where the settlor needs to be informed to make a decision and may even choose to include language in the trust restricting the reports to be provided to some or all of the beneficiaries." Marshall H. Peterson, "Tennessee Uniform Trust Code: New Formulations for a Trusty Tool," *Tennessee Bar Journal* (January 2005).

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