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Can You Keep A Secret? Working With Silent Trusts

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HISTORICAL ROLE OF TRUSTS

Trusts historically have provided a number of benefits to settlors and beneficiaries. Through a trust, a settlor transfers property to a trustee, who manages and controls the property, for the benefit of the beneficiaries, who retain the economic interest in the trust. The trustee is a fiduciary and is accountable to the beneficiaries. The beneficiaries enjoy the use of the trust property (subject to the trustee's discretion as provided by the settlor in the trust instrument) without the burden of investing and managing the trust property. In this way, trusts separate the benefits and burdens of property ownership.

Irrevocable trusts provide transfer tax planning opportunities to minimize estate and gift taxes. To a certain extent, irrevocable trusts also offer creditor protection, such that a beneficiary's interest may be pro-

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tected from the beneficiary's creditors, if the trust agreement provides that beneficiary's interests are inalienable and distributions are subject to the discretion of the trustee. Irrevocable trusts also can provide privacy protection; unlike a will, which becomes a public record when it is filed in probate court after the testator's death, trusts are not available to the general public and can remain private.

HISTORICAL ROLE OF TRUSTEES

Trustees of irrevocable trusts have an affirmative duty to inform (some) beneficiaries of (some) information about the trust, and beneficiaries have the right to demand additional categories of information from their trustees. At common law, a trust settlor generally may not, as a matter of public policy, waive the trustee's duty to inform or "account," to beneficiaries.¹ These duties of the trustee and rights of the beneficiary are intended to ensure that trust beneficiaries have the information necessary to protect their beneficial interests in the trust. In some states, the settlor is able to limit or waive this requirement in the trust instrument (as discussed in connection with the Uniform Trust Code, below); in other states, this requirement is not waivable as a matter of public policy.

Courts and commentators have viewed a transfer of property to a transferee with an express disclaimer of any duty to account or provide information to any third party (such as the putative beneficiary) as evidence of an intent to make an outright gift to the transferee rather than to a trust for the benefit of another. The traditional view of the trustee's duty to inform and account is expressed in Bogert's Trusts and Trustees, §965: "A trust necessarily grants rights to the beneficiary that are enforceable in equity. If the trustee cannot be called to account, the beneficiary cannot hold the trustee to any standard of conduct with regard to the trust property or sue for breach of trust. Rather, without accountability, the trustee may

¹ See *Briggs v. Crowley*, 224 N.E.2d 417 (Mass. 1967); *Wood v. Honeyman*, 169 P.2d 131 (Or. 1946).

ignore the terms of the trust and do as the trustee likes with the trust property, with the beneficiary and the court being unable to determine whether there has been a breach of trust. Consequently, as a practical matter the beneficiary and the court will be unable to hold the trustee liable for breach, without regard to how clearly and how significantly the trustee may have breached its trust.”

TRUSTEE’S AFFIRMATIVE DUTY TO INFORM

Restatement (Second) of Trusts

At common law, the scope of information that the trustee must provide to the beneficiaries without a request varies. The Restatement (Second) of Trusts suggests that a trustee does not generally have a duty to provide information to the beneficiaries in the absence of a request, except when the trustee is engaging in a self-dealing transaction, or to provide material facts affecting the interest of the beneficiary that the trustee knows the beneficiary does not know and which the beneficiary needs to know for the beneficiary’s protection in dealing with a third person with respect to the beneficiary’s interest.² Even where the trustee acts in good faith in not disclosing material facts to the beneficiaries, in the belief that it is in the best interests of the beneficiaries to withhold the information, the failure to disclose has been found to be a breach of fiduciary duty.³

Restatement (Third) of Trusts

The Restatement (Third) of Trusts⁴ provides a more comprehensive scope for information the trustee must provide to beneficiaries without a request: (1) the existence of the trust; (2) their status as beneficiaries; (3) their right to obtain further information; (4) basic information about the trusteeship (including contact information for the trustee); (5) significant changes in their beneficiary status; (6) changes of trustee; and (7) significant developments involving the trust and its administration, including material information needed to protect their interests.

TRUSTEE’S DUTY TO RESPOND TO REQUESTS FOR INFORMATION

Whether or not the law of a particular state imposes an affirmative duty on the trustee to provide informa-

tion to beneficiaries, every U.S. jurisdiction imposes a duty on trustees to respond to requests for information from trust beneficiaries for information material to their trust interests.⁵

Several state courts have held that the trustee’s duty to inform beneficiaries of information material to their trust interests and to respond to beneficiaries’ requests includes an obligation to provide information and documents that would ordinarily be protected from disclosure by the attorney-client privilege. In states that have found a so-called fiduciary exception to the attorney-client privilege, trustees may be required to produce communications between the trustee and trustee’s attorneys concerning the administration of the trust. This exception to the privilege is usually based on the notion that the legal advice is rendered for the benefit of the trust and in seeking it, the trustee is acting in its fiduciary capacity, that the beneficiary is the “real client,” or that the trustee and beneficiary should, in the absence of any adversity at the time of the communication, have identical interests.⁶

UNIFORM TRUST CODE

Introduction

The drafters of the Uniform Trust Code (UTC) acknowledge that the duty to keep the beneficiaries of a trust reasonably informed of the trust’s administration is a fundamental duty of the trustee. At the same time, the drafters admit the desire of some settlors to keep knowledge of a trust’s bounty from younger beneficiaries until they have reached an age of maturity and self-sufficiency. As such, although the UTC imposes broad disclosure requirements on the trustee to the “qualified beneficiaries” of the trust, the enacting jurisdiction may choose to allow the settlor to override these requirements in the trust instrument. In addition, the concept of a “qualified beneficiary” was developed to avoid involving those beneficiaries whose interests are remote and contingent, as those beneficiaries are “not likely to have much interest in the day-to-day affairs of the trust.”⁷

A qualified beneficiary is a beneficiary who, on the date the beneficiary’s qualification is determined: (1) is a distributee or permissible distributee of trust income or principal, (2) would be a distributee or permissible distributee of trust income or principal if the

² Restatement (Second) of Trusts, §173 cmt. d (1959).

³ *In re Estate of Halas*, 568 N.E.2d 170 (Ill. App. Ct. 1991).

⁴ Restatement (Third) of Trusts, §82 (2007).

⁵ Restatement (Second) of Trusts, §173 (1959).

⁶ See, e.g., *Riggs Nat’l Bank of Washington v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976); *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055 (Ariz. Ct. App. 2014); Restatement (Third) of Trusts, §82, cmt. f (2007).

⁷ Comment to UTC §103.

interests of the distributees described in (1) terminated on that date without causing the trust to terminate, or (3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. In essence, the qualified beneficiaries are those beneficiaries currently eligible to receive a distribution from the trust and the “first-line remaindermen.”

Section 813 of UTC sets forth the duty to inform and report and imposes several separate but related duties on the trustee. However, §105 of the UTC also provides for default rules (those that apply if the trust instrument is silent) and mandatory rules (those that cannot be altered by the trust instrument), which allow the enacting jurisdiction to opt in or out of the mandatory nature of the disclosure requirements. Notably, §105(b)(8) and §105(b)(9) of the UTC, which relate to certain provisions of the disclosure requirements (asterisked below), were expressly made optional by a 2004 amendment to the UTC and appear in brackets in the UTC.

§813: Duty to Inform and Report

Pursuant to §813 of the UTC:

Duty to Keep Beneficiaries Reasonably Informed. 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.

***Duty to Respond to Requests for Information.** Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.

Duty to Provide Trust Instrument. Upon request of a beneficiary, a trustee shall promptly furnish to the beneficiary a copy of the trust instrument.

***Duty to Notify Acceptance of Trusteeship.** Within 60 days after accepting a trusteeship, a trustee shall notify the qualified beneficiaries of the acceptance and of the trustee’s name, address, and telephone number.

