SILENT TRUSTS IN A VERY LOUD WORLD: GOD'S GIFT? OR THE DEVIL'S WORK?

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I. Introduction.

Most state laws impose requirements on trustees to keep current and "next-in-line" beneficiaries of a trust reasonably apprised of their beneficial interest in the trust, which will often require the trustees to provide the beneficiary information regarding the existence of the trust, a copy of the trust instrument, and with trust account statements on a periodic basis. An even broader group of beneficiaries may be entitled to information on request. While the purpose behind disclosure is to provide the beneficiary with information, these disclosure requirements can be concerning to many grantors who do not want the beneficiary to have such information, particularly with respect to younger beneficiaries or spendthrifts. Further, the Grantor may not want a creditor of a beneficiary to be able to compel a beneficiary (such as a divorcing spouse) to provide copies of such information that may be in the beneficiary's possession.

Grantors often fear that a beneficiary's knowledge of the wealth in the trust can result in a disincentive for the beneficiary to achieve his or her own success, especially where such trust holds significant assets. Grantors also often do not want beneficiaries to know what they have given or provided to others, or if that there may be differences in the terms of a trust for one beneficiary over another. These concerns have resulted in the creation of the "silent trust" which eliminates a trustee's duty to inform beneficiaries of the existence of a trust for a period of time, eliminates the Trustee's duty to (and even forbids a fiduciary from) providing a copy of the trust instrument, and eliminates a duty to account to the beneficiaries.

This outline will first focus on trustee disclosure requirements imposed by various state statutes. It will next identify the various jurisdictions that permit trust instruments to delay notification to trust beneficiaries. It will then focus on the concerns a trustee faces in administering a silent trust. It will next address the difficulties of importing quiet trust language into an existing irrevocable trust which does not contain such language. Finally, it will review relevant case law as it pertains to silent trusts.

II. Statutory Disclosure Requirements.

A. Uniform Trust Code. The Comment to Section 813 of the Uniform Trust Code ("UTC") states that one of the fundamental duties of a trustee is to keep the beneficiaries reasonably informed of the administration of the trust. It should come as no surprise, then, that the UTC imposes broad disclosure requirements. This is, perhaps, one of the reasons why, contrary to its intended purpose, there is such a lack of uniformity among the states (including the District of Columbia, hereafter "D.C'.") that have adopted versions of the UTC

1. Default Requirements. Section 813 of the UTC imposes the following duties upon a trustee:

   (a) To keep **qualified beneficiaries** reasonably informed about the trust's administration and of material facts necessary to allow them to protect their interests. UTC § 813(a).

(i) Pursuant to UTC § 103(13) a **qualified beneficiary** is "a beneficiary who, on the date the beneficiary's qualification is determined" constitutes one of the following:

(1) A distributee or permissible distributee of trust income or principal;

(2) A would-be distributee or permissible distributee if the interests of the current distributees or permissible distributee terminated on that date (without causing the trust to terminate); or

(3) A would-be distributee or permissible distributee if the trust terminated on that date.

(ii) The Comment to Section 813 makes clear that qualified beneficiaries do not include "appointees under the will of a living person . . . [or] the objects of an unexercised inter vivos power."

(b) To promptly respond to a **beneficiary's** request regarding information related to the trust's administration, unless unreasonable under the circumstances. UTC § 813(a).

(i) Section 103(3) of the UTC defines a **beneficiary** much more broadly as a person (including corporations, trusts, estates, partnerships, etc.) that has a present or future beneficial interest in the trust (either vested or contingent) <u>or</u> holds a power of appointment in a non-trustee capacity.

(c) To promptly furnish a copy of the trust instrument to a **beneficiary** upon request. UTC § 813(b)(1).

(d) Within sixty (60) days of acceptance, to notify **qualified beneficiaries** of acceptance of trusteeship. The trustee must provide his, her, or its name, address, and telephone number. UTC § 813(b)(2).

(e) Within sixty (60) days after acquiring knowledge of an irrevocable trust's creation or that a revocable trust has become irrevocable, to notify **qualified beneficiaries** of the existence of the trust, the identity of the settlor(s), the right to request a copy of the trust instrument, and the right of a trustee's report. UTC § 813(b)(3).

(f) To provide advance notice to **qualified beneficiaries** of a change in rate of compensation. UTC § 813(b)(4).

(g) At least annually and at the termination of the trust, to send to **distributees** or **permissible distributees** of trust income or principal, as well as **qualified** or **nonqualified beneficiaries** who request it, 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." In addition, upon a vacancy in trusteeship when no co-trustee remains in office, the former trustee must send such a report to **qualified beneficiaries**. UTC § 813(c).

(i) This is reinforced by Section 110, which requires a trustee to give notice to any **beneficiary** who requests it whenever notice to **qualified beneficiaries** is required under the UTC.

2. Limiting Default Requirements. Although the default requirements for notice and disclosure are rather broad, the UTC does allow a settlor to limit these requirements to a certain extent.

Section 105(b) states that the terms of a trust instrument prevail over the provisions of the UTC except for the following:

(a) A trustee's duty under Section 813(a) to respond to a request by a **qualified beneficiary** for reports and information reasonably related to the trust's administration. UTC § 105(b)(9).

(b) A trustee's duty under Sections 813(b)(2) and 813(b)(3) to notify **qualified beneficiaries** age twenty-five (25) or older of the existence of the trust, the identity of the trust, and the right to request a trustee's report. UTC § 105(b)(8).

The Comment to Section 105 clarifies the specifics of what a settlor can and cannot waive within the terms of a trust instrument. For example, a settlor can waive the duty to provide a copy of the trust instrument to **beneficiaries** and the duty to provide **qualified beneficiaries** with annual reports. Note, however, that such duties may be required in a given situation if the information requested is reasonably related to the administration of the trust.

With respect to **qualified beneficiaries** under age twenty-five, a trust instrument can provide that a trustee not even inform such beneficiaries of the existence of the trust. If, however, such a beneficiary should learn of the existence of the trust, a trustee is still required to respond to requests for information reasonably related to the trust's administration.

Lastly, it is worth noting that neither Section 105(b)(8) nor Section 105(b)(9) apply to revocable trusts, thereby allowing a settlor to waive all reporting requirements. But, if a settlor does not waive such requirements, they take effect upon the settlor's incapacity. Prior to a settlor's incapacity, the duties of a trustee are owed solely to the settlor. UTC § 603.

B. Restatement (Third) of Trusts. Much like the UTC, the Restatement (Third) of Trusts (the "Restatement") imposes reporting requirements on trustees, but the requirements under the Restatement are not quite as extensive. In addition, Section 74 of the Restatement also makes clear that the trustee of a revocable trust generally owes duties, including reporting requirements, only to the settlor. However, the donee of a presently exercisable general power of appointment is also treated like a settlor with respect to duties owed by the trustee. Restatement (Third) of Trusts § 74.

1. Default Requirements. With respect to irrevocable trusts, a trustee has the following duties:

(a) To promptly inform **fairly representative beneficiaries** of "the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning trusteeship." Restatement (Third) of Trusts § 82(1)(a).

(i) General Comment (a)(1) to Section 82 clarifies what is meant by **fairly representative beneficiaries**. According to the comment, a trustee is required to make a good-faith effort to "select and inform a limited number of beneficiaries whose interests and concerns appear . . . likely to coincide with . . . the trust's beneficiaries generally." For the most part, this limited class consists of present mandatory and discretionary beneficiaries of income or principal and first-tier remaindermen, i.e., those who would receive or would or be eligible to receive distributions of income or principal upon the termination of a present interest or the termination of the trust. Restatement (Third) of Trusts § 82, General Comment (a)(1).

(1) The trustee is to inform **fairly representative beneficiaries** of "the existence, source, and name . . . of the trust; the extent and nature . . . of their interests; the name(s) of the trustee(s), contact and compensation information, and perhaps the roles of co-trustees; and the . . . right to further information." Restatement (Third) of Trusts § 82, Comment on Subsection (1), b.

(ii) Interestingly, General Comment (a)(1) to Section 82 continues by adding that, on occasion, a trustee's duty to provide information can extend to a donee of a power of appointment or a person granted the power to (1) veto or direct acts of the trustee, e.g., special trustee, distribution committee; or (2) modify the trust, e.g., trust protector. Likewise, in a situation in which there is a large class of present discretionary beneficiaries, a trustee's duty to inform can be more limited.

(b) To inform **beneficiaries** of significant changes in their status as a beneficiary. Restatement (Third) of Trusts § 82(1)(b).

(i) Section 3 of the Restatement defines a **beneficiary** as "[a] person for whose benefit property is held in trust." Section 48 of the Restatement goes on to state that a person is a beneficiary if the settlor manifests the intent to give a beneficial interest, but a person merely incidentally benefitting from the performance of the trust is not enough.

(c) "[T]o keep **fairly representative beneficiaries** reasonably informed of changes involving trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interests." Restatement (Third) of Trusts § 82(1)(c). The trustee is to exercise reasonable judgment with respect to determining what is significant. Restatement (Third) of Trusts § 82, Comment on Subsection (1), d.

(d) To promptly respond to a **beneficiary's** request for information concerning the trust and its administration, and to permit an inspection of the trust's documents, records, and holdings. Restatement (Third) of Trusts § 82(2). Typically, the trustee is also to furnish a copy of the trust instrument. Restatement (Third) of Trusts § 82, Comment on Subsection (2), e.

