

The Uniform Trust Code Clarifying and Codifying Vermont Trust Law

What is the Uniform Trust Code (UTC)?¹ The UTC is a model code for states to use to create a uniform, comprehensive, easy-to-find body of trust law. With some exceptions, it is generally a default statute that applies only when a trust is silent on a particular issue or question. Why should Vermont consider adopting the UTC? The use of trusts has become more and more common. People use trusts for many reasons, including tax planning, probate avoidance, privacy and to provide for minor children, disabled family members, or generally to provide for a surviving spouse and the next generation and beyond. Currently little black-letter law exists in Vermont about the administration of trusts, except for trusts overseen by the probate court system (mostly testamentary trusts), investments (the Uniform Prudent Investor Act), and the allocation of income and principal of a trust (the Uniform Principal and Income Act). Attorneys, trustees, beneficiaries, and third parties dealing with trusts find only minimal statutory and case law to interpret trusts, to try to fill in blanks when trusts are silent, unclear on issues, or have contradictory provisions. In the absence of Vermont statutory and case law, attorneys and others dealing with trusts, trustees, and beneficiaries must rely on secondary sources such as the *Restatement (Second and Third) on Trusts*² and *Scott on Trusts*³ when Vermont law is silent. Attorneys and professionals working with trusts every day are familiar with case law and the secondary sources of law. Individual beneficiaries and trustees and third parties dealing with trusts, however, may not be familiar with those secondary sources and currently cannot easily determine what Vermont trust law would be for many situations. In addition, in our mobile society, having a body of trust law that is similar to the law in other states would help people who move to and from Vermont by reducing the need to revise trust documents and by minimizing the need to learn a new set of trust laws in another state. According to the National Conference of Commissioners of Uniform State Laws, as of August 28, 2008, the District of Columbia and nineteen states,

including New Hampshire, Maine, and Florida, have adopted the UTC in some fashion. Four additional states, including Massachusetts, have introduced bills to adopt it.⁴

Proposed Vermont Uniform Trust Code

Since early 2007, a group of Vermont attorneys, trust officers, and bankers have met at least monthly, and most recently every second or third week, to analyze the model UTC. The first phase of the project involved understanding the UTC and comparing it to existing Vermont law. Individuals, and sometimes teams, studied and presented each article of the UTC to the full study committee.

The second phase, currently in progress, again has individual members and teams reviewing each article of the UTC with an eye toward drafting a proposed Vermont UTC (VTUTC). The review includes specific attention to how other states have revised each section of the UTC. The study committee has generally revised aspects of the UTC to codify or complement and expand current Vermont law, with some interesting exceptions that are intended to modernize Vermont's laws and integrate them within the structure of the UTC. At the time of the writing of this article, the group has finished the second phase through Article 7 and is working on Article 8. The goal is to have a proposed VTUTC ready to introduce to the legislature in the fall of 2008. The proposed VTUTC will provide a comprehensive and easy-to-find body of trust law, primarily a default statute, for individual trustees and beneficiaries, professional trustees, attorneys, and third parties dealing with trusts.⁵

Current Vermont Statutory Law on Trusts

The Vermont UTC study committee who reviewed the UTC and current Vermont law found limited Vermont trust law. The law that does exist, for the most part, is similar to the provisions of the model UTC. Therefore, very few provisions of the model UTC need to

be changed to comply with current Vermont law. Current statutory trust law is found under Chapters 105 and 117 (the Uniform Principal and Income Act) of Title 14, and Chapter 147 (the Uniform Prudent Investor Act) under Title 9 of the Vermont Statutes Annotated. Chapter 105 of Title 14 applies primarily to testamentary trusts, over which the probate courts have jurisdiction. Chapter 117 of Title 14, as the title suggests, addresses allocation of income and principal, and Chapter 147 of Title 9 provides the trustee with the standard of care and duties for investment of trust property.