***Duty to Notify Beneficiaries of Trust Existence and Beneficiary Rights.** Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, a trustee shall notify the qualified beneficiaries of the trust’s existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee’s report.

Duty to Notify a Change in Trustee Compensation. A trustee shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee’s compensation.

Duty to Account. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

Beneficiary Waiver. A beneficiary may waive the right to a trustee’s report or other information otherwise required to be furnished under this section (and may withdraw a waiver previously given).

Effective Date. The “Duty to Notify Acceptance of Trusteeship” and “Duty to Notify Beneficiaries of Trust Existence and Beneficiary Rights” described above do not apply to a trustee who accepts a trusteeship before the effective date, to an irrevocable trust created before the effective date, or to a revocable trust that becomes irrevocable before the effective date.

§105: Default and Mandatory Rules

Pursuant to §105 of the UTC:

Default Rule. Except as otherwise provided in the terms of the trust, the applicable trust code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

Mandatory Rules Related to Disclosure. If a state has enacted its version of the Uniform Trust Code with §105(b)(8) and §105(b)(9) as proposed, the trust terms governing the trustee’s duties to disclose information to the beneficiaries prevail over any provision of the applicable trust code, except for the following duties that are not waivable by the settlor: (a) the duty to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, the identity of the trustee, and of their right to request trustee’s reports;⁸ and (b) the 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 the trust.⁹

STATE RESPONSE

Although the UTC has now been adopted in 33 jurisdictions, no two states have enacted an entirely

⁸ UTC §105(b)(8).

⁹ UTC §105(b)(9).

identical version of the provisions related to the duty to inform and report. Many UTC jurisdictions have not adopted the mandatory provisions of §105(b)(8) and §105(b)(9), thereby permitting the settlor to override in the trust instrument the default statutory duty to disclose. However, given the relatively recent effective date of many state trust codes modeled on the UTC, most existing trust instruments do not expressly override the duty to disclose, thus still subjecting the trustee to the disclosure requirements.

It is common, however, for state statutes that allow for silent trusts to require that the trustee report to a third person (referred to in these materials as a “beneficiary surrogate” or simply as a “surrogate”), so that the beneficiary surrogate may receive accountings and enforce the beneficiary’s rights on the beneficiary’s behalf during the “silent period.”

WHAT IS A SILENT TRUST?

A silent trust generally is an irrevocable trust in which the settlor waives entirely, or severely limits, a trustee’s duty to inform the beneficiaries of the existence of the trust, or to notify beneficiaries of other trust information. More specifically, a 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.”¹⁰ Ultimately, silent trusts represent a departure from the common law duties imposed on trustees and the general understanding of the fiduciary relationship between a trustee and the beneficiaries of the trust.

Identification of Beneficiaries. As with any trust, beneficiaries of silent trusts are identified in the trust instrument, either by name or by class description. However, the extent to which any one or more of them will be notified of information relating to the trust may vary. How much information is provided, and to which beneficiary, generally depends on the terms of the trust instrument and the law of the jurisdiction that governs the administration of the trust.

Information Disclosed. Depending on the settlor’s directions in the trust instrument and the requirements of the governing law, the limitations placed on the trustee’s duties (or authority) to disclose may vary. For example, the trustee may be (1) required to disclose trust information to current beneficiaries, but not to contingent beneficiaries; (2) required to provide a copy of the trust instrument, or any other trust infor-

mation, to a beneficiary **only** upon request (i.e., the trustee is prohibited from volunteering trust information to any beneficiary); (3) prohibited from providing a copy of the trust instrument, or any other trust information, to a beneficiary, even upon a beneficiary’s request; (4) permitted to provide information only to certain beneficiaries; or (5) permitted to provide information only to a “surrogate” specifically designated under the trust instrument to receive information regarding the administration the trust on behalf of the beneficiary.

Period of Nondisclosure. The period of nondisclosure or “silent period” varies, but usually will extend until a beneficiary reaches a certain age (e.g., age 25, in jurisdictions that adopt the UTC), or may extend for a defined length of time (e.g., a “period [of time]” for silent trusts created under the laws of the State of Delaware).

IS A SILENT TRUST RIGHT FOR MY CLIENT?

U.S. individuals are wealthier than ever, yet common law and statutes of many states have not kept pace with this wealth, or the changes in the attitudes, behaviors, goals, or needs of high net worth individuals, or even advances in technology. All of these factors create desires, reasons, and even needs, for waiting longer to disclose family wealth to younger family members, while tax and estate planning considerations continue to encourage intergenerational transfers sooner rather than later.

Despite certain concerns raised for silent trusts, increasing numbers of states are enacting silent trust statutes, and increasing numbers of individuals are creating them. And, for individuals who want to transfer wealth to their children but do not want to talk to them about it, silent trusts can be a way to bridge the gap. Silent trusts also allow individuals to engage in tax planning early on to achieve substantial tax savings.

Silent trusts, and whether they should be included as part of an individual’s estate plan, are controversial among legal and financial advisors. Indeed, as states debated the UTC, the differing views about the advantages and disadvantages of mandatory disclosure to beneficiaries became abundantly clear. According to comments to §105 of the UTC that were added as part of the 2004 amendments, the subsections on a trustee’s duty to inform and report “have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code” and brackets were placed around §105(b)(8) and §105(b)(9) “out of recognition that there is a lack of consensus on the extent to which a settlor ought to be

¹⁰ See Charles E. Rounds, Jr. & Charles E. Rounds, III, *Loring and Rounds: A Trustee’s Handbook* (2016), §6.1 — General Duties, §6.1.5.1 — Duty to Provide Information, at p. 554, citing (at n. 840), Joyce Crivellari, *Trust and Estate Insights*, May 2013 (A UBS Private Wealth Management Newsletter).

able to waive reporting to beneficiaries.”¹¹ Accordingly, it is not surprising that states that have enacted the UTC have taken a variety of different approaches to reconciling a settlor’s concerns (e.g., about privacy) with the risk of trustee abuse in administering silent trusts. Accordingly, it is not likely that states that have enacted UTC §105(b)(8) and §105(b)(9) will do so with any uniformity.

Highlighted below are reasons commonly cited by advisers for why a client should at least consider create a silent trust (or not) and the potential benefits (and potential detriments) of them.

Reasons to Create a Silent Trust

Many settlors create trusts because they perceive that their children, and potentially their more remote descendants, are not prepared to handle significant wealth if distributed to them outright. Families also create trusts for privacy reasons, as a wealth preservation/asset protection tool, and also for the tax planning benefits trusts offer. Families who create trusts as silent trusts do so for similar reasons, but often have additional reasons for including the nondisclosure feature that silent trusts offer. Some of the top reasons cited for creating silent trusts are listed below.

Silent Trusts Protect Against Perceived Unpreparedness and Immaturity. Many wealthy families feel a strong responsibility to their children, and most believe that leaving wealth to their children is important. Yet, many worry about the effect that a substantial legacy may have on their children’s personal and professional lives and, therefore, a majority have not engaged their children in discussions about the families’ wealth and the responsibilities it brings.