(e) To provide **beneficiaries** with reports or accountings, upon request, at reasonable intervals. Restatement (Third) of Trusts § 83. This requires a trustee to submit an account to **beneficiaries** upon a trust's termination. Restatement (Third) of Trusts § 83, Comment b.

(i) Such a report or accounting can be relatively informal, so long as it (1) reveals the trust's assets and liabilities, receipts and disbursements, and other transactions; and (2) discloses trustee compensation.

2. Limiting Default Requirements. The statutory language of Section 82 of the Restatement expressly recognizes a settlor's ability to modify trust duties under the

terms of the trust instrument. However, one must look to the Comments for further guidance to determine what can be modified.

(a) A **beneficiary** is always entitled to request information reasonably necessary to enforce his or her rights and/or prevent breach of trust, and the duty to respond is, therefore, not subject to modification.

(b) A settlor can modify the trustee's duty to provide the information required under Restatement (Third) of Trusts §§ 82(1)(a)-(c), but not entirely or to a degree (or time) that would unduly interfere with the purposes for the information requirements. Restatement (Third) of Trusts § 82, General Comment a(2).

(i) A settlor can only modify these duties by "clear language" in the terms of the trust instrument and within the limits described above.

(c) A settlor can modify and limit the duty to disclose trust provisions or other information, perhaps to prevent a spendthrift beneficiary from learning of his or her interest, but, as stated above, a beneficiary is always entitled to request information. Restatement (Third) of Trusts § 82, Comment on Subsection (2), e.

(d) The terms of a trust instrument may allow the trustee to provide accountings to a designated person, e.g., one of the **beneficiaries** (or the settlor of an irrevocable inter vivos trust), and provide that such person's approval shall discharge the trustee's liability. However, such a provision is only effective if the designated person does not act in bad faith (or disregard for the interests of other beneficiaries) in approving the accounting and the accounting discloses material information about the trustee's conduct. Restatement (Third) of Trusts § 83, Comment d.

C. Delaware Disclosure Requirements. The Delaware Code is rather silent with respect to the default duties of trustees to provide information and reports to trust beneficiaries. However, a landmark case from 2002 sets the standard for trustee disclosure. McNeil v. McNeil, 798 A.2d 503 (Del. 2002). In fact, in response to this case, the legislature enacted 12 Del. C. § 3303, which allows a settlor to modify case law/common law trustee disclosure requirements. More on that statute shortly.

1. McNeil Case. The basic facts underlying the case are that in 1959, Henry Slack McNeil, Sr. sold his pharmaceutical company to Johnson and Johnson and created a number of trusts with the sale proceeds. Four (4) trusts were established for the benefit of Mr. McNeil's children and a fifth trust was established for the benefit of

Mr. McNeil's wife, Lois (the "Lois Trust"). McNeil, 798 A.2d at 506 (Del. 2002). Although the children were unaware for quite some time, the terms of the Lois Trust made each child a current discretionary beneficiary of income and principal. *Id*.

The original trustees of the Lois Trust were three (3) individual trustees and Wilmington Trust Company. *Id*. at 506-507. Thereafter, two (2) individual trustees were removed and replaced with a new individual trustee and Provident National Bank ("PNC"). *Id*. All trustees were aware of the children's status as current beneficiaries of the Lois Trust. *Id*. at 507. Ultimately, Henry Slack McNeil, Jr. ("Hank") had a falling out with his family, causing disinheritance by his father and a bequest from his mother in the "paltry" amount of two million dollars ($2,000,000). *Id*. This ultimately led Hank to seek large distributions from the trustees of his trust, who were basically the same trustees of the Lois Trust. *Id*. As a result, the trustees of Hank's trust requested that Hank's children take a position on the distributions since, like the McNeil children under the Lois Trust, they were current discretionary beneficiaries of Hank's trust. *Id*.

Although not clear as to when, Hank discovered his status as a current beneficiary in the Lois Trust and filed a complaint in the Court of Chancery seeking a make-up distribution from the Lois Trust, the removal and surcharge of the trustees of the Lois Trust, and a restructuring of the operations of the Lois Trust. *Id*.

The Court of Chancery ultimately concluded that Hank's estrangement and treatment as an outsider was continued by the trustees of the Lois Trust, but such trustees shared a great deal of information with Hank's siblings. *Id*. Further, the trustees continually rebuffed Hank in his efforts to learn about the specifics of the Lois Trust and followed Lois' wish that no principal distributions be made. *Id*.

Because the trustees of the Lois Trust breached their fiduciary duties to Hank by failing to inform him that he was a current beneficiary, by showing partiality to Hank's siblings, and by allowing the Lois Trust to operate on "autopilot," the Court of Chancery ordered a make-up distribution of seven and a half percent (7.5%) of the value of Hank's interest in the Lois Trust after her death, i.e., one quarter (1/4) of the value of the Lois Trust. *Id*. at 508. In addition, PNC was removed as trustee and all trustees were surcharged one-fifth (1/5) of their commissions received from 1987-1996. *Id*.

On appeal, the trustees of the Lois Trust claimed that the express terms of the trust agreement precluded them from breaching any duties owed to Hank. *Id*. at 509. Specifically, the trustees argued that discretionary distributions were to be made in their sole judgment, that decisions by the committee of trustees were not subject to court review, and that any good faith action taken by the trustees was to be considered

proper. *Id*. Further, the trust agreement relieved the trustees of "all personal liability except for gross negligence or willful wrongdoing." *Id*.

In reviewing these provisions of the Lois Trust, the Delaware Supreme Court held that the trustees were exculpated from ordinary negligence, "but not the duty to (i) inform beneficiaries or (ii) treat them impartially." *Id*. Regardless of his intent, Mr. McNeil did not relieve the trustees of these duties. *Id.* at 509-510. The court found that Hank's repeated attempts to obtain information about the Lois Trust should have put the trustees on notice that Hank did not know about his standing as a current beneficiary. *Id*. at 510.

"A trustee has a duty to furnish information to a beneficiary upon reasonable request. Furthermore, even in the absence of a request for information, a trustee must communicate essential facts, such as the existence of the basic terms of the trust. That a person is a current beneficiary of a trust is indeed an essential fact." *Id*.

Due to the "pattern of deception and neglect over a span of many years," including denying Hank information and telling him that he was only a remainderman of the Lois Trust, the Delaware Supreme affirmed all rulings of the Court of Chancery, except for the individual who was to replace PNC as trustee, which was remanded for further proceedings. *Id*. at 515.

2. Delaware Statute. Delaware has not adopted the UTC. Instead, Delaware has enacted statutes that allow a settlor of a Delaware trust to validly create a silent trust.

   Section 3303 of Title 12 of the Delaware Code provides that the terms of trust instrument may expand, restrict, eliminate, or vary the "rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time," as well as a "fiduciary's powers, duties, standard of care, rights of indemnification and liability to persons whose interests arise from that instrument." 12 Del. C. § 3303(a)(1), (4). The Section goes on to make clear that it is intended to give maximum effect to "the principle of freedom of disposition and to the enforceability of governing instruments." 12 Del. C. § 3303(a).

   With respect to limiting a beneficiary's right to be informed for a "period of time," the statute provides the following non-exclusive list of examples: "(1) A period of time related to the age of a beneficiary; (2) A period of time related to the lifetime of each trustor and/or spouse of a trustor; (3) A period of time related to a term of years or specific date; and/or (4) A period of time related to a specific event that is certain to occur." 12 Del. C. § 3303(c).

Additionally, unless the governing instrument provides otherwise, during the time that a beneficiary's right to be informed is restricted or eliminated, the beneficiary may be represented and bound by a "designated representative" for both judicial proceedings, as well as nonjudicial matters. 12 Del. C. § 3303(d).

In order to be a "designated representative," such person must be authorized to act in one of the following ways: (1) by express appointment as a designated representative or by reference to the applicable section(s) of the Delaware Code in the governing instrument; (2) by authorization or direction in the governing instrument to represent or bind beneficiaries for purposes of a judicial proceeding and/or nonjudicial matter (as defined in 12 Del. C. § 3303(e)); (3) by appointment by a person expressly authorized in the governing instrument to appoint someone described in (1) or (2), above; (4) by appointment by a beneficiary to act as his or her designated representative; and/or (5) by appointment by the settlor to act as a designated representative for the beneficiar(ies). 12 Del. C. § 3339(a). In addition, the designated representative must deliver a written acceptance to the trustee. *Id*. Finally, 12 Del. C. § 3339(b) provides that a person serving as a designated representative is presumed to be a fiduciary.

Recent Delaware case law has confirmed the effect of Section 3303 of Title 12 of the Delaware Code. "Essentially, so long as an instrument does not purport to exculpate or indemnify a fiduciary for *intentional misconduct,* the language of the contract governs. Thus, any rights or responsibilities of the trustee are expressly dictated by the terms of the [trust instrument]." *In re Rohlf*, 2011 WL 3201798, Footnote 6 (Del.Ch. 2011).

D. Illinois Disclosure Statutes. Illinois has adopted an amended version of the UTC. Sections 813.1 and 813.2 of the Illinois Trust Code ("ITC") provide statutory notification and accounting requirements under two separate circumstances—Section 813.1 controls requirements for trusts that became irrevocable, or for a trustee who accepted trusteeship, after January 1, 2020, whereas Section 813.2 governs trusts and trusteeships established before January 1, 2020. In addition to these two sections, the ITC provides a list of mandatory rules that cannot be overridden by the trust instrument under Section 105(b), which includes certain aspects of notice and accounting under Section 813.1.