Model Uniform Trust Code

The balance of this article will summarize the model UTC and discuss the revisions proposed by the VTUTC study committee. The model Uniform Trust Code (last revised or amended in 2005)⁶ was drafted by the National Conference of Commissioners on Uniform State Laws. The model UTC has eleven articles. The first article provides for general provisions and definitions. Article 2 addresses judicial proceedings, Article 3 addresses representation, and Article 4 pertains to the creation, validity, modification and termination of trusts. Article 5 addresses creditor's claims and spendthrift and discretionary trusts. Revocable trusts are provided for in Article 6. Articles 7 and 8 address trustee appointment, acceptance, duties, and powers. Article 9 is the Uniform Prudent Investor Act (UPIA). Vermont has already adopted the UPIA, which is codified as 9 V.S.A. §§ 4651-4662. Article 10 deals with trustee liability and the rights of persons dealing with trustees. Finally, Article 11 is a catchall article with miscellaneous administration provisions.

Article 1: General Provisions and Definitions

Article 1 is an introductory article. It provides for the title and scope of the UTC. Under section 102, the UTC applies to many types of trusts. Under Section 103, Article 1 defines many of the terms used in the UTC. One of the more controversial provisions of the whole

UTC is Section 105, which provides the default and mandatory rules. The terms of the trust prevail except for certain mandatory rules including the requirements for creating a trust, the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and interests of the beneficiaries, subject matter jurisdiction of the courts, and statutes of limitations. One of the most controversial provisions of Section 105 is whether the duty to notify certain beneficiaries of a trust of the existence of the trust and to provide requested reports should be a default or mandatory provision. As originally drafted, the UTC provided that the duty to notify and provide requested reports to certain beneficiaries was mandatory. This provision of the model UTC has been amended and may now be a default or mandatory provision. A number of states, including New Hampshire,⁷ have amended or changed the UTC to make this duty a default provision. The VTUTC study committee has considered such a move, but has not yet determined that the duty to provide notice and requested reports to certain beneficiaries should be a default provision.

Article 2: Judicial Proceedings

Article 2 addresses the general role of the court in trust administration, including subject matter jurisdiction and venue. The VTUTC study committee tentatively decided that the probate courts be given exclusive jurisdiction of proceedings brought in Vermont by a trustee or beneficiary concerning the administration of a trust. Probate courts already have considerable expertise with regard to trust administration, and, given the ability under the UTC for trustees and beneficiaries to confirm desired actions with a court ruling, probate courts can act expeditiously and with less expense to the parties on these requests. This is a change from current Vermont law but continues a trend, such as the recent enactment of legislation authorizing replacement of a trustee in probate court.⁸

Article 3: Representation

This article addresses representation of trusts and beneficiaries. According to the UTC Article 3 comments, "Representation is a topic not adequately addressed under trust law of most States."⁹ This article addresses different types of representation, including representation of a holder of a general power of appointment and of fiduciaries

(including of an estate, guardianship, and trust).¹⁰ The VTUTC study committee tentatively decided that Article 3 be adopted generally as is.

Article 4: Creation, Validity, Modification, and Termination of Trust

Article 4 would codify the methods for creating a trust (Section 401) and the requirements for creation (Section 402). Section 403 addresses the validity of trusts created under laws of jurisdictions other than Vermont. Trust purposes are covered under Sections 404 and 405. Article 4 also covers the validity of a number of types of trusts, such as trusts created for the care of an animal while the animal is alive (Section 408) and non-charitable trusts without an ascertainable beneficiary (Section 409). Sections 410 through 416 address modification and termination of trusts, including modification or termination by consent (Section 411), due to unanticipated circumstances or inability to administer the trust effectively (Section 412), or because the trust has become uneconomic (Section 414). Section 415 allows for trust reformation to correct a mistake and Section 416 allows for modification to achieve the settlor's tax objectives. This article also allows for division or combination of trusts in certain circumstances, with proper notice to certain beneficiaries (Section 417).