Silent Trusts Promote Fiscal and Social Responsibility. Many settlors want to promote fiscal and social responsibility among their children, and are legitimately concerned that if their children have knowledge of a large trust created for their benefit, it may negatively impact their work ethic, they may lose motivation to work hard and be productive, and may turn instead to a life of greater leisure. Essentially, if a beneficiary knows his or her future is financially secure, he or she may not pursue a productive and financially secure lifestyle. A beneficiary who receives trust funds too early, or becomes aware of a substantial trust for his or her benefit too soon, might “grow up feeling dependent and conflicted” or “fail to develop their natural ambition and desire for independence.”¹²

Silent Trusts Are a Preferred Alternative to Incentive Trusts. In general, incentive trusts include

distribution provisions that are intended to inspire a trust beneficiary to behave in a certain way or achieve goals that are highly valued by the settlor.¹³ Incentive trusts are similar to silent trusts in that they are geared toward counteracting the reaction of a beneficiary when he or she learns that they are a beneficiary of a trust with significant wealth, with that reaction being that the beneficiary loses incentive to be financially independent.¹⁴ However, incentive trusts may fall short of a settlor’s intended objectives, and also may be too inflexible or too difficult to draft to anticipate all possible circumstances. Those who advocate silent trusts take the position that simply **not** disclosing the trust’s existence to a beneficiary is a better means of accomplishing the settlor’s goals (i.e., to motivate a beneficiary or, put another way, not create a situation that will cause the beneficiary to lose motivation to become a productive citizen). A further benefit to silent trusts not offered by incentive trusts is that a silent trust provides the settlor with an opportunity to prevent a demanding beneficiary from making unreasonable information, investment, or distribution demands from a trustee — at least for a period of time.

Silent Trusts Promote Wealth Preservation/Asset Protection. Some settlors believe that the less a child knows about the family wealth (or the child’s own inheritance), the less likely the child will be subject to frivolous lawsuits, undesirable friends, identity theft, and even kidnapping. If a beneficiary has emotional or psychological issues, drug problems, a troubled marriage, or creditor risks, a settlor may prefer that the beneficiary be unaware of the trust and unable to request and access trust funds to perpetuate these circumstances and deplete trust funds for unintended purposes.

Privacy Concerns. Privacy concerns are increasingly cited for reasons to create trusts as silent trusts. Some wealthy parents have not disclosed wealth to their children because they are worried about family privacy and fear their children will discuss family wealth publicly.¹⁵ For example, the rise in social media has generated serious concerns among some settlors. A young beneficiary who carelessly publicizes his or her wealth, whether via social media or by carelessly leaving trust statements in plain view for friends to see, needlessly expose themselves to frivolous lawsuits and identity theft. High net worth indi-

¹¹ Comment to UTC §105.

¹² See Donald D. Kozusko, *In Defense of Quiet Trusts*, *Trusts & Estates*, at 24 (Mar. 2004).

¹³ See generally, Nancy G. Henderson, *Managing the Benefits and Burdens of Inherited Wealth and Incentive Trusts*, *The Practical Lawyer* (Sept. 2001); see also Nancy G. Henderson and Eric A. Baggett, *Drafting and Administering Trusts With Incentive Provisions*, ALI-CLE (June 2015).

¹⁴ *Id.*

¹⁵ See U.S. Trust, *2012 U.S. Trust Insights on Wealth and Worth* (2012).

viduals and, in particular, those in the public eye, have significant presence in social media and, therefore, may be at a much higher risk for security attacks (e.g., credit card fraud, tax return hijacking, robbery, and theft). For these individuals, if the beneficiary knows of his or her wealth, so may the public, and the settlor may wish to create a trust as a silent trust to minimize the risks attendant to the publicity of a beneficiary's wealth. If a beneficiary does not know the trust exists, his or her friends on Facebook won't know either.

Cyberattacks in the form of client impersonation also could be avoided where a beneficiary does not know of significant inherited wealth and, therefore, is without the ability to disclose it. Criminals can gain significant information about a high net worth beneficiary from internet research, social media, and shrewd tactics to "friend" or engage the beneficiary on multiple social media platforms.¹⁶ These stealth investigations enable phishing attacks against beneficiaries and in turn can lead to an attacker taking over a beneficiary's online financial accounts (and possibly online trust accounts made available to the beneficiary), fraudulently obtaining credit in the beneficiary's name, and even sending spoofed asset transfer requests to the beneficiary's family office.¹⁷ When wealth inherited by a beneficiary remains silent for a period of time, the beneficiary is less likely to attract these kinds of attacks. This may minimize the risks to the beneficiary, the beneficiary's family and family office (if any), and other, unrelated families of high net worth. These risks make keeping wealth, and trusts holding significant wealth, no longer just about making sure a beneficiary is productive, but also about security, and protecting the privacy and wealth of generations of families.

Increased Risks for Family Offices. Just like a beneficiary's disclosure of his or her wealth, or access to it through a substantial trust created for his or her benefit (whether that disclosure is intentional or unintentional) can create the personal risks for the beneficiary (described above), that disclosure also can create significant risks for a family office that manages the wealth of the beneficiary, his or her family, and potentially many other family office clients. This is increasingly relevant given the proliferation of multi-family offices in recent years, and families that rely on them to plan for, manage, and protect their wealth. A beneficiary's knowledge of his or her wealth, and even the inadvertent disclosure of it (whether to younger, less mature family member beneficiaries, or by tweeting to the general public) can increase the visibility of an otherwise low-key family office and its clients.

¹⁶ Jed Davis, *Cybersecurity for Family Offices*, WealthManagement.com (Feb. 24, 2017).

¹⁷ *Id.*

Tax Reasons. Many settlors are motivated by tax reasons to create trusts during their lifetimes for the benefit of their heirs, often times making gifts in trust to the extent permitted without incurring gift or generation-skipping transfer tax. The issue for many settlors, however is the fact that once a lifetime trust is created and funded (with potentially significant wealth), the settlor's children or other heirs are notified of the transfer, if not immediately, then at least upon attaining age 18. For many settlors, this is a reason **not** to transfer wealth in trust for their children. Specifically, settlors express the concerns noted above associated with creating trusts for the children, and having their children know about the wealth that has been set aside for them. Therefore, while the primary reason for a settlor creating a trust may be for transfer tax reasons, the settlor is not also necessarily keen on the concept of their child knowing about the trust at an early age.

Benefits That Silent Trusts Offer

Permits Settlers to Engage in Tax Planning that Might Not Otherwise Happen. Sound estate planning requires that individuals engage in wealth transfer planning during life by transferring assets to irrevocable trusts, and trust law traditionally mandates that the trustee disclose to the beneficiary the trust's existence, and other detailed information about the trust. However, some settlors are concerned that disclosing the existence of the trust to the beneficiary will diminish the beneficiary of at least some, or possibly all, of any drive the beneficiary may have had. This often is a reason why some engage in no lifetime planning, and disclose details of their estate plans to their heirs only at death.

Silent trusts can benefit the settlor who wants to transfer wealth during his or her lifetime to maximize tax planning, but does not want his or her child, as a beneficiary of an irrevocable trust funded with the settlor's gift and generation-skipping transfer tax exemption, to know about the inherited wealth right away.

Permits Settlers to Adjust Tax Planning Done Too Soon. During 2012, many settlors rushed to engage in wealth transfer planning and created irrevocable trusts for the benefit of their heirs to avoid the looming reduction in the estate and gift tax exemption and increase in tax rates (absent acts of Congress, in 2013 the gift and estate tax exemption would have fallen to \$1 million and the tax rate would have increased to 55%). Settlers thus sought to lock in favorable tax rules before the possible change in 2013. In so doing, many failed to consider the non-tax (i.e., emotional) consequences of their actions, including the fact that their heirs would learn of their inheritance (i.e., the trust) sooner than the settlor may have anticipated or even realized.

For example, a settlor creating a trust for his child then age 12 either (1) may not have anticipated that six years down the road the child would have full access to information about the trust, or (2) may not have anticipated this result, but incorrectly assumed that the child, at age 18, would possess the maturity to handle the news of his or her inheritance responsibly, and a commitment nonetheless to be a productive member of his or her community. Yet, others who had considered the non-tax considerations of wealth transfer were reluctant to transfer wealth because they did fear that their children would “lose motivation to work hard and be productive.”¹⁸

For those individuals who **had considered** these non-tax considerations, a solution for many of them was to create a silent trust. For those individuals who **had not considered** these non-tax considerations, the settlor now could consider modifying the trust to make the trust a silent trust, so long as the beneficiary had yet to learn of the trust’s existence.