1. Notice and Accounting Requirements for Irrevocable Trusts & Trusteeships after January 1, 2020.

Notice. Under Sections 813.1 and 105(b), there are certain rules that cannot be overridden by the trust instrument. It is mandatory for trustees to notify Qualified Beneficiaries of (i) the existence of the trust, (ii) the Qualified Beneficiary's right to request a complete copy of the trust, and (iii) whether the Qualified Beneficiary is

eligible to receive or request trust accountings. A "Qualified Beneficiary" under ITC Section 103 is anyone who (i) is a distributee or permissible distributee of trust income or principal, (ii) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in (i) terminated on the day the issue is being considered without causing the trust to terminate, or (iii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that day.

Accounting. An annual accounting is mandatorily required to be given to current beneficiaries. An annual accounting must also be given to presumptive remainder beneficiaries unless the trust instrument provides otherwise. Upon termination of the trust, Section 813.1 mandates that all beneficiaries entitled to a distribution must receive a final accounting. Note that the definition of a beneficiary changes under the accounting rules. A "current beneficiary" is a distributee or permissible distributee of trust income or principal, including those persons who hold a general power of appointment. A "presumptive remainder beneficiary" would be either (i) eligible to receive income or principal if the trust terminated or (ii) would be eligible to receive income or principal of the interests of all current beneficiaries terminated without causing the trust to terminate. It is worth noting that, while the trust instrument cannot draft around providing annual accountings to current beneficiaries, the current beneficiaries may opt to waive such right.

Duty To Inform and Beneficiary Requests. The ITC did not adopt Section 813(a) of the UTC, which provides that trustees shall keep qualified beneficiaries reasonably informed to protect their interests and respond to beneficiary requests for information.

2. Irrevocable Trusts & Trusteeships before January 1, 2020. There is no notice requirement for trusts that became irrevocable or for trusteeships that began before January 1, 2020. However, Section 813.2 codifies accounting requirements under the previous Trusts and Trustees Act as they relate to irrevocable trusts and trusteeships entered into prior to the enactment of the ITC. Under these rules, annual accountings are required to be given to income beneficiaries and, upon termination, to all beneficiaries entitled to a distribution. However, the trust instrument can override this requirement.

E. Nevada Disclosure Requirements. Nevada trust law has long been known for its focus on protecting the rights of a grantor to establish a trust that carries out the grantor's intent. Accordingly, so long as a grantor's intent in a trust instrument is not contrary to Nevada's public policy, the grantor's intentions to establish a silent trust are generally enforceable. NRS 163.004. Since Nevada's public policy, statutorily codified at NRS 163.004 recognizes the public policy of allowing a grantor to place restrictions on the manner and method of administering a beneficial interest in a trust estate, including the

right to restrict the information that the beneficiary is entitled to review and receive for a period of time, it is difficult to overcome the provisions of a silent trust on public policy grounds. There are some exceptions to the above general rule respecting the grantor's intent as discussed hereafter. But such exceptions can often be avoided through careful drafting that takes into consideration grantor's desire to establish a silent trust.

Rather than focusing on the general rights of a beneficiary to information about the trust under common law, Nevada's legislature codified the beneficiary's right to information (and the limitations thereon) under Chapter 165 of the Nevada Revised Statutes. By tying a beneficiary's right to information (including the right to review the trust instrument) to the beneficiary's right to an accounting, Nevada law permits the grantor to impose silence on the trust's existence, terms, and holdings from those who are "not" entitled to the accounting or inventory as addressed in more detail below:

1. Beneficiary's Right to An Inventory of Trust Assets. NRS 165.030 recognizes a beneficiary's right to request an inventory of the trust assets, but only if the beneficiary is entitled to an accounting. Accordingly, the right to an initial inventory of assets is contingent on the beneficiary's inclusion in the class of beneficiaries who are entitled to receive an accounting under the terms of either (1) the trust instrument or (2) under a statutory right to an accounting under NRS 165.1201 to 165.148 (discussed in further detail below).

2. Beneficiary's Right to a Copy of the Trust Instrument. NRS 165.147(3) specifically states that "[e]xcept as otherwise provided in NRS 165.145(1) or by order of the court for good cause shown under NRS 165.145(2), the trustee must not be compelled to provide a copy of the trust instrument to a person who is not a beneficiary of the trust or a person who is not entitled to demand an account of the trust pursuant to the provisions of NRS 165.1201 to 165.148, inclusive." Further, Nevada law does not impose an affirmative duty to provide a beneficiary a copy of the trust instrument except where the trust instrument requires such delivery. In fact, Nevada law recognizes that a grantor can impose a duty on the Trustee prohibiting such disclosure under the terms of the trust instrument. See NRS 165.004(1)(a); 165.147; NRS 164.025; and NRS 165.145. See also *I the matter of Horst Trust,* 136 Nev. Adv. Op. 90, at 9 (December 31, 2020) (confirming the Trustee's ability to cut off time to contest the trust by sending a notice to interested persons is entirely optional and is not required in Nevada unless required by the Trust or otherwise demanded by a qualified beneficiary. NRS 164.021.

There are two statutory exceptions to a silent trust where a trustee can be mandated to release a copy of the trust instrument. The first is under NRS 165.147(1) which relates to the beneficiary's right to demand a copy of the trust instrument if the beneficiary is entitled to receive an accounting. However, this right only exists if the trust

instrument does not otherwise specifically prohibit the release of the instrument. Even if the beneficiary is entitled to demand and/or receive an accounting, the trustee may not ignore the grantor's intent. The grantor can authorize an accounting but still direct a restriction on the release of the trust instrument. *Id.* Second, if a beneficiary is entitled to demand an accounting under NRS 165.1201 to NRS 165.148, inclusive,. but the trust instrument restricts release, the beneficiary may seek a court review and if a court finds good cause exists to order the trust instrument released, the court can do so. NRS 165.147(2). However, this "good cause" is not carte blanche. Good cause is limited to providing the trust or portions the court deems pertinent to determination of the adequacy of the of the trustee's account to allow the beneficiary to enforce the beneficiary's rights. This exception recognizes that a beneficiary may need a copy of the trust instrument to be able to understand the Trustee's accounting that the beneficiary has received by the trust terms or by a demand right. The Court may order a redacted or limit disclosure, or may decline to find that the instrument is needed at all. Further, such disclosure of the Trust instrument can also be limited to *in camera* review by in independent reviewer rather than releasing it to the beneficiary. NRS 165.145.

On December 22, 2022, the Nevada Supreme Court issued its decision in the case of *In Re 23 Partners Trust I,* 138 Nev., Adv Op. 84 (Dec 22, 2022), upholding Nevada's silent trust provisions in relation to a beneficiary's demand for both the trust instrument and an accounting. While the Court ultimately permitted the beneficiary in that case to have both the trust instrument and an accounting, the decision was based not on the statutory right to demand such items, but rather because the Court found that the language in the trust instrument permitted the same. The Court specifically held that the beneficiary would not have been entitled to the same under Chapter 165 of the Nevada Revised Statutes statute because the beneficiary (whose interest was purely discretionary in the hands of the trustee) was not a "qualified beneficiary to statutorily demand the same. But the language in the Trust instrument authorized "vested" beneficiaries with a "present" interest to receive an accounting, and the Trust instrument specifically defined this particular beneficiary's interest as "vested" and "present" despite being a discretionary interest. *Id*. The case underscores the importance that the Nevada Supreme Court places on the language in the trust instrument. It further clarified that a purely discretionary interest beneficiary (absent contrary language in the trust instrument) does not qualify to demand the trust instrument (or an accounting).

The *In Re 23 Partners Trust I* also recognized that the Court's authority to override the silent trust provisions within a trust is limited. The beneficiary was dissatisfied with the district court's award of a redacted version of the trust instrument and appealed the redaction. Although the beneficiary argued that NRS 165.180, which provides the Court with broad jurisdictional authority over trusts and its authority is not abridged by statutory limitation, the Nevada Supreme Court held that NRS 165.180 does not grant the court authority to ignore other Nevada law on a beneficiary's right to

receive the trust instrument or accounting, and NRS 165.180 does not provide the Court an independent basis on which to ignore the terms of the trust or other authority governing the beneficiary's rights. *Id.* at 17. Accordingly, even though a Court has discretion, a court will need to consider the trust terms and NRS Chapter 165 provisions before broadly ordering release of trust instruments and accountings in silent trusts

3. Beneficiary's Right to An Accounting. Nevada's accounting requirements were historically simple prior to the 1999 Nevada Legislative session which required a Trustee of a non-testamentary trust to account in accordance with the terms of the Trust instrument to the income beneficiary; and if silent, pursuant to the default provisions of NRS 165.135. However, in 1999, a provision was added to include residuary beneficiaries without limitation to the terms of the Trust instrument. 199 Statutes of Nevada, Page 2384 (Chapter 467 of AB 400). This change had the impact of inadvertently imposing a strict liability standard on the Trustee to account to all beneficiaries (even as to a revocable trust, and during the lifetime of a surviving spouse, and further without limitation). While Nevada estate planners struggled with this change, the change was short-lived. However, the resulting statutory framework was no longer simple.

