Title

The Uniform Trust Code's qualified-beneficiary concept confuses yet another court

Text

Trustees have always been accountable in equity to the holders of the vested and contingent equitable property interests that are incident to the trust relationship. They still are. Thus, a trustee has an affirmative duty to furnish each beneficiary with all information that he would need to protect/defend his equitable property rights ("critical information"). The UTC creates two classes of beneficiary, qualified and non-qualified, the former presently ascertainable, the latter not, and then saddles trustees with an *additional* affirmative duty to supply the qualified ones with non-critical information relating to the "day-to-day affairs of the trust." See UTC §103, cmt. For more detail and discussion see §6.1.5.1 of *Loring and Rounds: A Trustee's Handbook* (2022), which section is reproduced in its entirety in the appendix immediately below. Now comes *In the matter of the Colecchia Family Irrevocable Trust*, [https://www.mass.gov/files/documents/2021/11/29/r20P0224.pdf], Mass. Appeals Court, No. 20-P-224, 11/29/2021. The subject of the litigation was an irrevocable, income-only/use-only trust under which the equitable property rights of remaindermen had vested *ab initio*. The fiduciary-disclosure issue was as follows: Were trustees accountable to the remaindermen during the lifetimes of the current beneficiaries? The Court's holding: They were not. We disagree. First, equitable non-possessory property rights in the remainder in corpus had vested *ab initio*. Second, the trustees had had a background overarching enforceable equitable duty to act in the interests of *all* beneficiaries, not just the current ones. See Massachusetts UTC §105(b)(2).

Appendix

§6.1.5.1 Duty to Provide Information to Beneficiaries [from *Loring and Rounds: A Trustee's Handbook* (2022)].

The historical context and utilitarian rationale. The trustee's duty to inform the beneficiaries about the trust and its administration is of ancient origin. In the 1818 Chancery case of *Walker v. Symonds*, Lord Chancellor Eldon stated: "It is the duty of trustees to afford to their [beneficiaries] accurate information of the disposition of the trust-fund; all the information of which they are, or ought to be, in possession …"[763] In 2007, one commentator articulated the utilitarian rationale for imposing on trustees such a duty: "The trustee has a mandatory duty to inform the beneficiaries because only they have both the financial incentive and legal authority to fulfill the monitoring and enforcement functions."[764] "A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request

[763][1818] 3 Swanst. 1,59, 36 Eng. Rep. 751, 772 (Ch.)

[764]T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C.L. Rev. 1595, 1621 (2007).

for information."[1]

Information to which the beneficiary is entitled. An incident of the trustee's general duty to account is the specific affirmative duty to furnish the beneficiary with all the information that the beneficiary needs to protect his, her, or its equitable property rights.[765] Or, to put it another way, a beneficiary is entitled to all the information "that is reasonably necessary to the prevention or redress of a breach of trust or otherwise to the enforcement of the beneficiary's rights under the trust."[766] A trustee who breaches this duty to inform may be compelled by the court to do so incident to an equitable action to account, an action that is typically brought by the beneficiary.[767] Even a beneficiary whose equitable interest is contingent on the trustee's exercise of discretion would have standing to bring such an action.[768] Having said that, certain opinions of counsel, a special category of "information" that is covered in §8.8 of this handbook, may not be discoverable. "When the trust is in favor of successive beneficiaries, a beneficiary who has a future interest, as well as a beneficiary who is presently entitled to receive income, is ordinarily entitled

---

[1] UTC §706 cmt. *See, e.g.*, Wood v. Honeyman, 178 Or. 484, 561, 169 P.2d 131, 164 (1946) (the court observing that a provision in the terms of a trust relieving a trustee of the duty to furnish the beneficiary on an ongoing basis with whatever information the beneficiary would need to protect the equitable interest would render equity "impotent" and is therefore unenforceable; otherwise, should the settlor's confidence in the trustee prove mistaken, the provision could be "virtually a license to the trustee to convert the fund to his own use and thereby terminate the trust").

[765]UTC §813(a) (Duty to Inform and Report). *See also* Bogert §961; Restatement (Third) of Trusts §82(1)(c); Restatement (Second) of Trusts §173; 3 Scott & Ascher §17.5; 2A Scott on Trust §173. *See* §5.4.1.1 of this handbook (the beneficiary's right to information and confidentiality) and §8.8 of this handbook (whom trust counsel represents). For a comparison of the trustee's common law duty to provide information with the ERISA fiduciary's statutory duty to disclose, *see* John H. Langbein & Bruce A Wolk, Pension and Employee Benefit Law 697–701 (2000) (suggesting that the courts have become "more insistent about developing disclosure standards under ERISA than in the common law of trusts" because "disclosure duties in ERISA plan settings demarcate the tension between the employer's two roles, that is, between the employer's so-called 'business' or 'settlor' functions and the ERISA fiduciary functions").