Article 5: Creditor's Claims; Spendthrift and Discretionary Trusts

"This article addresses the validity of a spendthrift provision and the rights of creditors."¹¹ Under Section 501, absent an applicable spendthrift provision, the court may authorize a creditor or assignee of a beneficiary to attach the present or future distributions to or for the benefit of a beneficiary. No statutory Vermont law addresses this, and the case law is not directly on point. This provision would give creditors the right to attach distributions for the benefit of a beneficiary, not just distributions made directly to the beneficiary. Section 502 provides the requirements to create a spendthrift provision. Section 503 excepts certain creditors, including a beneficiary's child, spouse, or former spouse who has a judgment or court order, a state or the United States with a claim, to the extent allowed by state or federal law, from spendthrift provisions. The study committee tentatively decided that a spendthrift provision would be unenforceable against a beneficiary's

child but not against a beneficiary's spouse or former spouse. Section 504 makes the protection of distributions from creditors the same whether the distributions are discretionary or subject to a standard.¹² The protection applies even if the trustee has abused the discretion.¹³ To the extent the trustee has not complied with the standard or has abused the discretion, Section 504, however, provides protection to certain creditors (the beneficiary's child, spouse, or former spouse).¹⁴ Section 505 provides that regardless of whether there is a spendthrift provision, property in a revocable trust and property in an irrevocable trust to the extent of the settlor's benefit are subject to the settlor's creditors' claims. The study committee tentatively decided that the section would not apply to "special needs" trusts established to allow a disabled person to retain the benefit of an inheritance or insurance settlement despite receiving government support. In addition, under Section 506, regardless of whether there is a spendthrift provision, creditors may reach mandatory distributions of the beneficiary if the trustee fails to make the distributions within a reasonable time. Finally, Section 507 makes it clear that the trust property is not subject to the personal obligations of the trustee even if the trustee is insolvent or bankrupt.

Article 6: Revocable Trusts

Article 6 addresses the unique characteristics of, and issues regarding, revocable trusts. Section 601 provides that the capacity required to create, amend, revoke, or add property to a revocable trust is the same as that required to make a will. Section 602 provides that a trust is revocable unless the trust expressly provides that it is irrevocable. It also addresses who may revoke the trust, and to what extent, when the trust is funded by more than one settlor. The UTC addresses community property but is silent about tenancy by the entirety. The VTUTC group considered the special tenancy by the entirety ownership for spouses in Vermont and tentatively decided that the revocation of the trust to the extent the trust property consists of tenancy by the entirety property requires joint action of both spouses. Section 603 makes it clear that while the trust is revocable the settlor controls the beneficiaries' rights and the trustee's duty is owed solely to the settlor. Finally, Section 604 provides a statute of limitations for filing a judicial proceeding to contest the validity of a

revocable trust at the settlor's death.

Article 7: Office of Trustee

Article 7 provides default procedures for acceptance, declination, and resignation of a trustee from a trusteeship, removal of a trustee, when a vacancy occurs, how successor trustees are appointed, and addresses compensation of a trustee and reimbursement of expenses. Under Section 707, Article 7 also states the duty of a trustee to protect trust property until the property is delivered to a successor trustee or other person entitled to it.

Article 8: Duties and Powers of Trustee

Article 8 provides for the general duties and powers of the trustee. Article 8 trustee duties expand the duties provided for investments under the UPIA¹⁵ to overall trust administration. These duties include the duty to act in good faith, the duty of loyalty and the duty to act impartially when there are two or more beneficiaries. This article also addresses trustees with special skills and delegation by a trustee.¹⁶ Under Sections 809 and 812, the trustee must take reasonable steps to take control of and protect trust property, including from a former trustee, and under Section 810, must keep adequate records and keep the trust property separate from the trustee's own property. The duty to inform and report under Section 813 is another controversial provision of the UTC. It requires the trustee to keep certain beneficiaries reasonably informed about the administration of the trust,¹⁷ to provide notice to certain beneficiaries upon acceptance of the trusteeship and when the trust becomes irrevocable or the trustee has such knowledge within a certain period of time,¹⁸ and to respond to a request of a beneficiary for a copy of the trust instrument.¹⁹ Originally Section 813(a) and 813(b)(2) and (3) were mandatory provisions under Article 1, Section 105. The model UTC has been revised to make these sections mandatory or default provisions. The VTUTC study committee has considered but not yet determined that these be default provisions in the event the trust is silent. Under Sections 814, 815, and 816, Article 8 gives the trustee certain discretionary, general, and specific powers to administer the trust. Finally, Section 816 provides a framework for the trustee to distribute the trust property upon termination of the trust.