NRS 165.1207 recognizes a beneficiary's right to an accounting if it is set forth under the Trust instrument. Absent a contrary provision in the Trust instrument, the Trustee in Nevada need not issue an accounting unless a "qualified" demand for one is made. Hence, there is not "affirmative" duty to issue the account under any Nevada trust (silent or otherwise) absent a qualified demand or requirement under the truts instrument. See NRS 165.1207. In order to impose an accounting requirement on the Trustee where the Trust is silent on accountings, the beneficiary must make a "qualified demand" and not all beneficiaries are entitled to make a qualified demand. In fact, a grantor can draft the trust to prevent a beneficiary from being entitled to make a qualified demand under NRS 165.1207, thereby upholding the "silent trust" status of a trust instrument in Nevada. For example, beneficiaries with a purely discretionary interest, even though a current interest, are not entitled to demand an accounting. NRS 165.1207(1)(b)(5). Further, even a beneficiary with a current mandatory distribution interest may not be entitled to demand an accounting if the interest is subject to elimination by a currently effective "broad" power of appointment by another power holder. Instead, the trustee can satisfy the demand by accounting to the power holder interest of the beneficiary whose demand right supersedes the interests of the beneficiary. NRS 165.1207(1)(b)(2). Further, as discussed below, if there is any question about the beneficiary's right to demand the accounting, a Trustee in Nevada can seek instructions from the Court, including seeking to enforce a "confidential account" even where the Court finds that the beneficiary is or may be entitled to some degree or a full accounting (and/or copy of the trust instrument). NRS 164.145. Given the Nevada Supreme Court's recent decision in *In re 23 Partners Trust I,*

supra, it is evident that the above statutory structure will be upheld in Nevada, furthering the right of grantors to restrict what a beneficiary is entitled to receive through drafting.

4. In Camera or Confidential Accounting Options. Nevada law recognizes the concept of a designated representative (specifically a "reviewer") to receive the accounting (and trust instrument). First, NRS 165.1207(1)(b)(2) would permit the priority right of the power holder under a power of appointment to receive the account in place of the beneficiary. Second, if the Trust instrument does prohibit or restrict disclosure or limits accountings to a "confidential account", the Trustee can request the Court to permit a "confidential accounting" in lieu of accounting to the beneficiary. NRS 165.147. A confidential accounting election by the Trustee then permits the beneficiary to designate a "Reviewer" who must be an attorney or accountant who will confidentially review the accounting and report to the Court under seal or *in camera*, and a copy of such Reviewer's report may not be provided to the beneficiary. NRS 165.147. The Reviewer is paid by the beneficiary and further must agree to the Court ordered confidentiality requirements. *Id.* Of course, if the reviewer does find concerns in the review, the Court could thereafter order the Trustee to release further portions or even a full accounting, or order the Trustee to take other action to address the findings of the Reviewer. In reality, this option is difficult for all sides. Because of the rigid compliance requirements now imposed on licensed CPAs by their own governing bodies, not all CPAs can undertake this review and further may be limited to their licensing standards to compliance and audit standards applicable to audit making this option expensive and lengthy for a beneficiary. However, if the Review does find misstatements or errors, that cost may be imposed on the Trustee. Accordingly, careful attention has to be paid to the instructions by the Court to the Reviewer to confirm how the engagement will be carried out in coordination with the CPAs own professional standards. Accordingly, a Trustee may need to balance this process against the silent trust directions of the grantor in pursuing this avenue.

5. Impact of Silent Trust Provisions in Contest Litigation. As with most states that allow silent trusts, there is still some concern even in Nevada as to the rights of a contestant when it is the validity of the Trust at issue, rather than when it is a challenge to the fiduciary's actions or duties. Discovery in contest litigation may create varying results when considered in different counties, by Discovery Commissioners (Masters) or Judges who may not view the silent provisions as important as judicial efficiency in resolving a case. While the above provisions are all still applicable even in a contest, it is not to be unexpected that a court, even in Nevada, may still exercise discretion in favor of disclosure. However, the decision of *In Re 23 Partners Trust I, supra*, recognized the limitations on the Court's authority under NRS 163.180, which may interfere with a Court simply ordering disclosure where disclosure is not permitted under the instrument. Therefore, a beneficiary seeking to contest a trust may have to do so blindly, without information about the terms and conditions of the trust, and without knowledge of the

incontestability clause. In 2020, the Nevada Supreme Court did consider whether the failure to provide the beneficiary "all" relevant portions of the trust instrument (including a subsequent amendment which did contain provisions relevant to the beneficiary) was sufficient to trigger the Nevada's 120 day limit on the time to contest a previously revocable trust that became irrevocable on death of the grantor. NRS 164.021. In *Horst, supra*, the Nevada Supreme Court affirmatively agreed that NRS 164.021 was purely discretionary in the hands of the trustee, and while the Trustee could give the notice of the time to contest with the trust instrument provisions, the Trustee did not have to do so. Rather, the Court ruled that failure to give the beneficiary information regarding all pertinent portions of the trust attributable to the beneficiary (or person), including amendments, was insufficient to trigger the 120 day period to contest. The Court did not order the Trustee to provide trust instruments, but did indicate that if a Trustee desires to take advantage of that statute of limitation on the time to contest, the Trustee must strictly comply with disclosure of the "all" pertinent portions of the Trust instrument (including amendments) as to the beneficiary's interest. Accordingly, a Trustee may be put into an uncomfortable position of having to choose between enforcing the grantor's intent as to a silent trust versus the Trustee's interest in cutting off the right of a person (perhaps who may not even be a named beneficiary, such as an heir or person who was previously included and has now been eliminated), to contest the trust instrument.[1]

III. State Statutes that Permit Trust Instruments to Delay Notification.

Due to their rising popularity among settlors, a number of other jurisdictions have enacted legislation to allow for the creation of silent trusts, including states that have adopted the UTC but have altered the default trustee disclosure requirements.

A. Alaska. Section 13.36.080(a) of the Alaska Statutes imposes notice and disclosure requirements upon a trustee, e.g., to provide information as to where the trust is registered and the trustee's name and address, provide a copy of the terms of the trust upon request, provide annual and termination accountings, etc.

However, pursuant to AS § 13.36.080(b), a settlor may exempt a trustee from these duties with respect to beneficiaries who are not annually entitled to a mandatory distribution of income or principal. Such exemption can be provided in the terms of the trust instrument, by amendment to the trust instrument, or by a separate writing. Such exemption only applies for the shorter of the settlor's life or determination of incapacity.

[1] Based on information, there is currently legislative pending for the 2023 Nevada legislative session to further define the minimum extent of information a trustee must provide to trigger the 120 day contest period. If such legislation passes, it would likely be effective October 1, 2023.

B. Arizona. Arizona has adopted its own version of the UTC. Chapter 11 of Title 14 of the Arizona Revised Statutes. Accordingly, the standard default disclosure and notification provisions apply. A.R.S. § 14-10813. However, Arizona allows a settlor to modify (to an extent) the default notice requirements. A.R.S. § 14-10105(B). A settlor cannot waive either "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 a trust" or the notice provisions regarding charitable trusts. A.R.S. § 14-10105(B)(8).

C. Arkansas. Arkansas has also adopted its own version of the UTC. Chapter 73 of Title 28 of the Arkansas Code Annotated. Accordingly, the standard default disclosure and notification provisions apply. A.C.A § 28-73-813. However, Arkansas allows a settlor to modify or waive the default notice requirements, as the Arkansas Code does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. A.C.A § 28-73-105. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

D. District of Columbia. D.C. is another jurisdiction that has adopted a version of the UTC. Chapter 13 of Title 19 of the D.C. Code. Accordingly, the standard default disclosure and notification provisions apply. DC ST § 19-1308.13. D.C. takes a bit of a different approach by allowing a settlor, either via the trust instrument or other writing delivered to trustee, to waive or modify the trustee notification provisions in the following ways: (1) by waiving or modifying such duties during the lifetime of the settlor or the settlor's spouse; (2) by specifying an age other than twenty-five (25) at which a beneficiary is entitled to notice; or (3) by designating a person to act in good faith on behalf of the beneficiaries to receive such notice(s). DC ST § 19-1301.05.

E. Florida. Florida has also adopted its own version of the UTC. Chapter 736 of Title XLII of the Florida Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. F.S.A. § 736.0813. Such duties cannot be waived or modified. F.S.A. §§ 736.0105(r), (s), (t). However, a settlor may appoint a surrogate to receive information on behalf of the current beneficiaries. F.S.A. § 736.0306. The trust instrument can also authorize anyone other than the trustee to appoint a surrogate. F.S.A. § 736.0306(1).

F. Georgia. Georgia has adopted its own version of the UTC. Ga. Code Ann., § 53-12-243. Accordingly, the standard default disclosure and notice provisions apply. Ga. Code Ann., § 53-12-243. However, the provisions of the trust may provide otherwise or the settlor of the trust may direct the trustee in writing delivered to the trustee otherwise. Ga. Code Ann., § 53-12-243(d).