[766]Hammerman v. N. Trust Co. (*In re* Kipnis §3.4 Trust), 235 Ariz. 153 (Ct. App. 2014).

[767]Bogert §970 (Parties and Procedures on Accounting).

[768]Bogert §970 (Parties and Procedures on Accounting). The Uniform Trust Decanting Act, specifically §4(b), provides that the Act does not create or imply a duty on the part of a trustee with decanting authority "to inform beneficiaries about the applicability of the Act." Depending upon the particular facts and circumstances, however, the trustee may have such a duty under general principles of equity. Decanting is taken up generally in §3.5.3.2(a) of this handbook.

to this information, whether the interest is vested or contingent ….”[769] Recent English case law is generally in accord.[770] Secrecy and accountability are incompatible.[771] Again, this is an affirmative duty, not a passive one.[772] That the beneficiary did not ask for the information is no excuse. The Restatement (Third) of Trusts is generally in accord,[773] as is the UPC.[774]

The UTC's qualified beneficiary concept. Under the UTC, any person who has a present or future interest in an irrevocable trust, whether vested or contingent, and any holder of a power of appointment over the trust property is entitled upon request to the trustee's accountings or "reports," as well as any other information reasonably related to the trust's administration.[775] This right may not be waived by the settlor.[776] The UTC further provides that the trustee has an affirmative duty to notify the "qualified beneficiaries" of an irrevocable trust who are 25 years of age or older of the existence of the trust and of their right to request accountings or "reports" and other information related to the administration of the trust.[777] The trustee may not be relieved of this duty by express language in the governing instrument.[778] A "qualified beneficiary" is either a current beneficiary or a presumptive remainderman.[779] Moreover, a presumptive remainderman would include one who could receive the remainder in corpus subject to a further trust, such as via an eventual division of the corpus into trust shares, as well as outright.[780]

Under the UTC, in a critical matter such as when equitable property rights, whether vested or contingent, are at stake, notice to the qualified beneficiaries would not relieve the trustee of the duty to give adequate notice to *the nonqualified beneficiaries*, either by giving actual notice to them or by giving notice to a duly appointed guardian ad litem charged with representing their

---

[769] 3 Scott & Ascher §17.5. Note, however, that if beneficiary *X* has a "right of revocation, a general power of appointment, or an unrestricted right of withdrawal" and beneficiary *Y* does not, then while *X* is of full age and legal capacity, the trustee generally has no duty to keep *Y* informed.

[770] *See, e.g.*, Schmidt v. Rosewood Trust Ltd. [2003] WTLR 565 (Isle of Man Privy Council), *adopted under English law by*, Breakspear v. Ackland [2008] EWHC (Ch) 220 (Eng.).

[771] *See generally* Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373 (Summer 2005).

[772] *See, e.g.*, McNeill v. Bennett, 798 A.2d 503, 510 (Del. 2002). *See generally* 3 Scott & Ascher §17.5.

[773] Restatement (Third) of Trusts §§82, 82(1)(c) & 83.

[774] UPC §7-303.

[775] UTC §105(b)(9).

[776] UTC §105(b)(9).

[777] UTC §105(b)(8).

[778] UTC §105(b)(8).

[779] UTC §103(12).

[780] *See, e.g.*, Rachins v. Minassian, 251 So. 3d 919 (Fla. Dist. Ct. App. 2018).

interests.[781] The nonqualified beneficiaries, not just the qualified beneficiaries, are entitled under the U.S. Constitution to due process.[782] Thus, it is not surprising that the Restatement (Third) of Trusts acknowledges that even nonqualified beneficiaries have enforceable property rights.[783] The virtual representation exception to the notice requirement applies only if there is no conflict of interest between the qualified and nonqualified beneficiaries. In most cases, however, there will be such a conflict. But, even in the absence of a conflict, the failure to give actual notice to the virtually represented can be fraught with peril when property rights are at stake, not only for the trustee but also for trust counsel.[784]

Here is the UTC's commentary on its own limitations on the qualified-beneficiary concept: "Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the *day-to-day affairs of the trust*, the Uniform Trust Code uses the concept of 'qualified beneficiary'… to limit the class of beneficiaries to whom certain notices must be given or consents received."[785] Examples given are trustee resignations, successor trustee appointments, combining trusts, and the like. In other words, notice to the qualified beneficiaries is only sufficient in quasi-ministerial undertakings that generally do not affect one way or another equitable property rights, absent special facts.

Uniform Trust Decanting Act. The Uniform Trust Decanting Act, specifically §16, requires that if the "first trust instrument" (the instrument governing the terms of the to-be-decanted trust) specifies an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless all qualified beneficiaries of the "second trust' (the recipient trust) consent in a signed record to the increase.[786] The accompanying official comment offers a somewhat circular rationale for why not all those with equitable property rights in the entrusted property need sign off: "Obtaining the

---

[781]*See* Roth v. Jelley, ___ Cal. Rptr. 3d ___, No. A155742, 2020 WL 882150 (Cal. Ct. App. Feb. 24, 2020).