Permits Settlers to Delay Disclosure. A silent trust can be used to simply **delay** disclosure to a beneficiary until a later time (e.g., age 25 in states that adopt the UTC, or later, in other states like Delaware), but not forever. A silent trust may allow the silent period to extend as long as may be needed for a determination to be made as to when and whether a child (or more remote descendants) is mature enough to handle the news of their inherited wealth, or has exhibited signs of social and fiscal responsibility. Essentially, the constraints on the beneficiary’s access to information may provide a solution for individuals to deal with a beneficiary who is particularly immature, and also address an individual’s concern that knowledge of the trust could corrupt character not yet tested.

Addresses Changing Times. The non-waivable trustee duties under the UTC represent an attempt to balance the settlor’s desires for non-disclosure against the interests of the beneficiaries who may need to enforce their rights under the trust.¹⁹ However, trust laws have evolved over time, and must continue to evolve, to adjust to contemporary issues and concerns. For example, modern trust laws have relaxed the restrictions on perpetual trusts by eliminating, or at least reducing the reach of, the rule against perpetuities. Similarly, procedures to change irrevocable trusts and settle trust disputes have expanded and become available among more and more jurisdictions. Some take the position that the same should hold true for rules prohibiting nondisclosure and that a settlor should be

able to waive the a trustee’s customary duty to disclose, and laws should continue to change to meet the recent and developing demands of individuals who wish to keep a trust silent, at least for a period of time. As one practitioner has noted, a “silent trust addresses the need to adapt the trust form so that it offers a choice that respects our contemporary concerns (e.g., safety, publicity), and breaks away from old disclosure standards.”²⁰

Individuals today are more likely to transfer wealth during life, rather than wait until death, and are more “conscious of the outcome and effect their early gifts have on young or immature beneficiaries.”²¹ These developments have increased the importance of giving more choices to settlors, even if it is at the expense of beneficiaries, and permitting nondisclosure limits on beneficiaries’ rights to information they traditionally have enjoyed.

The opportunity to create a trust as a silent trust allows a settlor’s intentions to prevail over a beneficiary’s (traditional) right to information. This is not entirely inconsistent with settlor’s powers under traditional trust and inheritance laws. As one author duly notes, a settlor may disinherit his children, grant to anyone a power to appoint trust property to anyone at all, grant fiduciary powers and duties to inexperienced trustees (e.g., family members) and include distribution standards that are so discretionary, and investment powers that are so broad, as to put the trustee’s discretion virtually beyond challenge.²² If these powers are respected, should not a settlor’s power to control the disclosure of information to a beneficiary also be respected?

Continued innovations in the trust law, like the emergence of silent trusts, arguably “keep the trust model adaptive and alive, encouraging improvements in trust governance, and avoid the confining logic that declares more disclosure is better simply because some disclosure is good.” Silent trusts provide options to “manage wealth transfers across a spectrum of different needs and family circumstances” and, who better in a position to address them than the settlor him or herself.²³

Reasons Not to Create Silent Trusts

There also are arguments against the use of silent trusts. Some take the position that the use of silent trusts hinders the education of the next generation. Others point to the risk of personal liability run by

¹⁸ See Kelly Greene and Arden Dale, *Can You Trust Your Kid With \$5.25 Million?*, Wall St. J. (Jan. 18, 2013).

¹⁹ Comment to UTC §105.

²⁰ Kozusko, n.12, above, at 21.

²¹ *Id.* at 22.

²² *Id.*

²³ *Id.*

trustees who fail to provide beneficiaries with information material to their trust interests, even when following the apparent wishes of the settlor. Some of the top reasons cited for **not** creating silent trusts include the following:

Family Wealth Should Be Discussed Openly. Informing children at an appropriate age of their parents' estate plan encourages open discussions of financial matters in family setting. When children are treated with respect and are included as part of the planning process, they are more likely to develop responsible attitudes. Providing financial and estate planning detail can set the stage for educating the child on financial matters and instilling family values at an early age.

According to a survey of estate planners conducted by Brown Brothers Harriman, some take the view that it is important to teach younger generations about their family's values and history behind the family empire early on, rather than have younger generations presume that money grows on trees (e.g., personal stories family members endured that led to success may actually motivate younger generations to engage in productive and fulfilling careers). Families should instill in younger generations at a young age the perseverance that led to their family's wealth and an appreciation of their role as future stewards of it.²⁴ That being said, the survey also revealed that although 86% felt it is important to prepare younger family members for their succession, doing so is often no easy task, and that there is no "cookie cutter" solution that is guaranteed to work for every family.²⁵

Disclosure Avoids Litigation. Once a beneficiary does learn about a silent trust, the beneficiary may question the administration of the trust during the silent period, ask questions, and seek legal advice, all of which could lead to litigation between the beneficiary and trustee. Some believe that disclosing the trust (and, instead, possibly creating a discretionary trust) and keeping the beneficiary informed from inception is more likely to avoid litigation.

At a minimum, providing beneficiaries with material information about their interests and regular accountings will start the clock running on the applicable statute of limitations period for any beneficiary complaints.

On the other hand, if the trust has been properly managed and administered during the silent period, the beneficiary should have no claim against the trustee. The concern is that during the period of silent administration, the trustee will have no way to know

whether the beneficiaries would object to any aspect of the trust administration. By the end of the silent period, the alleged damages to the trust may have increased significantly, either from lost returns compounded over the years or because the trustee has repeatedly engaged in similar transactions before the beneficiaries knew enough to object. In either case, the silent period itself would not cause the trustee's exposure, but it could greatly increase its magnitude.

Of course, beneficiaries can and do initiate litigation against trustees even when they are given information about their trust interests on an ongoing basis. Affirmative disclosures and regular reporting to the beneficiaries are no guarantee that a trustee will not have to defend its administration in court.

Issues Silent Trusts May Raise

Those less in favor of silent trusts commonly cite the following as issues that should discourage their use.

Trustee Duties. Silent trusts make it more difficult for a trustee to keep beneficiaries informed about the administration of the trust. However, proponents of silent trusts would respond that designating a "surrogate" to receive information on behalf of the beneficiary during the silent period could resolve this issue.

Breaches of Trust. Informing a beneficiary of the existence of a trust and reporting to the beneficiary during administration helps to prevent breaches of trust, or allows breaches that do occur to be discovered in a timely fashion. As a solution to this concern, proponents of silent trusts would argue that a surrogate could act as a trustee-watchdog on behalf of the beneficiary during the silent period. In jurisdictions where these surrogates are not considered to be fiduciaries, however, the watchdog function is significantly curtailed.

Practical Issues. When a trust is silent, how are the beneficiary's income tax issues addressed, what if the beneficiary decides to get married and decides to sign a premarital agreement, and how does a trustee respond to direct inquiries by a beneficiary who suspects a trust for his or her benefit exists? Responses to these questions by proponents of silent trusts are addressed below.

HOW TO CREATE A NEW SILENT TRUST

Get to Know Your Client

Key Preliminary Considerations. To effectively advise clients and customize planning solutions for them, it is critical that advisors educate themselves

²⁴ Anna Sulkin, *The Game Plan to Successful Wealth Transfers*, WealthManagement.com (Mar. 13, 2017).

²⁵ *Id.*

about their clients, and consider whether a silent trust might be appropriate for them. Advisors should identify the experiences and emotions that drive their decisions about how to manage their wealth. This is essential if advisors want to advise clients effectively and identify planning solutions that are customized for and aligned with their personalities, priorities, values and objectives.