G. Hawaii. In 2022, Hawaii adopted the UTC, but with a variety of special provisions that modify its application. Section 105 deletes the UTC's minimum age requirement of 25 for qualified beneficiaries to learn of existence of trust and right to inspect reports, including accountings. Hawaii determined that age 25 was arbitrary and was an advanced age without adequate justification for such restrictions. Sections 105 and 108 also have mandatory notice provisions under Hawaii's versions, limiting ability to establish silent trusts. However, Section 110 was modified to limit notice requirements to qualified beneficiaries as that term is defined in Hawaii, and not requiring notice to all contingent and remote beneficiaries as was otherwise consistent with Hawaii law.

H. Kansas. Kansas has also adopted its own version of the UTC. Chapter 58A of the Kansas Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. K.S.A 58a-813. Unlike the previous jurisdictions, the Kansas statute states that the notice provisions do not apply so long as a surviving spouse is a qualified beneficiary or holds any power of appoint over the entire trust, and where all other qualified beneficiaries are issue of the surviving spouse. K.S.A 58a-813(d).

In addition, Kansas allows a settlor to modify the default notice requirements, as the Kansas Statutes do not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. K.S.A 58a-813(b). Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

I. Kentucky. Kentucky statute implies that silent trust language is permissible. Kentucky has adopted its own version of the UTC. Kentucky statute provides that, unless the trust instrument provides otherwise, the trustee shall keep qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. KRS § 386B.8-130. Kentucky statute further provides that notwithstanding the provisions of a trust instrument, the trustee shall have a duty to notify and to report to at least one (1) qualified beneficiary of an irrevocable trust who has attained twenty-five (25) years of age, or a designated person having a fiduciary relationship to a qualified beneficiary, of the existence of the trust, of the identity of the trustee, and of his or her right to request trustee's reports. KRS § 386B.8-130.

J. Maine. Maine is yet another jurisdiction that has adopted a version of the UTC. Title 18-B of the Maine Revised Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. 18-B M.R.S.A. § 813. Similar to D.C., Maine allows a settlor, by the trust instrument or other writing delivered to trustee, to waive or modify the trustee notification provisions for all qualified beneficiaries other than the surviving spouse during such spouse's lifetime, but requires a designee to act

in good faith to protect the interests of a current beneficiary for whom notice was waived and to receive reports on behalf of such beneficiary. 18-B M.R.S.A. § 105(3).

K. Maryland. Maryland has adopted its own version of the UTC. Section 14.5-813(a) of the Maryland Trust Act provides that unless unreasonable under the circumstances, a trustee shall promptly respond to the request of a qualified beneficiary for information related to the administration of a trust, including a copy of the trust instrument. Furthermore, within 60 days of accepting trusteeship, a trustee shall notify the qualified beneficiaries of the acceptance and the trustee's contact information. MTC § 14.5-813(B). The Maryland Trust Act makes disclosure subject to a reasonableness test. However, a qualified beneficiary may waive the right to a trustee's report or other information.

L. Michigan. Michigan has also adopted its own version of the UTC. Article VII of Chapter 700 of the Michigan Compiled Laws Annotated. Accordingly, the standard default disclosure and notification provisions apply. M.C.L.A. § 700.7814. The bulk of such duties cannot be waived or modified. M.C.L.A. § 700.7105(i). However, a settlor may modify or waive the duty to keep qualified beneficiaries reasonably informed, the duty to promptly respond to a beneficiary's request for information regarding the administration of the trust, and the duty to provide advance notice of any change in trustee compensation. *Id.*

M. Minnesota. Minnesota has adopted its own version of the UTC. M.S.A. § 501C.0813. M.S.A. § 501C.0813(a) requires that a trustee keep qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary to protect their interests. Effective January 1, 2016, the Minnesota UTC introduced the concept of a silent trust to Minnesota law. A settlor may provide, by an express provision in the trust instrument, that paragraph (a) of M.S.A. § 501C.0813 shall not apply to the administration of a trust during any period when the trustee is required by the terms of the trust to keep the settlor or another person, including one or more beneficiaries of the trust or a representative of a beneficiary, reasonably informed about the administration of the trust and of the material facts necessary to protect the beneficiaries' interests. M.S.A. § 501C.0813(b).

N. Mississippi. Mississippi has also adopted its own version of the UTC. Chapter 8 of Title 91 of the Mississippi Code. Accordingly, the standard default disclosure and notification provisions apply. Miss. Code § 91-8-813. The Mississippi Code, however, allows a settlor to modify the default notice requirements, except with respect to providing notice to first-tier remaindermen, and possibly holders of a power of appointment, upon the termination of a current interest. Miss. Code § 91-8-813(c).

With respect to the notice provisions that can be waived, a settlor, trust protector, or trust advisor may waive such duties (in a writing delivered to trustee) in the following ways: (1) by waiving or modifying such duties as to all qualified beneficiaries during the lifetime of the settlor or the settlor's spouse; (2) by specifying a different age at which a beneficiary must be notified; and (3) by designating a surrogate to receive such notice who will act in good faith to protect the interests of the beneficiary.

O. Missouri. Missouri has also adopted its own version of the UTC. Chapter 456 of Title XXXI of Vernon's Missouri Statutes. Accordingly, the standard default disclosure and notification provisions apply. V.M.S. § 456.8-813. A settlor cannot waive or modify either the duty to respond to a qualified beneficiary's request for reports and information reasonably related to the trust administration or the duty to notify each permissible distributee age twenty-one (21) or older of the trust's existence and such distributee's right to request trustee reports and other information reasonably related to the administration of the trust. V.M.S. §§ 456.1-105(2)(8), (9).

However, pursuant to V.M.S. § 456.1-105(3), a settlor, by the terms of the trust instrument, can designate "one or more permissible distributees to receive notification of the existence of the trust and of the right to request trustee's reports and other information reasonably related to the administration of the trust in lieu of providing the notice, information or reports to any other permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee." Essentially, a current beneficiary can be designated as a surrogate to receive information on behalf of other current beneficiaries that are the surrogate's ancestors or lineal descendants.

P. Nebraska. Nebraska has also adopted its own version of the UTC. Article 38 of Chapter 30 of the Revised Statutes of Nebraska Annotated. Accordingly, the standard default disclosure and notification provisions apply. Neb.Rev.Stat. § 30-3878. While a settlor can modify or waive many of these trustee duties, pursuant to Neb.Rev.Stat. § 30-3805(b)(8), a settlor cannot modify or waive the duty to keep qualified beneficiaries reasonably informed about the trust's administration and the material facts necessary to protect their interest, and the duty to respond to a request of qualified beneficiary of an irrevocable trust for reports and information reasonably related to the trust's administration.

Q. New Hampshire. New Hampshire has also adopted its own version of the UTC. Chapter 564-B of Title LVI of the Revised Statutes of the State of New Hampshire. Accordingly, the standard default disclosure and notification provisions apply, with some variations on the age (21) for disclosure. N.H. Rev. Stat. § 564-B:8-813. However, New Hampshire allows a settlor to modify or waive the default notice requirements, as the New Hampshire Code does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying

the default notice and disclosure requirements. N.H. Rev. Stat. § 564-B:1-105. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

R. New Jersey. New Jersey has adopted a version of the UTC. N.J.S.A. 3B:31-67. Thus, the default notice and disclosure requirements apply. However, N.J.S.A. § 3B:31-5 allows the terms of the trust to override most provisions of the act except the duty "to respond to the request of a qualified beneficiary of an irrevocable trust who has attained the age of 35 years for a copy of the trust instrument or for other information reasonably related to the administration of the trust." With this exception, silent trust language related to beneficiaries under age 35 may be permissible.

S. New Mexico. New Mexico is another jurisdiction that has adopted a version of the UTC. Chapter 46A of the New Mexico Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. N.M.S.A. 1978, § 46A-8-813. However, N.M.S.A. 1978, § 46A-8-813F allows a settlor to knowingly waive the trustee's duties (in whole, in part, subject to a contingency, to only certain beneficiaries, etc.) to "respond to the request of a qualified beneficiary of an irrevocable trust for a trustee's reports and other information reasonably related to the administration of a trust," so long as the trustee is a regulated financial service institution qualified to do trust business in New Mexico. In addition, the "waiver must be conspicuous, must be contained in the terms of the trust or of a separate affidavit signed by the settlor and must state that the settlor has been informed of the risks and consequences of the waiver and that the settlor nevertheless directs that the reports and information be withheld by the trustee." N.M.S. 1978, § 46A-8-813F. Conspicuous is defined as "so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." N.M.S. 1978, § 55-1-201(b)(10).

Curiously, N.M.S.A. 1978, § 46A-1-105B(8) does not allow the terms of a trust instrument to waive a trustee's duty to notify qualified beneficiaries of an irrevocable trust who have attained age twenty-five (25) of the trust's existence, the trustee's identity, and of their right to request reports.

T. North Carolina. North Carolina has also adopted its own version of the UTC. Chapter 36C of the North Carolina General Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. N.C.G.S.A. § 36C-8-813. However, North Carolina allows a settlor to modify or waive the default notice requirements, as the North Carolina General Statutes Annotated do not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. N.C.G.S.A. § 36C-8-813. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

U. North Dakota. North Dakota has also adopted its own version of the UTC. Chapter 59-09 – Chapter 59-19 of Title 59 of the North Dakota Century Code. Accordingly, the standard default disclosure and notification provisions apply. NDCC § 59-16-13. However, North Dakota allows a settlor to modify or waive the default notice requirements, as the North Dakota Century Code does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. NDCC § 59-09-05. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

V. Ohio. Title LVIII of the Ohio Revised Code appears to be based, at least in part, on the UTC. As such, the trustee has the standard duties to provide information and notice to the beneficiaries. R.C. § 5808.13. However, pursuant to R.C. § 5801.04(C), a settlor may, within the terms of the trust instrument, modify or waive the bulk of such duties with respect to current beneficiaries. The waiver can only be made by the settlor and must designate a surrogate to receive information on behalf of the current beneficiaries. The surrogate must act in good faith to protect the interests of the current beneficiaries. *Id*. In addition, a settlor can, without the need for a surrogate, waive the duty for a trustee to provide a copy of the trust instrument to a beneficiary upon request. R.C. § 5801.04(B).