[782]*See* Roth v. Jelley, ___ Cal. Rptr. 3d ___, No. A155742, 2020 WL 882150 (Cal. Ct. App. Feb. 24, 2020).

[783]*See* Restatement (Third) of Trusts §94 cmt. b ("A suit to enforce a private trust ordinarily … may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s)at issue. The beneficiaries of a trust include any person who holds a beneficial interest, present or future, vested or contingent.").

[784]*See* Roth v. Jelley, ___ Cal. Rptr. 3d ___, No. A155742, 2020 WL 882150 (Cal. Ct. App. Feb. 24, 2020) (criticizing trust counsel for wrongfully having facilitated the taking of the contingent equitable property rights of a trust beneficiary without "bothering" to give the beneficiary notice and an opportunity to be heard, and for "hiding" the taking from the beneficiary for a number of years).

[785]UTC §103, cmt. (emphasis added).

[786]*See* §16(a)(1) of the Act. *See also* §16(b)(1) of the Act ("If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary may not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by [this state's trust code] unless … all qualified beneficiaries of the second trust consent to the increase in a signed record.").

consent of qualified beneficiaries, who would generally be immediately impacted by a change in compensation, should be sufficient." What about the equitable property rights of the nonqualified beneficiaries? The practice of apportioning trustee fees between the income and principal accounts comes to mind. It does not seem self-evident that equitable property rights may be subject to fiduciary subversion so long as the impact is not "immediate." Decanting is taken up generally in §3.5.3.2(a) of this handbook.

Waiver by the settlor via the trust terms of the trustee's duty to keep the beneficiaries informed. The failure of a settlor to inform the beneficiaries of the creation of the trust may be evidence that the settlor's intent to create a trust was not final and definitive. So also if the terms of the trust purport to relieve the trustee of the duty to keep the beneficiaries reasonably informed of the existence and affairs of the trust.

Section 105(b)(8) & (9) of the UTC would impose some mandatory internal reporting duties on the trustee, duties that may not be drafted around:

- (8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports.
- (9) the duty under Section 813(a) 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 the trust.

UTC §105(b)(8) has not been faring that well when it comes to actual enactments: "Yet of the thirty-five jurisdictions enacting the UTC, seventeen have eliminated this mandatory rule, and many others have weakened it."[787] There may be less to this mini-revolt, however, than meets the eye. Presumably enactment of a version of the UTC that lacks a §105(b)(8)-type feature would not compromise, erode, or otherwise limit the trustee's preexisting and longstanding equitable duty to keep the beneficiaries duly informed. Quite the opposite, in fact: It would seem that general principles of equity would kick in by default.[788] In any case, "[w]aiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions."[789] All beneficiaries are owed this general duty, not just the qualified beneficiaries. True, the UTC imposes on the trustee a duty to involve the qualified beneficiaries in the "day-to-day affairs of the trust" to a limited degree, such as by keeping them informed of trustee resignations and the like. This is an additional burden imposed on the trustee by the UTC. In no way does this imposition, however, derogate from, or otherwise erode, the critical general duty—a duty that trustees have

[787]Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31, 33 (Fall 2019).

[788]*See, e.g.*, Wilson v. Wilson, 690 S.E.2d 710 (N.C. Ct. App. 2010) ("Applying the rule in *Taylor*, we hold that the information sought by Plaintiffs was reasonably necessary to enforce their rights under the trust, and therefore could not legally be withheld, notwithstanding the terms of the trust instrument," this though there is no UTC §105(b)(8) and (9), or their equivalent, in the "mandatory rules" section of North Carolina's version of the UTC.).

[789]UTC §105, cmt.

had since time immemorial—to account to all the beneficiaries, qualified and nonqualified alike, for the trustee's actions. It remains the case that the beneficiary is entitled to whatever information the beneficiary must have in order to effectively defend and protect his or her equitable property rights, whether those rights be vested or contingent, except, perhaps, (1) while the trust is revocable or (2) if the five-year period of the UTC's §1005(c) statute of ultimate repose has run. And, except for the statute of repose, the statute limiting actions for breaches of trust will not begin to run against the beneficiary until such time as that information has been received and comprehended by the beneficiary.[790]

Uniform Directed Trust Act. The Uniform Directed Trust Act would relieve a directed trustee of any duty (1) to monitor the activities of a trust director and (2) to inform or give advice to a beneficiary "concerning an instance in which the trustee might have acted differently than the director."[791] That having been said, a trustee who is on *actual notice* of a trust director's breach of trust has an affirmative duty to inform the beneficiary of the breach and take appropriate measures to remedy the situation, which includes bringing the matter before a court should all else fail.[792]

The information surrogate. In several states, the terms of a trust may authorize the trustee to account to a "surrogate" of the beneficiary in lieu of accounting to the beneficiary.[793] The trustee is said to be a "quiet trustee." The surrogate is designated in the trust's terms and would seem to meet the definition of a trust protector.[794] If one assumes that the protector/information surrogate is a fiduciary, which is likely to be the case, then the tangle of possible intersecting fiduciary relationships and duties could get mind-boggling. The protector/information surrogate, for example, might well owe a fiduciary duty to a minor beneficiary to report to the minor's guardian about the activities of the protector's cofiduciary, namely the quiet trustee. In turn, the guardian might well owe a fiduciary duty to the minor to apprise himself of all the critical information he can get his hands on relative to the minor's equitable property rights under the quiet trust. In other words, the guardian might well owe the minor a duty to monitor the relevant activities of both the protector/information surrogate and the quiet trustee.