Consider the client's attitude towards their wealth, and whether the client inherited his or her wealth, or established it on their own (i.e., what is the source of the client's wealth, how was it earned, and how was it accumulated). Understand the personal life experiences that have shaped the client's attitudes and beliefs about money and wealth, and the emotions that drive the estate planning process (i.e., what is the purpose of the client's money today, and what values or priorities should be addressed when establishing the client's wealth transfer plans and objectives).

Understand that although many clients may have come from inherited wealth, and knew about it from an early age, certain clients may have very different attitudes about what their own children should be told, and when, particularly where a client's child already has established him or herself as a spendthrift or fiscally irresponsible and, therefore would be better off not knowing about his or her inherited wealth for a period of time **after** that wealth is transferred in trust for him or her.

Discuss Options and Needs With Clients and Dialogue With Fiduciaries. Advisors who believe a silent trust may be an appropriate planning tool for their client should not only discuss the benefits and issues raised above, but also establish that the client has clear understanding of the parties involved and the issues that may arise during the administration of the trust.

In addition, neither the adviser nor the settlor should assume that individuals the settlor has selected to act as a fiduciary under a silent trust, whether as a trustee or a surrogate, will be willing to take on such a role. Some may be wary of doing so, so the adviser and settlor should approach these potential fiduciaries early in the process to discuss the settlor's objectives before the trust instrument is finalized or even drafted.

Preliminary discussions with the fiduciaries should include a review of the contemplated provisions of the proposed trust instrument in an effort to ensure that the terms of the trust instrument are clear and unambiguous to those who must carry them out, and also address any potential conflicts arising out of the duties allocated among fiduciaries.²⁶

²⁶ See William R. Burford, *What the Kids Don't Know* — De-

Key Provisions

The instrument creating the silent trust should include certain key provisions.

Governing Law. The adviser should identify jurisdictions that have silent trust statutes and select the jurisdiction most appropriate for the client. If the laws of the state of the settlor's residence do not expressly permit silent trusts, the adviser should identify a situs that expressly permits them.²⁷ The trust instrument should include a provision whereby the settlor expressly identifies the governing state law and refers to the specific state statute that permits the settlor to waive the trustee's duty to inform. This language should demonstrate the settlor's intent to withhold information from one or more beneficiaries, thereby protecting the trustee from behavior that might otherwise be considered disloyal or in bad faith.

Waiver of Duty to Disclose. The settlor's waiver of the trustee's duty to disclose should be expressly stated in the trust instrument, or drafted as express direction that the trustee shall not disclose any information to the beneficiary during the silent period. The settlor also could deliver a separate written instrument to the trustee, reaffirming the settlor's intent that neither the existence of the trust nor any information regarding its administration should be delivered to the beneficiary during the silent period.

In all events, neither the trustee nor any other fiduciary (e.g., the surrogate) should rely on any verbal or other informal request by the settlor for nondisclosure, or on any unwritten waiver of the duty to disclose. Neither beneficiaries nor courts are likely to look kindly upon a trustee whose basis for nondisclosure is a settlor's informal request, or a trustee who merely relies on the terms of the governing trust instrument where nondisclosure is not permitted by governing state law.

As illustrated in *McNeil v. McNeil*,²⁸ a trustee can face liability for breach of trust and penalties ranging from removal to surcharges or denial of fees if it relies on an informal request for nondisclosure where neither the trust instrument nor the statute of the law of the state governing the administration of the trust expressly permits nondisclosure.

Further, granting the trustee broad authority to manage the trust will be insufficient to protect against

constructing the "Silent Trust," ALI-CLE (Feb. 2014).

²⁷ For a copy of a 50 State Survey of positions taken on each state on silent trusts, contact the authors.

²⁸ 798 A.2d 503 (Del. 2002) (where trust terms did not limit or waive the trustees' duty to inform the beneficiaries, trustees breached their fiduciary duties by failing to inform the plaintiff of his beneficial interest in the trust and to respond to plaintiff's requests for information about the trust).

nondisclosure when nondisclosure is not expressly permitted.²⁹

Distribution Provisions. Any trust instrument will include provisions directing the trustee as to distributions of trust income and principal, to whom such distributions may be made, under what circumstances, in what amounts, and when. With a silent trust, the trust instrument should expressly prohibit distributions to the beneficiary during the silent period. In the alternative, the settlor could provide precatory language, stating the settlor's intention that no distributions be made during the silent period. With the latter approach, the trustee would have discretion to make distributions during the silent period. However, the distributions would terminate the silent period and convert the silent trust to a noisy trust.

Also, the trust instrument should not treat nondisclosure as a simple "add-on feature" to a standard irrevocable trust instrument.³⁰ The trust provisions for distributions and nondisclosure should be carefully coordinated.

Period of Nondisclosure. The UTC (and states that adopt it) expressly permits the nondisclosure period to run until the beneficiary attains age 25.³¹ Other jurisdictions have deviated from the UTC and permit the nondisclosure period to extend beyond a beneficiary attaining age 25, thereby expanding opportunities for quiet trusts.³² The nondisclosure provisions of the trust instrument must not run afoul of the law of the jurisdiction in which the administration of the trust takes place. The trust instrument also should not identify disclosure periods that have no certain end date, are too narrowly drawn, that are based on events that may never happen, or are just plain amorphous.

For example, do not condition disclosure on a beneficiary attaining a certain degree or level of education (e.g., college, medical school). If the trust instrument conditions disclosure on the beneficiary obtaining a master's degree, but the beneficiary completes college and then goes to culinary school, opens one or more successful restaurants, and earns three Michelin Stars (but never earns a master's degree), then without any default provision, the nondisclosure period is in question. In addition, do not condition disclosure

on a beneficiary exhibiting fiscal responsibility and maturity, whether determined by a fiduciary under the trust instrument (e.g., the trustee or the surrogate), an outside adviser, or a relative. This kind of event subjects disclosure to an arbitrary standard, driven by whomever has the power to make the determination.

When the power to determine the nondisclosure period is delegated to a fiduciary named in the trust instrument, the trust instrument should include provisions to identify successors to that fiduciary in the event that fiduciary resigns, becomes disabled, dies, or simply fails to maintain a relationship with the beneficiary that would allow the fiduciary to adequately identify the disclosure period.

In all events, the power to determine the disclosure period should never be given to the grantor, as retention of that power could cause the property of the trust to be included in the grantor's estate for federal estate tax purposes under I.R.C. §2036 or §2038 (relating to powers to control beneficial enjoyment).³³

Finally, consider building in a backstop provision in the event that the original disclosure period cannot be identified with certainty, such as the grantor's death.

Identify a Surrogate. In general, the trust instrument should ensure that, from the start, the trustee must report regularly to someone on behalf of the beneficiary. The trust instrument could designate a surrogate, to receive information about the trust during the silent period that otherwise would be delivered to the beneficiary. This could include a copy of the trust instrument, trust accountings, information regarding the succession of fiduciaries, and any other information a trustee otherwise would provide to a beneficiary as required under state law.

One option is for the trust instrument to designate a protector to oversee the interests of the beneficiary during the silent period. Most states with silent trust statutes also have complimentary trust protector statutes (e.g., Alaska, Delaware, New Hampshire, South Dakota, Tennessee). Another option may be to designate a close family friend, so long as the settlor is assured that the friend will ask questions, understand the beneficiary's life circumstances, and will be able to observe how they may change over time. Family offices are in routine contact with family members and often have established intimate relationships with the family. Accordingly, the family office could offer options for a surrogate, or be an easy, if not obvious, choice for a surrogate under a silent trust arrangement.

When a surrogate is identified to receive information on behalf of a beneficiary during the silent pe-

²⁹ See *id.*

³⁰ See *Drafting a Silent Trust*, JPMorgan (Summer 2012).

³¹ UTC §105(b)(8).