W. Oklahoma. By statute, a settlor may, within the provisions of the trust instrument (or amendment to the trust instrument), relieve a trustee from "any and all duties, restrictions, and liabilities which would otherwise be imposed upon him," subject to certain duties and restrictions for corporate trustees, none of which pertain to beneficiary notice, e.g., restriction against self-lending/self-dealing, restrictions on deposits, etc. 60 Okl. St. Ann. § 175.21.

X. Oregon. Oregon has also adopted its own version of the UTC. Chapter 130 of Title 13 of the Oregon Revised Statutes. Accordingly, the standard default disclosure and notification provisions apply, with an exception that only settlor's surviving spouse need to receive disclosures under certain circumstances. O.R.S. §§ 130.710(8). However, Oregon allows a settlor, to an extent, to waive or modify such duties. O.R.S. § 130.020(4). A settlor has the ability, within the terms of the trust instrument or another writing delivered to a trustee, to waive the duties during the period that either the settlor is living and competent or the settlor's spouse, if a qualified beneficiary, is alive and competent. O.R.S. § 130.020(4)(a). Alternatively, a settlor may designate a person, acting in good faith to protect the qualified beneficiaries' interests, to receive any disclosures. O.R.S. § 130.020(4)(b).

However, any report that contains information regarding a termination of a trust must be provided to the qualified beneficiaries or the person designated in accordance with O.R.S. § 130.020(4)(b). O.R.S. § 130.020(5).

Y. Pennsylvania. Pennsylvania has also adopted its own version of the UTC. Chapter 77 of Title 20 of Purden's Pennsylvania Statutes and Consolidated Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. 20 Pa.C.S.A. § 7780.3. Such duties cannot be waived or modified. 20 Pa.C.S.A. § 7705(b)(8). However, a settlor may appoint a surrogate to receive information on behalf of the current beneficiaries. 20 Pa.C.S.A. § 7780.3(k).

Z. South Carolina. South Carolina has also adopted its own version of the UTC. Article 7 of Title 62 of the Code of Laws of South Carolina 1976. Accordingly, the standard default disclosure and notification provisions apply. Code 1976 § 62-7-813. However, South Carolina allows a settlor to modify or waive the default notice requirements, as the South Carolina Code does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. Code 1976 § 62-7-105. This is further evidenced by the fact that the provisions of Code 1976 § 62-7-813 pertaining to notice and disclosure are prefaced by "[u]nless the terms of a trust expressly provide otherwise." Code 1976 §§ 62-7-813(a), (b), (c). Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

AA. South Dakota. Not surprisingly, South Dakota has not adopted a version of the UTC. Its notice requirements are found in SDCL §§ 55-2-13 and 55-2-14, the latter of which deals exclusively with revocable trusts. Regardless of the status of the trust as revocable or irrevocable, South Dakota allows a settlor (or trust advisor or trust protector) to modify or waive the trustee's duties with respect to notice either within the terms of a trust instrument or a separate writing. SDCL §§ 55-2-13, 55-2-14.

BB. Tennessee. Tennessee has also adopted its own version of the UTC. Chapter 15 of Title 35 of the Tennessee Code Annotated. Accordingly, the standard default disclosure and notification provisions apply. T.C.A. § 35-15-813. However, Tennessee allows a settlor to modify or waive the default notice requirements, as the Tennessee Code Annotated does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. T.C.A. § 35-15-105. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

CC. Texas. Texas imposes upon a trustee the duty, upon the request of a beneficiary, to deliver an accounting to each beneficiary. Such accounting is to cover all transactions since the last accounting or the trust's inception, and the trustee is not obligated to provide such an accounting more frequently than annually unless required by the court. V.T.C.A., Property Code § 113.151. For the requirements that must be included in the accounting, see V.T.C.A., Property Code § 113.152. This duty cannot be waived or

modified with respect to current beneficiaries and first-tier remaindermen of irrevocable trusts. V.T.C.A., Property Code § 111.0035(b)(4).

In addition, pursuant to V.T.C.A., Property Code § 111.0035(c), "[t]he terms of a trust may not limit any common-law duty to keep a [current beneficiary or first-tier remainder] beneficiary of an irrevocable trust who is 25 years of age or older informed."

DD. Utah. Utah has also adopted its own version of the UTC. Chapter 7 of Title 75 of the Utah Code Annotated. Accordingly, the standard default disclosure and notification provisions apply. U.C.A. 1953 § 75-7-811. However, Utah allows a settlor to modify or waive the bulk of default notice requirements, as the Utah Code Annotated does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. U.C.A. 1953 § 75-7-105. This is further evidenced by the fact that the provisions of U.C.A. 1953 § 75-7-811 pertaining to notice and disclosure are prefaced by "[e]xcept to the extent the terms of the trust provide otherwise." U.C.A. 1953 §§ 75-7-811(1), (2).

Interestingly, the paragraph regarding the duty of a trustee to send a report of the trust property, liabilities, receipts, and disbursements (including trustee compensation), as well as a listing of trust assets and their fair market value (if feasible) to a requesting qualified beneficiary is not prefaced with any limiting language. U.C.A. 1953 § 75-7-811(3). However, since that paragraph is not listed among the items over which a trust instrument will not prevail, it is likely that this duty can be modified or waived. U.C.A. 1953 § 75-7-105.

EE. Vermont. Vermont has also adopted its own version of the UTC. Title 14A of the Vermont Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. 14A V.S.A § 813. However, Vermont allows a settlor to modify or waive the default notice requirements, as the Vermont Statutes Annotated do not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. 14A V.S.A § 105. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

FF. Virginia. Virginia has also adopted its own version of the UTC. Chapter 7 of Title 64.2 of the Annotated Code of Virginia. Accordingly, the standard default disclosure and notification provisions apply. VA Code Ann. § 64.2-775. However, Virginia allows a settlor to modify or waive the default notice requirements, as the Annotated Code of Virginia does not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default

notice and disclosure requirements. VA Code Ann. § 64.2-703. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

GG. Washington. Washington allows a settlor to waive or modify certain notice requirements, either within the terms of the trust instrument or a separate writing delivered to a trustee. RCWA 11.98.072(5). A settlor cannot, however, waive the duty of a trustee to (1) keep all qualified beneficiaries reasonably informed about the trust's administration and the material facts necessary for them to protect their interests; (2) promptly respond to any beneficiary's request for information related to the trust's administration, which can be satisfied by providing a copy of the entire trust instrument; and (3) distribute to each current beneficiary an annual accounting. RCWA 11.98.072(1), RCWA 11.106.020.

HH. Wyoming. Wyoming has also adopted its own version of the UTC. Chapter 10 of Title 4 of the Wyoming Statutes Annotated. Accordingly, the standard default disclosure and notification provisions apply. W.S.1977 § 4-10-813. However, Wyoming allows a settlor to modify or waive the default notice requirements, as the Wyoming Statutes Annotated do not include provisions similar to UTC §§ 105(b)(8) and 105(b)(9), i.e., the UTC Sections that prevent a settlor from modifying the default notice and disclosure requirements. W.S.1977 § 4-10-105. Thus, the settlor should be able to waive or modify all notice and disclosure requirements.

II. Comparison of State Statutes. Because over half of the states provide some type of relief from the expansive notice requirements under the UTC and the Restatement, it is hard to pinpoint a common theme. That said, there appears to be a trend towards allowing a settlor to designate a surrogate to receive information on behalf of the beneficiary. In addition, it appears that a number of the above-listed jurisdictions continue to require an accounting, either annually or at a trust's termination, regardless of whether or not other trustee duties can be waived.

IV. Administering Silent Trusts.

A. Introduction. Many of the potential issues that could arise with the use of silent trusts can be avoided through careful drafting. Also, communication with the grantor is important during the planning and drafting stage of the trust instrument. As discussed *infra*, if the grantor expects that information will be restricted or eliminated, this needs to be drafted into the trust. Further, it's very important to discuss the benefits and also consequences of the silent trust provisions which may be designed to protect a beneficiary initially, but which may give shelter to a trustee's mismanagement, or even worse, fiduciary fraud. While this may not be as big of a concern when the fiduciary is a well-established professional trust company that may have significant internal controls to prevent fiduciary malfeasance, that same control may not exist for a private fiduciary (and

especially for individuals such as friends and family members who lack knowledge of the requirements of a fiduciary).