Once the minor beneficiary attains the age of majority, it could get even more interesting. Presumably, both the guardian and the protector/information surrogate would then owe the beneficiary a fiduciary duty to convey in good faith to the beneficiary all the critical information that they had acquired while the beneficiary was a minor regarding the terms of the quiet trust and the activities of the quiet trustee. What information would be critical? Whatever information the beneficiary would need to protect and defend his equitable property rights under the quiet trust. Moreover, if the quiet trustee upon being confronted by the beneficiary intentionally deceives the beneficiary as to the existence and/or terms of the trust, then the quiet trustee risks incurring

[790]*See generally* §7.1.3 of this handbook (defense of failure of beneficiary to take timely action against trustee).

[791]*See* Unif. Directed Trust Act §11(a)(1).

[792]*See* Unif. Directed Trust Act §11, cmt.

[793]*See, e.g.*, D.C. Code Ann. §19-1301.05(c)(3).

[794]*See generally* §3.2.6 of this handbook (discussing the office of trust protector).

liability for committing acts of fraud against the beneficiary.

Prof. Alan Newman has written a law review article that, in part, flags some "additional questions" that are raised by a quiet trusteeship that has a protector/information surrogate feature to it, such as whether there is a tolling of the applicable statute of limitations for breaches of fiduciary duty until such time as the beneficiary is put on actual or constructive notice of the relevant facts and law.[795] Under the Restatement (Third) of Trusts, one has a sense that notice only to the protector/information surrogate would not start the applicable breach of trust statute of limitations running against the clueless beneficiary. It provides that "[b]y the terms of a trust, the settlor may reserve or confer upon others the power to enforce the trust. The holder of such a power has standing, on behalf of the beneficiaries, to bring suit against the trustee, although the power does not prevent a beneficiary from acting on his or her own behalf."[796]

Now, if the protector/information surrogate, by statute, case law, or trust term, is truly not a fiduciary, then it is hard to see how a quiet trust can be a true trust, a trust being a fiduciary relationship with respect to property. It cannot be said that the quiet trustee owes any fiduciary duties to the protector/information surrogate, the protector/information surrogate not being a beneficiary. Certainly the protector/information surrogate owes the quiet trustee no fiduciary duties. No fiduciary duties, no trust, at least not of the kind that is the subject of this handbook.

Some beneficiaries may now be more equal than others, but only as to things ministerial. As noted, the UTC and the Restatement (Third) of Trusts would limit those who must be kept informed *on an ongoing basis* to those entitled or eligible to receive distributions of income and principal and to those who *would be entitled* to take upon the termination of the current interest or the trust itself, whether their interests are contingent or vested.[797] This class is referred to in the UTC as "qualified beneficiaries"[798] and in the Restatement as "fairly representative" beneficiaries.[799] On occasion, this ongoing duty to inform may run to a holder of a general testamentary or nongeneral power of appointment, a power to veto or direct acts of the trustee, or a power to modify the trust.[800] Absent special facts, this ongoing duty would not run to representatives of unborn and unascertained contingent interests.[801] The trustee, however, may "for

---

[795]*See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 649, 680–681 (2005).

[796]Restatement (Third) of Trusts §94 cmt. d(1).

[797]*See, e.g.*, Barber v. Barber, 837 P.2d 714 (Alaska 1992) (a contingent trust beneficiary having a constitutionally protected property interest, the beneficiary was entitled to notice of a contemplated sale of real estate comprising the trust estate).

[798]*See* UTC §103(12) (defining "qualified" beneficiary).

[799]*See* Restatement (Third) of Trusts §82 cmt. a(1) (defining "fairly representative" beneficiary).

[800]Restatement (Third) of Trusts §82 cmt. a(1).