Article 9: Uniform Prudent Investor Act

Article 9 incorporates the UPIA, already adopted by Vermont as Chapter 147 of Title 9 of the V.S.A. The presumption of the model UTC is that states that have already adopted the UPIA will insert it into Article 9. This would move and place the UPIA with all the other Vermont trust law, presumably as an additional chapter under Title 14, Decedent's Estates and Fiduciary Relations, from its current isolated and separate location in Title 9.

Article 10: Liability of Trustees and Rights of Persons Dealing with Trustees

Except for Sections 1010–1013, Article 10 provides the default provisions for remedies and damages for a breach of trust, damages in absence of a breach, the authority of the court to award costs and expenses, including reasonable attorney's fees, of any party, to be paid by another party or the trust, and provides a statute of limitations for bringing an action against a trustee. Mandatory Section 1010 limits the personal liability of a trustee except when the trustee is personally at fault. Mandatory Section 1012 provides third parties who deal with or assist the trustee in good faith and without knowledge with protection from liability. Mandatory Section 1013 provides a trustee's certification third parties may rely on to determine whether the trustee has the authority and power to act. This provision is similar, although not identical, to 27 V.S.A. § 352 relating to the conveyance of real estate by a trustee.

Article 11: Miscellaneous Provisions

Article 11 provides a catchall provision that includes the effective date of the UTC and what, if any, existing state laws are to be repealed.

Conclusion

The UTC provides a comprehensive, broad code of trust law to help people dealing with trusts in all capacities, as beneficiaries, trustees, settlors, attorneys, and third parties. Because people use trusts more and more for a wide array of reasons, having an easy-to-find body of trust law all in one place is increasingly important. As a mobile society, having a more or less uniform body of trust law from state to state is also important, so that trusts created in one state do not have to be completely rewritten when the settlor moves to

another state or the situs of the trust is changed from one state to another. Within the past few years, nineteen states and the District of Columbia have adopted the UTC. Four other states have introduced the UTC for adoption. The trend in trust law is toward adopting the UTC. Vermonters would benefit from the adoption of a VTUTC for all these reasons, but especially to make it easier for people dealing with trusts to find and understand Vermont trust law.

Catherine Richmond, Esq., is an attorney at Stebbins Bradley Harvey Miller & Brooks, PA, in Hanover, New Hampshire. She is admitted to practice law and the firm has offices in both Vermont and New Hampshire.

¹ Uniform Trust Code (2005), at www.utcproject.org (August 28, 2008).

² RESTATEMENT (THIRD) OF TRUSTS (TENTATIVE DRAFT NO. 1, APPROVED 1996), RESTATEMENT (SECOND) OF TRUSTS (1959).

³ AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASHER ON TRUSTS, Successor Edition to Scott on Trusts, (5th ed. 2007).

⁴ Uniform Trust Code (2005), at www.utcproject.org (August 28, 2008).

⁵ The study group meetings are held in Montpelier. People interested in attending the meetings may contact Dan Kimbell at dkimbell@passumpsicbank.com for a schedule of upcoming meetings.

⁶ Uniform Trust Code (2005), at www.utcproject.org (August 28, 2008).

⁷ See N.H. Rev. Stat. Ann. § 564-B:1-105 (2007).

⁸ See generally 14 V.S.A. §§ 2301-2329; 14 V.S.A. § 2314.

⁹ Uniform Trust Code, Art. 3 cmt. (2005).

¹⁰ *Id.*

¹¹ Uniform Trust Code, Art. 5 cmt. (2005).

¹² Uniform Trust Code, § 504 cmt. (2005).

¹³ See Uniform Trust Code, § 504(b)(2) (2005).

¹⁴ See *id.* at § 504(c).

¹⁵ See, e.g., 9 V.S.A. §§ 4651, 4652, 4655 - 4567, 4659

¹⁶ Uniform Trust Code, §§ 806, 807.

¹⁷ *Id.* at § 812(a).

¹⁸ *Id.* at § 812(b)(2),(3).

¹⁹ *Id.* at § 812(b)(1).