B. Issues in administering a silent trust that can be handled with careful drafting of the trust.

1. Crummey Powers or other powers of withdrawal. Although it seems obvious when pointed out, it is very important that any provisions restricting disclosure not conflict with requirements to provide notice such as those found within Crummey or other withdrawal powers. If the trust instrument provides that the trustee is directed not to provide notice of the trust, statements, or any other information to the beneficiaries, and yet the trust has standard Crummey withdrawal provisions with the required notice to the beneficiary, there is a conflict in the terms of the trust which leaves the trustee in an uncertain position. Careful planning in the drafting stage will avoid this. However, there are instances where the provisions restricting notice come toward the end of the trust agreement, the Crummey powers of withdrawal and related notice requirements are among the earlier dispositive provisions, and there is no coordination between the two provisions. In addition to the importance of careful drafting, a safety net might be to provide a trust protector with the power to change the provisions restricting notice to the beneficiaries, if needed.

2. The trustee has discretion to withhold information. What if the trust instrument does not direct the trustee to withhold information but rather gives the trustee the discretion to withhold information? Arguably the trustee could be protected under the statute of the given state. However in many instances a trustee will not want to be in the position of exercising this discretion, even if protected by a statute allowing a trust instrument to permit notice to the beneficiaries to be reduced or eliminated. The preferred drafting would be to direct the trustee rather than provide the trustee with discretion to withhold information.

3. There are no provisions in the trust regarding notice to beneficiaries. Many trust officers have faced the situation where the grantor tells the trust officer not to send statements or any information to a beneficiary who has reached the age of majority, even though there are no such provisions in the trust instrument. A common reaction from the grantor might be, "I thought this state allowed notice to be withheld from beneficiaries." However, if the trust instrument does not provide for this, it is likely that the trustee will have to go through the considerations under the applicable state law such as the considerations in Delaware described in the *McNeil* Case *supra*, the *Horst* case in Nevada, *supra*, or similar case or statutory law of the state under which the trust is being administered. The important message here is to discuss the grantor's desires regarding notice and draft the appropriate provisions in the trust instrument if needed, rather than have this issue arise at a later time when it might be too late.

C. Issues which exist regardless of careful drafting. Even with careful drafting the trustee may still be faced with some issues when administering a silent trust.

1. Subsequent Discovery by Upset Beneficiary. If a beneficiary learns about the trust after many years after the creation of the beneficiary's interest in the trust, the beneficiary's reaction may be surprise and perhaps anger that he or she was not informed earlier. At that point, a trustee might hear from the beneficiary that the beneficiary would have purchased a house or gone to medical school if he or she had known about the trust. Although the statute protects the trustee, there is still the possibility of a difficult client relationship with a beneficiary at a later time. As with most legal issues, secrecy tends to create suspicion of impropriety and that suspicion can negatively impact the relationship between the Trustee and beneficiary moving forward.

2. Negative Impact on Trustee's Relationship with Beneficiary. There is a spectrum of fact patterns which might impact the trustee's relationship with the beneficiary upon the beneficiary learning about his or her interest in the trust. For example, suppose the trustee is directed not to provide notice until the beneficiary reaches age 25 or completes his or her current college program, and that beneficiary is one or two years away from graduation. Perhaps that is a reasonable reason and amount of time to withhold notice, and it is more likely that the beneficiary would be pleased when he or she learns about the trust. On the other end of the spectrum would be the fact pattern where the trustee is directed to never provide notice to the beneficiary unless the beneficiary receives a distribution from the trust. This could lead to the dissatisfied beneficiary / client described above.

3. Failure to Trigger Statutory Limits on Time to Object/Contest. One of the more obvious issues facing the trustee is the fact that there will be no beneficiary to receive statements, which means not starting any statute of limitations for a beneficiary to bring a cause of action against the Trust for investment management or other fiduciary acts. For example, Delaware law provides that a beneficiary may initiate a proceeding against a trustee for breach of trust within one year after the date the beneficiary was sent a report that adequately discloses the facts constituting the claim, 12 Del. C. §3585. In Nevada, the *Horst* decision confirms that withholding the trust may create issues with the 120 day time to contest under NRS 164.021. Failure to account may also never trigger the 90 day statute for a beneficiary to object to the accounting. NRS 165.1214(4)(a). Furthermore, under Delaware law the terms of the trust can provide a shorter period for a beneficiary to bring a cause of action. If the trust is a silent trust, the beneficiary does not receive any report to begin the statute of limitations period. However, one method that might be utilized to address this is the use of a "beneficiary representative" or "reviewer" discussed in more detail herein.

4. Trustee's Refusal To Follow Silent Trust Provision. There is often the potential, and even a right under applicable law in some locations, for trustee to ignore silent provisions and reveal information despite restrictions. Drafters should discuss with their clients the reality that in many states, the Trustee may still have the overriding authority to refuse to comply with such "silent trust" intentions of the Grantor and given the ability to decant to move trusts from one situs to another, it may not be the law of the current location that will ultimately control. For example see NRS 165.148 in Nevada re an accounting. Accordingly, if this is a risk in the state at issue, a grantor may need to consider who the trustee will be and whether that Trustee will in fact be a person or entity likely to enforce the same. In some circumstances, a grantor may wish to discuss this issue with the proposed trustee to insure that it's not against that trustees policies and that the trustee will in fact be willing to act in accordance with the Grantors silent trust requirements.

D. Beneficiary Representatives. Various jurisdictions including Florida, Illinois, Ohio, Pennsylvania, and the District of Columbia have statutes that specifically provide that an individual can be named to receive notice, accountings, statements or any other information concerning the trust on behalf of a beneficiary and bind that beneficiary, fulfilling the trustee's requirement to provide notice to beneficiaries and preventing the beneficiary from later claiming that he or she did not receive the information. *See e.g.*, Fla. Stat. §736.0306; Ohio Rev. Code Ann §5801.04(c) (creating a "beneficiary surrogate"); 760 ILCS 3/307 (providing for designated representatives); 20 Pa. Cons. Stat. §7780.3(k); and D.C. Code Ann. §19-1301.05(c)(3). Further, many states have common law or statutory recognition of the Doctrine of Virtual Representation that may allow notice to one person to cover many. And states like Nevada have a "Reviewer" to whom a confidential account can be provided in lieu of the beneficiary. The purpose of these statutes is to strike a balance between the grantor's right to privacy when creating the trust, and the beneficiaries' right to be informed of his or her interest in the trust

1. What this accomplishes. The concept is that the trustee has fulfilled its fiduciary duty to provide information to the beneficiaries. The beneficiaries are represented and bound by the beneficiary representative. That person is looking out for the interests of the beneficiary. Any statute of limitations for bringing a cause of action after receipt of information (12 Del. C. § 3585; NRS 165.1214; *supra*) begins to run with the receipt of the information by the beneficiary representative.

2. Is the beneficiary representative a fiduciary? As a general rule the answer is no. Most of these statutes provide a "good faith" standard for the beneficiary representative, but provide that the beneficiary representative is not liable as long as she or he acts with good faith. Of course the trust instrument can provide that the beneficiary representative is a fiduciary.

3. Who serves in this role? Generally the statute provides that the trustee cannot serve as a beneficiary representative. The various statutes have different requirements regarding who can fill this role, and the permissible methods of appointment. An equally important question is who actually is available and willing to serve in this role. In practice it seems that often times this role is filled by family members such as older siblings, aunts, or uncles; or a professional adviser close to the grantor. It is not always easy to find someone willing to take on this responsibility. Nonetheless, if the trust is created in a state that provides for this role, it would be advisable to draft the provisions into the trust so that the role can be filled at a later date if desired and if there is a viable candidate to fill the role.

V. Importing Quiet Trust Language into Existing Trusts.

A. Introduction. For practitioners and fiduciaries located in jurisdictions that allow trusts to contain some form of silent trust language, it is not uncommon for interested parties to want to modify an existing trust to import silent trust provisions. This can present unique challenges because, by their very terms, silent trust provisions restrict or eliminate a right of the beneficiaries to notice of the existence of, or information regarding, the trust at issue. However, certain options for modifying the trust as desired may be available depending on the jurisdiction. This section examines, as a point of reference, the possible methods available in Delaware and Nevada to add silent trust provisions to an irrevocable trust. However, many other jurisdictions have similar options that may be utilized in a similar manner to accomplish such changes.

B. Possible Methods for Importing Silent Trust Provisions.

1. Decanting. Decanting under Delaware law is governed by 12 Del. C. § 3528; and by NRS 163.556 under Nevada law. *See also, e.g.,* 760 ILCS 3/1201 et seq. (Illinois Trust Decanting Law) (modeled on the Uniform Trust Decanting Act).

i. Requirements and Mechanics.

(a) Delaware's decanting statute is available to any trust administered in the State of Delaware. 12 Del. C. § 3528(f). Nevada law will permit decanting of a trust over which the Trustee has discretion over income and/or principal, and further where the Trust is subject to Nevada law, subject to administration under Nevada law, or further has a Nevada situs. NRS 163.556 (1) and (1&).

(b) A trustee that has authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries, to exercise such authority by appointing all or a portion of the principal subject

to the power of invasion in favor of a trustee under a separate instrument (a second trust). 12 Del. C. § 3528(a). The same applies in Nevada as to the Trustee's power to invade principal and also income. NRS 164.556(1).

(c) Decanting can be utilized to make significant changes to a trust by decanting it into a new trust with the desired administrative provisions.