[801]*See, however,* Restatement (Third) of Trusts §83 cmt. b (suggesting that it is "essential to the enforceability of a meaningful duty of impartiality" that the trustee's duty to "report on request" extend when appropriate in light of a particular set of facts and circumstances to beneficiaries who are not "fairly representative," presumably even on occasion to appropriate representatives of the unborn and

some matters and some trustee concerns" provide information to additional beneficiaries, if the trustee "wishes or deems appropriate to the circumstances."[802] In the case of a charitable trust, the duty to be kept informed would run to the appropriate attorney general, and to identifiable charities, if any, with equitable interests under the trust.[803]

Sensitive personal information. At any given time, though, it may be appropriate for the trustee to furnish certain types of information to some beneficiaries and not to others, *e.g.*, information on the health condition of a particular beneficiary. This should not implicate the duty of impartiality,[804] provided "the trustee's selection—or exclusion—of those to be informed or consulted is fair, reasonable, and impartial in light of the context and reasons for the communication."[805] For a discussion of the dilemma a trustee can face when one beneficiary's right to information conflicts with another's right to confidentiality, §5.4.1.1 of this handbook. Absent special facts, however, "[w]hen a trustee prepares and provides a report in response to a request by a beneficiary, the trustee might wish to follow a simple, routine practice of also sending a copy to other beneficiaries, particularly to fairly representative beneficiaries and perhaps to others as well."[806]

The revocable trust exception. There is another exception to the trustee's duty to provide information, namely if the trust is revocable by the settlor alone and the settlor has the capacity to revoke it.[807] During the period when he does, the trustee may not disclose any information pertaining to the trust to the other beneficiaries, if any, *i.e.*, to those who possess equitable

---

unascertained). *See generally* §8.14 of this handbook (guardian ad litem and virtual representation issues).

[802]Restatement (Third) of Trusts §82 cmt. a(1). Take, for example, a trust for the benefit of a widow for her lifetime. Upon her death, the subject property passes outright and free of trust to her then living issue. The widow, her terminally ill daughter, the daughter's husband and guardian, and the daughter's two adult children are all alive. Under the circumstances, namely, that in all likelihood the daughter will predecease her widowed mother, the trustee may want to provide appropriate information regarding the trust to the two adult children (the widow's grandchildren) on an ongoing basis, although neither meets the technical definition of a "fairly representative" beneficiary. The trustee may want to do this if only to smoke out and informally address any misconceptions they may have about how the trust is being administered, or should be administered, in anticipation of sooner rather than later having to put before them his final accounts.

[803]Restatement (Third) of Trusts §82 cmt. a. *See generally* §9.4.2 of this handbook (standing to enforce charitable trusts).

[804]*See generally* §6.2.5 of this handbook (the trustee's duty of impartiality in his dealing with the beneficiaries).

[805]Restatement (Third) of Trusts §79 cmt. d.

[806]Restatement (Third) of Trusts §83 cmt. b.

[807]Restatement (Third) of Trusts §82 cmt. a; 3 Scott & Ascher §17.5. *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

contingent interests.[808] The trustee's duty to inform under these circumstances runs to the settlor and to the settlor alone.[809] Otherwise, the trustee should respond to a reasonable request for information as soon as possible after the request is received.[810]

The trustee's duty to inform upon creation of an irrevocable trust or upon a revocable trust becoming irrevocable. As noted above, the UTC provides that upon the creation of an irrevocable trust or upon a revocable trust becoming irrevocable, whether by death of the settlor or otherwise, the trustee has an affirmative duty immediately to notify the beneficiaries of the existence of the trust, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument,[811] and of the right to the accountings or "reports" of the trustee.[812] After accepting a trusteeship, the trustee should notify the beneficiaries of the acceptance and of the trustee's name, address, and telephone number.[813] Under the UTC, notice to current beneficiaries and to the presumptive remaindermen, *i.e.*, the "qualified beneficiaries," would satisfy these notice requirements.[814]

The Restatement (Third) of Trusts catalogs the "initial information" that the trustee should

[808]UTC § 603(b) (providing that to the extent a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor). *See also* §8.11 of this handbook (the duties of a trustee of a revocable inter vivos trust). Note, however, that the commentary accompanying UTC § 603(b) asserts that upon the incapacity of the settlor the other beneficiaries "are entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under §813." That having been said, "because …[UTC § 603]…may be freely overridden in the terms of the trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust."

[809]Restatement (Third) of Trusts §74 cmt. e.

[810]*See generally* Bogert §961. *See also* UTC §813(a) (providing that unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust). A trustee upon request shall promptly furnish to the beneficiary a copy of the trust instrument. UTC §813(b)(1).

[811]*See generally* 3 Scott & Ascher §17.5.

[812]The UTC §813(b)(3) provides that this shall be done within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust or within sixty days after the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise.

[813]UTC §813(b)(2) provides that this shall be done within sixty days after the trusteeship is accepted. *See generally* Bogert §961. *See also* §3.4.2 of this handbook (acceptance or disclaimer of the trusteeship); §3.4.4.3 of this handbook (successor trustees).