³² See, e.g., Ind. Code Ann. §30-4-3-6 (2015) (no age limitation on disclosure, which opens the opportunity for quiet trusts for beneficiaries of any age); Alaska Stat. Ann. §13.36.080 (permitting the silent period to extend until the settlor's death); Ky. Rev. Stat. Ann. §386B.8-130(2) (requiring information disclosure from the outset to a surrogate, on behalf of the beneficiary); and Del. Code Ann. tit. 12, §3303 (permitting nondisclosure for a "period of time").

³³ See generally, Burford, n.27, above. All section references are to the Internal Revenue Code of 1986, as amended (Code), and the regulations thereunder, unless otherwise specified.

riod, the trust instrument also should identify the surrogate's responsibilities to the beneficiary. The trust instrument should set forth that the surrogate not only must act in good faith to protect the beneficiary's interests, but also establish that the surrogate is a fiduciary. The surrogate therefore would owe fiduciary duties to the beneficiary. The nature and extent of the surrogate's duties, liabilities, rights, and powers should be specifically addressed in the trust instrument, and should be consistent with any similar provisions provided for under the law of the state in which the silent trust is established and administered. Although not all states require that a surrogate serve in a fiduciary capacity, due to the relative novelty of silent trusts, it is unclear what protection a trustee providing disclosures and accountings to a nonfiduciary surrogate will receive.

The adviser and client also should consider whether the surrogate would ever have an obligation to provide information to the beneficiary, notwithstanding the client's direction to the surrogate otherwise, despite any contrary provisions under applicable state law (e.g., §105(8) of the UTC). The trust instrument also should address whether the settlor would have any cause of action against a surrogate for unauthorized disclosure of trust information to a beneficiary during the silent period.

Some state statutes (e.g., Delaware) specifically authorize a settlor, under the trust instrument, to designate a surrogate to receive information on behalf of a beneficiary during the silent period, provide that the surrogate has standing to sue on behalf of a beneficiary, and authorize the surrogate to bind the beneficiary on judicial and nonjudicial matters. Other state statutes do not address this question, which raises the issue of whether a surrogate can receive trust information on behalf of the beneficiary, and if not, how a beneficiary may enforce trustee compliance during the nondisclosure period. Under these circumstances, until these disclosure issues are addressed by state statute or are reviewed by a court, whether a settlor may effectively assign to another person the power to enforce claims against a trust that beneficiary might otherwise bring, is a question that remains untested and unresolved.³⁴

In addition, if the surrogate determines that enforcement of the trustee's duties or other matters involving the administration of the trust, or construction of the trust instrument, warrant court involvement, whether the surrogate must provide notice of these proceedings to the beneficiary also must be addressed. Although, one could take the position that a trust structured as a silent trust is always a silent trust, and

the actions of a beneficiary (e.g., who suspects an individual is acting as trustee of a silent trust for the benefit of the beneficiary) or surrogate (e.g., who seeks to have a court offer instruction on issues involving the administration of the trust) should not turn a silent trust into a noisy one. If the settlor intended the trust to be a silent trust until the disclosure period ends, the trust should remain silent during that period.

As the case may be with protectors, there may be uncertainty regarding the role of a surrogate and whether the surrogate is a fiduciary. The trust instrument should identify the surrogate as a fiduciary, subject to fiduciary standards when acting on behalf of the beneficiary during the silent period. Not all states that permit the use of a surrogate with a silent trust speak to the standard required of a surrogate. However, some states expressly exonerate the surrogate from liability to the beneficiary if the surrogate's actions or omissions were made in good faith (e.g., New Hampshire³⁵). The question is whether this standard imposes a fiduciary standard or not.

Address Premature Disclosure. The trust instrument also should anticipate what steps should be taken to address a situation when the existence of the trust, or any aspect of its administration, is disclosed prematurely. For example, suppose a silent trust is created with a title that includes the beneficiary's name, an account statement for the trust is delivered to a home where the beneficiary resides, and the statement is left in plain view of the beneficiary.³⁶ One way to avoid this disaster is to simply not include the name of the beneficiary in the title of the trust instrument, and ensure that any account statements for the trust make no reference to the identity of the beneficiary.

As another example, suppose a settlor creates a silent trust for the benefit of the grantor's children, who are ages 10 and 15 when the trust is created. Suppose that the trust instrument provides that the silent period for a beneficiary ends when the beneficiary attains age 25. When the 15 year old attains age 25 and learns about the trust, the 25 year old then discloses the existence of the trust to his or her younger sibling, for whom the silent period has not yet terminated. One alternative is to create a separate silent trust for each child, rather than one trust for the collective benefit of both children. While this approach may not be fail-safe (i.e., the oldest child could disclose the existence of a trust solely for him or her, which could cause the younger siblings to question whether a similar trusts exists for them), the disclosure of the trust for the el-

³⁴ See generally, Burford, n.27, above.

³⁵ N.H. Rev. Stat. Ann. §564-B:12-1202.

³⁶ Al W. King III, *Should You Keep a Trust Quiet (Silent) From Beneficiaries?* WealthManagement.com (Mar. 25, 2015).

dest sibling only would not necessarily confirm that a similar trust does in fact exist for the younger sibling.

In all events, the settlor should consider providing in the trust instrument what actions should be taken when any such premature disclosure does occur, whether inadvertent (as in the case of the poorly placed account statement), or intentional (as in the case of the not-so-tight-lipped beneficiary). For example, the trust instrument could instruct the trustee, upon disclosing the trust to the beneficiary after the nondisclosure period, to explain to the beneficiary the intent behind and purpose of the silent nature of the trust, and instruct the beneficiary that if he or she does disclose the existence of the trust or any other information regarding the trust to his or her siblings, then a “penalty” provision will kick in. Such a provision might provide that distributions to the disclosing beneficiary will be restricted until a later date, or limited in some other way, all in an effort to encourage the beneficiary to preserve the silent nature of the trusts held for the benefit of his or her siblings.

Situs Considerations. The settlor and trustee should consider events during the administration of the trust that could impact situs and, therefore, the status of the trust as a silent trust. If a trust structured as a silent trust is established in a state that expressly permits silent trusts (e.g., Nevada), and the trustee, surrogate, and all other fiduciaries identified in the trust instrument are domiciled in Nevada, then the trust should not face situs issues. However, if the trustee decides to move the situs of the trust from a state the expressly permits silent trusts to a state that does not (e.g., California), if the situs of the trust is indirectly changed to another state because a trustee resigns and a new trustee is appointed in a state that does not expressly permit silent trusts, or if other circumstances necessarily cause the trust to be subject to the laws of a jurisdiction that does not expressly permit silent trusts, the trustee could become subject to rules that do not permit nondisclosure, in which case the silent period terminates (prematurely, and quite possibly inadvertently), and the trustee will have a duty to disclose information to the beneficiary as required under applicable state law.

In addition, if the trustee of a trust that is not structured as a silent trust wishes to move the trust to a jurisdiction that expressly authorizes silent trusts (i.e., to modify the trust to make it a silent trust), the jurisdiction from which the trust is moved may require the trustee to provide notice to the beneficiary of the modification, in which case converting a noisy trust to a silent trust may be impossible without notifying at least some of the beneficiaries (e.g., current, adult beneficiaries), but possibly not all of them (e.g., minor or remainder beneficiaries).

Build in Modification Provisions. The trust instrument should build in modification provisions, such as

granting the trustee or other fiduciary the power to decant. The trust instrument may allow the trustee to amend the trust instrument so that it may be silent without notice to any beneficiary. Before decanting, however, the adviser should examine whether the state’s decanting statute requires the decanting fiduciary to provide notice to a beneficiary of a silent trust. Many state decanting statutes do not require notice, or make notice optional.

Supplement With a Letter of Wishes. The settlor may wish to further evidence the intent to keep the trust silent by supplementing the trust records with a letter of wishes, which could explain why the settlor believed that keeping the silent trust for a period of time was in the best interests of the beneficiary.