[814]*See* UTC §103(12) (defining the term *qualified beneficiary*); UTC §813(b) (describing the events that trigger an affirmative duty on the part of the trustee to supply qualified beneficiaries with information).

furnish the "fairly representative" beneficiaries of a trust that is irrevocable, or has just become so:[815]

- "The existence, source, and name (or descriptive reference) of the trust;[816]
- The extent and (present or future, discretionary or conditional, etc.) nature of their interests;[817]
- The name(s) of the trustee(s), contact and compensation information, and perhaps the roles of the cotrustees;[818] and
- The beneficiaries' right to further information, including the usual right to request information concerning the terms of the trust or a copy of the trust instrument."[819]

A beneficiary might not qualify as "fairly representative" at the time when an irrevocable trust is funded or when a revocable trust becomes irrevocable. Should the beneficiary, however, later achieve "fairly representative" status, perhaps because of the death of a "higher" remainder beneficiary, the trustee would have a duty to furnish the beneficiary with the initial information described immediately above.[820] "If a beneficiary becomes currently entitled to distributions (such as by obtaining a specified age or because of another's death), or becomes eligible to receive or request discretionary distributions, or if a beneficiary ceases to be entitled or eligible to receive distributions, the trustee should appropriately inform the beneficiary."[821]

There are limits on a settlor's ability to limit the trustee's duty to keep the beneficiaries informed. Under the UTC, the settlor by the terms of the trust may not relieve the trustee of the duty to inform "qualified beneficiaries" 25 years of age or older of the existence of the trust, to provide them upon request with such accountings or "reports" as the trustee may have prepared, and to respond to their request for other information reasonably related to the trust's administration.[822] The settlor, however, by the terms of the trust may relieve the trustee of the duty to provide a beneficiary upon request with a copy of the trust instrument and the requirement that the trustee provide annual reports to the "qualified beneficiaries,"[823] a radical divergence from

[815]Restatement (Third) of Trusts §82 cmt. b.

[816]Restatement (Third) of Trusts §82 cmt. b.

[817]Restatement (Third) of Trusts §82 cmt. b.

[818]Restatement (Third) of Trusts §82 cmt. b.

[819]Restatement (Third) of Trusts §82 cmt. b. "It is appropriate, and will ordinarily be simplest, for the trustee to provide a copy of the trust instrument to fairly representative beneficiaries as a part of the initial information at the outset of administration." Restatement (Third) of Trusts §82 cmt. b.

[820]Restatement (Third) of Trusts §82 cmt. c.

[821]Restatement (Third) of Trusts §82 cmt. c.

[822]*See* UTC §105(b)(8).

[823]*See* UTC §105 cmt. *See also* Taylor v. Nationsbank Corp., 481 S.E.2d 358 (N.C. App. 1997). *But see* Fletcher v. Fletcher, 253 Va. 30, 480 S.E.2d 488 (1997) (although the settlor may have orally asked the

traditional trust principles that unsurprisingly is not without its detractors.[824] "The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration."[825] Certainly, as we have already discussed, the "provisions of the UTC that codify the trustee's duty to inform and report are among the most controversial portions of the UTC and, as a result, have become the least uniform among jurisdictions that have enacted the UTC."[826]

At the other end of the spectrum, the UPC encountered resistance when it came to limiting a trust beneficiary's access to the entire trust document. Section 7-303(b) of the UPC provided that "[u]pon reasonable request the Trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest …." In 2010, §7-303(b) was purged from the model UPC. The Restatement (Third) of Trust falls generally in line with the UTC in permitting a settlor in the terms of the trust to limit the trustee's duty to inform beneficiaries under the age of 25,[827] suggesting, however, that "a court that is troubled about such specificity and arbitrariness as a matter of common-law principle might consider a more flexible approach to reconciling" the "policy favoring a settlors' freedom of disposition" with "the policies of facilitating enforcement and limiting dead-hand control."[828]

While the Restatement (Third) of Trusts would tolerate some alteration in the amount of information a trustee must give to the beneficiaries initially and on an ongoing basis, as well as some alteration in the "circumstances and frequency with which, and persons to whom, it must be given," it cautions that a beneficiary is "always entitled … to request such information … as is reasonably necessary to enable the beneficiary to prevent or redress a breach of trust and otherwise to enforce his or her rights under the trust," except, of course, when the trust is self-settled and revocable, the settlor is alive and not legally incapacitated, and the beneficiary is not the settlor.[829] Moreover, it is not just the "qualified" or "fairly representative" beneficiary who is entitled to

---

trustee not to disclose to the beneficiaries the details of the trust, the court held that a beneficiary may inspect the entire trust document, not just redacted portions).

[824]*See, e.g.*, Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

[825]UTC §105 cmt.

[826]Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Prop. Prob. & Tr. J. 373, 400 (Summer 2005). *See also* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

[827]Restatement (Third) of Trusts §82 cmt. e.