Other Key Issues to Address

The following identifies additional considerations and options for avoiding issues that may arise during the administration of a silent trust.³⁷

Income Taxes. Those who disfavor silent trusts suggest that keeping a trust silent could raise issues relative to a beneficiary’s income tax reporting obligations. However, during the silent period, no distributions should be made to the beneficiary, in which case all of the trust income will be taxed to the trust, and would not be reported on the beneficiary’s individual income tax return. Accordingly, the trustee would have no need to send any tax information to a beneficiary and tax reporting should not interfere with the status of a trust as a silent trust.

In addition, if the silent trust is structured as a grantor trust for income tax purposes, and the grantor is treated as the owner of the trust for income tax purposes, all items of income would be reported on the income tax return of the grantor, not the return of the trust or the beneficiary.³⁸

Finally, the only other occasion that would require a trustee to report income tax information to a trust beneficiary is if the silent trust is a grantor trust as to a beneficiary, because the beneficiary has a general power of appointment over the trust, and the beneficiary is treated as the owner of the trust for income tax purposes. However, this can be avoided simply by not granting to a beneficiary a general power of appointment over the trust. Furthermore, doing so would effectively make the trust not silent as to the beneficiary.³⁹

Premarital Agreements. If a beneficiary of a silent trust decides to enter into a premarital agreement dur-

³⁷ See Burford, n.27, above.

³⁸ See King, n.37, above.

³⁹ See *id.*

ing the silent period, must the trustee disclose the existence of the trust to the beneficiary, and if so to what extent, despite the nondisclosure provisions of the trust instrument, and the laws of the silent trust statute that otherwise govern the administration of the trust? Should not only the beneficiary, but also that beneficiary's putative spouse (of a marriage that has yet to occur) be permitted to become aware of the trust just because the beneficiary gets engaged? Should the interests and rights of the settlor take a back seat to the putative spouse?⁴⁰

Another issue that a silent trust may raise for a beneficiary who is entering into a premarital agreement is whether the beneficiary will have satisfied all disclosure requirements under applicable state law, and whether this impacts the validity of the premarital agreement. The question is whether the beneficiary will have done so if he or she has not disclosed his or her interest in a silent trust that he or she does not know about. One solution may be for the beneficiary to include in the disclosure statement that members of the beneficiary's family may have created trusts of which the beneficiary may have a beneficial interest currently or at some time in the future, and that the beneficiary has no knowledge of the terms of any such trust, and any interests the beneficiary may have by reason of such trusts are mere expectancies and values of which are impossible to determine.

A potential solution also could be to permit nondisclosure on the first to occur of (1) the beneficiary attaining a certain age (e.g., age 25, in a UTC jurisdiction), and (2) the beneficiary entering into a premarital agreement in contemplation of marriage. It may turn out that the beneficiary does not get engaged before age 25 (which may be highly likely), or never enters into a premarital agreement, in which case the goal of the silent trust will have been achieved. At a minimum, the nondisclosure period still will extend beyond the age upon which a beneficiary traditionally would be notified of the trust.

In circumstances like this one, where disclosure may occur prematurely, the trust instrument should address and identify the trustee's obligations and the beneficiary's rights once the beneficiary learns of the trust (prematurely).

Direct Inquiries by Beneficiary to Trustee. Another situation that could arise during the administration is that the trust beneficiary suspects that a trust for his or her benefit exists, and directly asks the trustee if there is a trust for the benefit of the beneficiary.⁴¹

It is not inconceivable that a child of a high net worth family would suspect that his or her parents or

more remote ancestors have created one or more trusts for his or her benefit. If the child is raised in lavish surroundings, attends private school, enjoys annual ski vacations at the family's massive home in Jackson Hole, Wyoming, and annual summer vacations in Europe, it is not unlikely that the beneficiary will suspect that significant wealth has been set aside for him or her, or will be in the future.

Section 105(b)(2) of the UTC makes 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."⁴² Suppose the trust is established under the laws of a state that adopts the UTC and, specifically, §105(b)(2). Suppose further that the settlor structured the trust as a silent trust and permitted nondisclosure to the beneficiary until the beneficiary attained age 25, but the beneficiary approaches the trustee about the trust at age 23. How should the trustee respond to such an inquiry?

If the trustee denies the existence of the trust, denies the beneficiary status as a beneficiary of the trust, or misrepresents the terms of the trust, its assets, or their management, is the trustee necessarily not acting in good faith with respect to the beneficiary, even if the trustee (in good faith) believes it was acting at the specific direction of the settlor (as set forth in the trust instrument) to not disclose the trust, or any information about its administration, to the beneficiary? Does the trustee's decision to abide by the nondisclosure provisions of the trust instrument amount to a breach of the trustee's duty of loyalty? Does the trustee risk incurring liability for committing fraud with respect to the beneficiary?⁴³ One suggestion offered in response to this dilemma is that the trustee should resign.⁴⁴

Likewise, if the beneficiary suspects he or she is a beneficiary of the trust and suspects he or she knows the identity of the trustee, the beneficiary could pursue a legal proceeding to have answers to these questions revealed, but would the beneficiary be successful?⁴⁵ Some have suggested that if a beneficiary of a silent trust does bring a judicial proceeding against the suspected trustee during the silent period, a guardian ad litem could act on behalf of the beneficiary, and the court record could be sealed.⁴⁶

Although there are only a few court decisions that touch on this issue, there is some support for the ar-

⁴² UTC §105(b)(2).

⁴³ Rounds, n.11, above, at 547.

⁴⁴ JPMorgan, n.31, above.

⁴⁵ See Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?* Akron L. Rev. (2005).

⁴⁶ Kozusko, n.13, above. Although this concept is not discussed in depth, presumably the thought is that the guardian ad litem would step into the shoes of the beneficiary for purposes of the proceeding, and the beneficiary would not participate directly in

⁴⁰ See Burford, n.27, above.

⁴¹ See *id.*

gument that a trustee's fiduciary duty to act in good faith towards the beneficiaries of the trust may compel a truthful response.⁴⁷

Statute of Limitations. Not all states that have statutes that permit a settlor to waive the duty to disclose for a period of time address whether a trustee providing trust information to a surrogate will start the limitations period for actions by the beneficiary against the trustee for breach of fiduciary duty. For example, the one-year statute of limitations period begins to run from the "date the beneficiary or a representative of the beneficiary was sent a report."⁴⁸ Although the UTC does not define the term "representative" for this purpose, it does refer to "a person who may represent and bind a beneficiary as provided in [the general representation provisions of the UTC],"⁴⁹ which may not include a surrogate designated by the settlor to receive information on behalf of a beneficiary during a silent period. Accordingly, in states that adopt the surrogate concept (e.g., the District of Columbia), the limitation period may not begin to run if a trustee provides trust information only to the surrogate, and not directly to an adult beneficiary.

HOW COURTS TREAT NONDISCLOSURE BY TRUSTEES

Some courts have held that, without statutory authority for silent trusts and applicable trust terms, the trustee may not remain silent.⁵⁰ Other courts have held that with both statutory authority and direction under the governing instrument, the trustee may re-

the proceeding.

⁴⁷ See cases cited below at n.52 (particularly *Wilson v. Wilson*, 690 S.E.2d 710 (N.C. App. 2010)).

⁴⁸ UTC §1005.