[828]Restatement (Third) of Trusts §82 cmt. e, Reporter's Notes thereto. *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

[829]Restatement (Third) of Trusts §82 cmt. a(2). *See generally* 3 Scott & Ascher §17.5; Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

informa tion.[830] As to the trustee's duty to furnish information to a beneficiary who is under a legal disability,[831] the trustee may furnish the requisite information to the beneficiary's legal or natural guardian, conservator, agent under a durable power of attorney, or such "one or more trust beneficiaries whose concerns can be expected reasonably to coincide with those of the disabled beneficiary."[832]

The UPC's now-purged trust registration requirement. When it comes to the trustee's duty to inform and account to the beneficiaries, the model Uniform Probate Code was sort of the black sheep, in large part due to its trust registration requirement. Section 7-303(a) provided that "[w]ithin 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible one or more persons who … may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address." Section 7-303(b) required the trustee "upon request" to furnish the beneficiary with a copy of the "terms of the trust which describe or affect his interest." This obligation on the part of trustees to register their trusts was the centerpiece of the UPC's system of trust-related codifications and thus indispensable to the system's internal coherence and logic. *Again, the portions of the model UPC dealing with trust administration, housed mainly in its Article VII, were purged in 2010.*

When the trustee may have a duty to give beneficiaries advance notice of an important or significant event. The trustee may have a duty to give advance notice to the beneficiaries of important or significant events affecting the trust property, such as a change in the method or rate of the trustee's compensation or an important transaction involving an asset that is difficult to value or to replace, *e.g.*, real estate or a closely held business interest.[833] Under the UTC, the trustee would have a duty to notify the current beneficiaries and the presumptive remaindermen of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer.[834] A self-dealing transaction that involves the underlying trust property also

---

[830]Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 (1999).

[831]Restatement (Third) of Trust §82 cmt. a(1).

[832]Restatement (Third) of Trust §82 cmt. a(1). If, for example, two children, with more or less identical equitable interests under a trust are entitled to be furnished information about the trust on an ongoing basis, but one is a minor, ordinarily the trustee's duty to furnish information to the minor is satisfied if he furnishes only the adult child with the requisite information. If, however, the interests of the two children are in potential conflict, *e.g.,* if the two are permissible beneficiaries under a discretionary trust, *see* §3.5.3.2(a) of this handbook, then keeping just the adult beneficiary informed will not satisfy the trustee's duty to keep the minor informed.

[833]*See* UTC §813(a), (b)(4) & cmt. (suggesting that notice to qualified beneficiaries would satisfy the advance notice requirement); Restatement (Third) of Trusts §82(1)(c); 3 Scott & Ascher §17.5. *See also* Allard v. Pac. Nat'l Bank, 663 P.2d 104 (Wash. 1983) (surcharging trustee for failing to give beneficiaries advance notice of proposed sale of a parcel of real estate that was sole asset of trust); *In re* Green Charitable Trusts, 172 Mich. App. 298, 431 N.W.2d 492 (1988) (affirming trial court finding that trustee was in breach of trust for failing to inform beneficiaries of a contemplated transaction involving the trust estate).

[834]UTC §108(d).

would warrant the giving of advance notice. To the extent readily available, remainder beneficiaries, whether ascertained or presumptive, are shut out of the process, the trustee could be in breach of the duty of impartiality.[835] A trustee's duty under the default law to give advance notice to a beneficiary of a contemplated action, however, does not in and of itself afford the beneficiary a nonjudicial power to veto the contemplated action.[836] A general power in the beneficiary to veto contemplated actions of the trustee would conflict with a core principle of the default law of trusts, namely, that the trustee is not an agent of the beneficiary.[837] The source of any veto powers must be the terms of the trust.[838] The Restatement (Third) of Trusts lists some situations which could give rise to a requirement on the part of a trustee to give advance notice to qualified or fairly representative beneficiaries of a contemplated action:

- "significant changes in trustee circumstances, including changes in the identities, number, or roles of trustees or in methods of determining trustee compensation;
- decisions regarding delegation of important fiduciary responsibilities or significant changes in arrangements for delegation;
- important adjustments being considered in investment or other management strategies;
- significant actions under consideration involving hard-to-value assets or special sensitivity to beneficiaries (such as liquidating or selling shares of a closely held business or a sale or long-term lease of a major real estate holding);
- plans being made for distribution on termination or partial termination (or perhaps subdivision) of the trust; and
- other transactions or developments of which beneficiaries should be made aware and thereby allowed an opportunity to offer suggestions, comments, or information, or to request reports or accountings …."[839]

This duty to inform in advance has its limitations, particularly if the trustee is engaged in sensitive contract negotiations with third parties on behalf of the trust:

> Confidential information may take more than one form. Trustees negotiating a contract may obtain confidential information of the other party. To allow a beneficiary to see that information might be a breach of

---

[835]Restatement (Third) of Trusts §79 cmt. d. *See generally* §6.2.5 of this handbook (trustee's duty of impartiality in his dealings with the beneficiaries); 4 Scott & Ascher §20.1 (Impartiality Between Successive Beneficiaries).

[836]Restatement (Third) of Trusts §82 cmt. d.

[837]*See generally* §5.6 of this handbook (duties and liabilities of the beneficiary).