⁴⁹ See *id.*

⁵⁰ See, e.g., *Wood v. Honeyman*, 169 P.2d 131 (Or. 1946) (equity requires trustee to comply with the duty to keep beneficiaries informed); *Briggs v. Crowley*, 224 N.E.2d 417 (Mass. 1967) (settlor cannot waive duty to account to beneficiary as a matter of public policy); *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002) (where trust terms did not limit or waive the trustees' duty to inform the beneficiaries, trustees breached their fiduciary duties by failing to inform the plaintiff of his beneficial interest in the trust and to respond to plaintiff's requests for information about the trust); *In re Kipnis Section 3.4 Trust*, 329 P.3d 1055 (Ariz. Ct. App. 2014) (trustee's duty to "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" under the Arizona Trust Code bars the trustee from asserting the attorney-client privilege against the beneficiaries of the trust over attorney-client communications regarding legal advice sought in the trustee's fiduciary capacity on matters of trust administration).

main silent.⁵¹ Some courts have held that a silent trust may be converted to a noisy trust, despite the trust's terms and statutory authority. Depending on the governing law and the specific circumstances of the case before it, a court may decide that public policy and the scope of the court's own authority is sufficient to require a trustee to provide information about a nominally silent trust to the beneficiaries.⁵²

POTENTIAL METHODS FOR SILENCING AN EXISTING NOISY TRUST

Even in jurisdictions that permit silent trusts, it is possible that state law will require notice to the current beneficiaries and presumptive remaindermen before converting the existing irrevocable noisy trust.

Decanting

Trustees may have the power to distribute trust corpus into new trust under a new governing instrument — usually available only under state statute. Many state decanting statutes require notice of a decanting

⁵¹ See *In re Irrevocable Asset Protection Trust of Rohlf*, C.A. No. 4464-MG., 2011 BL 204405, n. 6 (Del. Ch. July 12, 2011) (rights and responsibilities of trustee expressly dictated by trust instrument control, so long as terms do not purport to exculpate or indemnify fiduciary for intentional misconduct, confirming the effect of 12 Del. C. §3303); *Hanselman v. Joseph Frank*, 928 N.E.2d 1024 (Mass. App. 2010) (plaintiff beneficiary triggered trust's *in terrorem* clause by suing for removal of trustee based on trustee's alleged failure to provide plaintiff with trust accountings; trust instrument specifically directed trustee never to provide accountings to plaintiff).

⁵² See, e.g., *Wilson v. Wilson*, 690 S.E.2d 710 (N.C. App. 2010) (courts retain the power to order trustees to provide information and accountings to beneficiaries despite express waiver of those duties in the trust instrument and the North Carolina legislature's determination not to make the disclosure and accounting provisions of §813 mandatory when it adopted the Uniform Trust Code). The North Carolina version of the UTC provides that the trustee's duty to act in good faith towards the beneficiaries, and the court's power to "take any action and exercise any jurisdiction as may be necessary in the interests of justice," are not waivable by the settlor. From these two requirements, the appellate court concluded that a trustee may not withhold information "necessary to prevent or redress a breach of trust" from a beneficiary, the terms of the trust notwithstanding. See also, *In re JP Morgan Chase Bank, N.A.*, 956 N.Y.S. 2d 856 (Surr. Ct. 2012) (trust provision absolving trustees from the duty to account violated public policy and would not be enforced); *Vena v. Vena*, 899 N.E. 2d 522 (Ill. App. Ct. 2008) (trust provision that would allow a majority of income beneficiaries to approve the trustee's accounts with the "same effect as if a court having jurisdiction over the trusts approved the accounts" deprived any objecting beneficiary of his or her rights (if in the minority) and effectively exculpated the trustee for willful misconduct, without providing any of the procedural protection of a court process, and was therefore unenforceable as a matter of public policy).

— either before or after the fact — to current or qualified beneficiaries.⁵³ However, not all states require the trustees to give notice of a decanting to beneficiaries of the trust.⁵⁴

If the trust is grandfathered for GST tax purposes, any modifications must be limited to administrative provisions, must not extend the time for vesting, and must not shift any interest to a lower generation.

Even in a state that requires notice of decanting, this may be an effective means of quieting an existing noisy trust as to later generations.

Keep in mind that decanting is a fiduciary decision by the trustee. A trustee faced with the decision whether to decant into a silent trust, potentially reducing the rights of the beneficiaries, must determine whether it would be in the beneficiaries' best interests not to receive information about the trust.

Modification/Reformation by Court Proceeding

Seeking court modification or reformation of a trust instrument appears, at first blush, to be contrary to everything a silent trust is intended to accomplish. Modification or reformation requires a public court proceeding and formal notice to the beneficiaries of the trust, immediately defeating any effort to maintain the confidentiality of the existence of the trust or the nature of the beneficiaries' interests (at least as to adult beneficiaries who must receive notice of the proceeding).

Common Law: Grounds for Modification or Reformation of an Irrevocable Trust. At common law, for a court to modify or reform an irrevocable trust, it must usually find grounds for doing so. These include (1) changed circumstances or impossibility; (2) mistake; and (3) illegality or violation of public policy.

Uniform Trust Code. The Uniform Trust Code expands the authority of a court to modify an irrevocable trust. Depending on which version of the relevant UTC section is adopted, an irrevocable trust may be modified or reformed by consent of the settlor and all beneficiaries (or by a court that finds that the settlor and all beneficiaries have consented), even if the proposed modification would be inconsistent with

a material purpose of the trust.⁵⁵ Without the settlor's consent, a court may modify an irrevocable trust with the consent of all beneficiaries if the proposed modification is not inconsistent with a material purpose of the trust.⁵⁶

These proceedings usually also require the appointment (and agreement) of a court-appointed guardian *ad litem* for beneficiaries who are minors, unborn, disabled persons, or unascertainable. Absent some compelling reason for nondisclosure and assurances that the represented beneficiaries' interests will be protected, it may be difficult to convince a guardian *ad litem* that silence is in the best interests of the represented beneficiaries. The guardian *ad litem* (and the court) would compare the proposed protections under the modified trust against the rights the represented beneficiaries would be giving up, as well as weighing the stated rationale for the modification.

Modification by Nonjudicial Settlement Agreement

A number of jurisdictions allow modification of trust terms of an irrevocable trust by nonjudicial settlement agreements among the trustee and beneficiaries. If this type of agreement is available under local law, it may avoid the need for a public court proceeding and appointment of a guardian *ad litem*. Under most statutes, an effective nonjudicial settlement agreement requires notice to and consent of all current beneficiaries and presumptive remaindermen.

As with modification through a court proceeding, attempting to silence a noisy trust through a nonjudicial settlement agreement would seem to be self-defeating, given the requirement that all current and presumptive remaindermen consent for the agreement to be effective. If, however, the purpose of the nonjudicial settlement agreement is to silence the trust only as to those beneficiaries whose individual consent is not required for the agreement to be effective — for example, minors and unborn beneficiaries — this may be an effective means of converting an existing trust into a silent trust where state law permits.

For a nonjudicial settlement agreement to bind future beneficiaries effectively (not just those who sign the agreement), the interests of the adult beneficiaries signing the agreement generally must not conflict with those of the beneficiaries to be represented. If there is a conflict of interest, the nonjudicial settlement agreement may not be valid without appointment and agreement of a court-appointed guardian *ad litem* or representative, such as under UTC §305. This is likely

⁵³ See, e.g., Ind. Code §30-4-3-36(d) (requires notice to qualified beneficiaries at least 60 days before effective date of decanting); 760 ILCS 5/16.4(e) (requires 60-day notice to current and presumptive remainder beneficiaries).

⁵⁴ See, Ariz. Rev. Stat. Ann. §14-10819 (silent on notice of decanting to beneficiaries; creation of a new irrevocable trust requires notice unless waived in the instrument pursuant to §14-10813); 12 Del. C. §3528 (silent on notice of decanting to beneficiaries).

⁵⁵ UTC §411(a).

⁵⁶ UTC §411(b).

to be an obstacle if the trust as modified will not be silent as to the adult beneficiaries serving as virtual

representatives, but only as to the beneficiaries they represent.