[838]*See generally* §3.2.6 of this handbook (considerations in the selection of a trustee) and §4.2 of this handbook (expressly reserved beneficial interests and powers).

[839]Restatement (Third) of Trusts §82 cmt. d.

> contract: a beneficiary having the information might wish to intervene concerning the conduct of negotiations, thereby compromising the trustees' autonomy. Trustees who own shares may receive confidential information in that capacity. If they breach confidentiality the value of the shares might be diminished: *Neagle v. Remington* [2002] 3 NZLR 827 at 32(e) per Patterson J.[840]

The Uniform Trust Decanting Act (UTDA), specifically §7(c), has an express advance-notice requirement. "Not later than [60] days" before a UTDA-authorized exercise of a decanting power, the first-trust's settlor (if alive), the first-trust's qualified beneficiaries, certain first-trust powerholders, and the fiduciaries involved with both trusts shall be given notice of the intended exercise. It goes without saying that, to the extent the equitable property rights of the nonqualified beneficiaries of the first trust could be compromised by the contemplated decanting, they too would be entitled to advance notice under general principles of equity and due process, provided what is being contemplated is in contravention of the settlor's intent as that intent has been manifested in the terms of the first trust.[841] Decanting is taken up generally in §3.5.3.2(a) of this handbook.

The trustee's duty to render accounts to the court and to the beneficiaries. Apart from the duty to provide advance notice of important or significant events, "[t]he trustee … owes his beneficiary a duty to render at suitable intervals, upon resignation or removal, and upon termination of the trust, a formal and detailed account of his receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is."[842] This we refer to as the duty to keep and render accounts, a topic that is covered next in §6.1.5.2 of this handbook.

Self-dealing transactions. The trustee's duty to inform also may be implicated when the trustee transacts with a beneficiary, a topic that is covered in §6.1.3.5 of this handbook (acquisition by trustee of equitable interest; duty of loyalty to the beneficiary in nontrust matters).

The quiet or silent trust. Is a quiet or silent trust illusory? The question is intentionally ambiguous. Is the question whether the trust itself is illusory, or just its quietness? A quiet or silent trust has been defined as "an irrevocable trust that, by its terms, directs the trustee not to inform the beneficiaries of the existence of the trust, its terms and the details of the administration of the trust."[843] South Dakota, for example, would seem to authorize such trusts by statute. See S.D. Codified Laws §55-2-13, which provides that "[t]he settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to the trust." It

---

[840]W. A. Lee, *Purifying the dialect of equity*, 7(2) Tr. Q. Rev. 14 (May 2009) [a STEP publication]. *See generally* §3.5.1 of this handbook (the trustee is a principal, not someone's agent).

[841]*See* Unif. Trust Decanting Act §7, cmt.

[842]Bogert §963.

[843]Joyce Crivellari, *Trust & Estate Insights*, May 2013 (A UBS Private Wealth Management Newsletter).

seems there are two possibilities.

The first is that S.D. Codified Law §55-2-13 means what it says, in which case a quiet or silent trust is something other than the legal/equitable relationship that is the subject of this handbook. Perhaps it is just a constructive principal/agency relationship, the "settlor" being the principal and the "trustee" being the agent. Or perhaps it is just a fancy completed common law gift to the "trustee."

The second is that a quiet or silent trust is a true trust. If that is the case, then how, as a practical matter, is the trustee to hide the existence of the trust from the beneficiary and comply with applicable tax laws?[844] Assuming that that is possible, then how is the trustee to handle a request for information from the curious beneficiary about the terms of the trust should the beneficiary somehow otherwise get wind of its existence? If the trustee lies to the beneficiary, or intentionally obfuscates, is he not committing an act of actual, or constructive, fraud against the beneficiary, such that any applicable statute of ultimate repose is tolled?[845] Finally, the trustee's duty to account is a two-edged sword. Yes, it is burdensome for the trustee. But rendering accounts to the beneficiary is also the tried-and-true vehicle for limiting the trustee's liability.

The quiet or silent trust is not to be confused with the secret (or semi-secret) trust, which is the subject of §9.9.6 of this handbook.

Countervailing considerations. It may not always be in the best interests of a beneficiary, or of his or her cobeneficiaries, for the trustee to disclose to the beneficiary confidential legal advice which counsel has rendered to the trustee. It could even be "prejudicial to the ability of the trustees to discharge their obligations under the trust."[846] This is a topic we take up in §8.8 of this handbook in our discussion of trust counsel and the attorney-client privilege.

---

[844]*See generally* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 Akron L. Rev. 659, 679 (2005) (taxation and the quiet/silent trust).

[845]*See generally* §7.1.3 of this handbook (the UTC's statute of ultimate repose).

[846]David Hayton, Paul Mathews & Charles Mitchell, *Underhilll and Hayton, Law Relating to Trusts and Trustees* §60.58 (17th ed. 2006).