(d) With some exceptions, common and key requirements of a decanting statute may include:

- The beneficiaries of the second trust must also be beneficiaries of the first trust. 12 Del. C. § 3528(a)(1); NRS 163.556(2)
- The second trust may not alter the beneficial interests of beneficiaries of the first trust that are not proper objects of the exercise of the power of invasion. 12 Del. C. § 3528(a)(1); NRS 163.556(1)
- The second trust must comply with any standard that limits the trustee's authority to make distributions from the first trust. 12 Del. C. § 3528(a). Although Nevada does permit broad authority for an independent trustee to alter standards including a HEMS standard. NRS 163.556(4).
- A written "decanting instrument" must be signed by the trustee and filed with the records of the trust. 12 Del. C. § 3528(b); NRS 163.556(9).

(e) While the second trust may not have beneficiaries who are not also beneficiaries of the first trust, the decanting statute specifically permits the second trust to grant a beneficiary of the first trust a limited or general power of appointment thereby allowing the beneficiary to appoint trust property to a person who is not a beneficiary of the first trust. 12 Del. C. § 3528(a). NRS 163.556(8)(a).

(f) The trustee does not need the consent of the beneficiaries or any other interested party to exercise its decanting power. However, because decanting is an exercise of the trustee's discretion it is common practice in Delaware to have the beneficiaries consent to the decanting and release and indemnify the trustee from any liability in connection with the decanting. Nevada recognizes the Trustee's discretionary right to do a Notice of Proposed Action but is not required to do so. NRS 163.556(7). Nevertheless, notice is still commonly given as its issuance has the effect of releasing the Trustee of liability for the action of decanting taken.

ii. Potential Advantages and Disadvantages.

(a) Notice to beneficiaries is not required under the statute. Therefore, in certain circumstances where it might be in the best interests of a beneficiary to delay notice of his or her interest in the trust beyond the time originally specified in the trust (e.g., if a beneficiary has a severe substance abuse problem), decanting can be accomplished and the desired quiet trust provisions included in the second trust without notifying the beneficiary.

(b) If virtual representation is not available, certain minor or unborn beneficiaries will not be represented for purposes of any consent, release, and indemnity agreement signed by all other interested parties to the trust.

2. Merger. Merger under Delaware law is governed by 12 Del. C. § 3325(29). NRS Chapter 163 provides for mergers under Nevada law, similar to Delaware

i. Requirements and Mechanics.

(a) Delaware's merger statute is available to a trustee when Delaware law governs the administration of the trust.

(b) There are at least 35 states (including Delaware) plus the District of Columbia that allow for trust mergers without judicial involvement, and other states may permit merger via the state's common law.

(c) The trustee is authorized to "[m]erge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust."

(d) Any changes to administrative provisions available through a decanting could also be accomplished by merger, including the addition of Investment Direction Advisers, Distribution Advisers and Trust Protectors.

(e) Similar to decanting, merger is an exercise of the trustee's discretion. While not required under the statute, the trustee may seek a consent, release and indemnity from the trust beneficiaries and other interested parties before effectuating a merger.

ii. Potential Advantages and Disadvantages.

(a) As with decanting, notice to beneficiaries is not required under the statute.

(b) If virtual representation is not available, certain minor or unborn beneficiaries will not be represented for purposes of any consent, release, and indemnity agreement signed by all other interested parties to the trust.

(c) Possible argument that including quiet trust provisions in the surviving trust that were not included in the original trust rises to the level of a "material change in the beneficial interests of the trust beneficiaries."

3. Nonjudicial Settlement Agreements. Nonjudicial settlement agreements ("NJSAs") under Delaware law are governed by 12 Del. C. § 3338. *See also, e.g.,* 760 ILCS 3/111; NRS 163.790 et. seq.

i. Requirements and Mechanics.

(a) Parties may utilize Delaware's nonjudicial settlement agreement statute when Delaware law governs the administration of the trust.

(b) Requires the agreement of all "interested persons" whose consent would be needed to achieve a binding settlement in the Delaware Court of Chancery. 12 Del. C. § 3338(a).

(c) The interested persons may enter into a binding agreement "with respect to *any matter involving a trust*…" (except with respect to charitable trusts and purpose trusts described in 12 Del. C. § 3541). 12 Del. C. § 3338(b) (emphasis added). The phrase "any matter" is inclusive rather than restrictive, suggesting that the presumption should be that any matter does fall within the proper subject matter of a nonjudicial settlement agreement rather than not, including trust modifications.

(d) A nonjudicial settlement agreement is "only valid to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the Court of Chancery under this title or other applicable law." 12 Del. C. § 3338(c).

ii. Potential Advantages and Disadvantages.

(a) A nonjudicial settlement agreement is often not a viable option to modify a trust to convert it into a silent trust as all beneficiaries are required parties to the nonjudicial settlement agreement. Therefore, any adult beneficiary would need to be a party to the nonjudicial settlement agreement. If the adult beneficiary has not yet been informed of the existence of the trust the

beneficiary will obviously become aware of the trust by virtue of being a party to the nonjudicial settlement agreement.

(b) Minor beneficiaries can typically be represented by adult beneficiaries (or the custodial parents of the minor beneficiaries if there are no adult beneficiaries) for purposes of the nonjudicial settlement agreement provided there is no conflict of interest between the minor beneficiary and the person representing the minor beneficiary. An adult beneficiary may have a conflict of interest with the minor beneficiary he or she is representing as the adult beneficiary is aware of the existence of the trust while the minor beneficiary is not. The custodial parents may also have a conflict of interest with the minor beneficiary as the desire to modify the trust to convert it into a silent trust may be driven by the parents and such modification is arguably not in the best interest of the minor beneficiary.

(c) Any interested person may seek judicial determination to interpret, apply, enforce or determine the validity of a nonjudicial settlement agreement. 12 Del. C. § 3338(e).

4. Modification of Trust by Consent While Trustor is Living Agreements. Modification of Trust by consent while Trustor is living ("Modification Agreements") under Delaware law are governed by 12 Del. C. § 3342.

i. Requirements and Mechanics.

(a) Parties may utilize Delaware's modification of trust by consent while trustor is living statute when Delaware law governs the administration of the trust.

(b) Requires the written consent or written nonobjection of all of the trust's trustors, all then serving fiduciaries and all beneficiaries having an interest in the trust (the "necessary parties"). 12 Del. C. § 3342(a).

(c) The necessary parties may enter into a binding agreement modifying any provision of a trust instrument or adding a new provision to the trust instrument, so long as such provision could have been included in the governing instrument of a trust were such trust created upon the date of the modification, regardless of whether the modification may violate a material purpose of the trust. 12 Del. C. § 3342(a).

ii. Potential Advantages and Disadvantages.

(a) The analysis of the advantages and disadvantages of engaging in a modification agreement to add silent trust provisions is the same as the analysis that pertains to nonjudicial settlement agreements.

(b) Any interested person may seek judicial determination to interpret, apply, enforce or determine the validity of a modification agreement. 12 Del. C. § 3342(c).

(c) If the Trustors are not living, 12 Del. C. § 3342 is not available.

VI. Relevant Case Law

A. ***Bright v. Bashekimoglu***. In *Bright v. Bashekimoglu*, Record No. CL10-7348 (Va. 2012), the Virginia Supreme Court ruled that the terms of the trust took precedence over the trustee's duty to disclose under the Uniform Trust Code.

Melih Bashekimoglu created a revocable trust in 2008, naming himself and his wife as co-trustees. The trust explicitly authorized the trustee to designate a person to receive notice, information, or reports on behalf of a Qualified Beneficiary. Melih died in 2009. A contingent beneficiary, Suzan Bright, requested information about the trust but was denied by the trustee. In 2010, Suzan filed a suit against the trustee seeking information about the trust. The trial court rejected her claim.

On appeal, the Virginia Supreme Court affirmed the trial court, holding that Suzan is not a Qualified Beneficiary and that the trust instrument permissibly modified the requirements under the Virginia UTC that would have required a nonqualified beneficiary be provided with requested information.

B. ***Wilson v. Wilson***. In *Wilson v. Wilson*, 2010 N.C. App. LEXIS 501 (March 16, 2010), the North Carolina Court of Appeals reversed the trial court's decision, finding that a beneficiary of a trust is entitled to information that is reasonably necessary to enforce his or her rights under the trust or prevent a breach of trust.

Lawrence Wilson, Jr. created two irrevocable trusts in 1992, naming Lawrence Wilson, Sr. as trustee. Neither trust authorized the trustee to account to any court or beneficiary. In 2007, the beneficiaries of the trust sued the trustee for breach of fiduciary duty and requested that the court compel an accounting. The trial court denied this request on the grounds that the terms of the trust instrument are absolute—the court could not compel an accounting. Notably, North Carolina's version of the UTC does not include any

mandatory disclosure requirements. The trustee secured a protective order preventing the beneficiaries from obtaining an accounting.

On appeal, the North Carolina Court of Appeals reversed the lower court's decision, holding that the court could not allow the terms of the trust instrument to override the interests of justice or the trustee's obligation (confirmed by the North Carolina UTC) to act in good faith. The court found that it was clearly within its power to compel discovery if and when it is necessary to satisfy a beneficiary's right to information that is reasonably necessary to enforce or prevent a breach of trust.

C. ***Miness v. Deegan***. In *Miness v. Deegan*, 2013 NY Misc. LEXIS 1983 (2013), a New York court found that a trustee was required to account to the trust beneficiaries despite the trust instrument instructing the trustee to account only to the settlor during the settlor's lifetime.

Michael Miness was the grantor of an irrevocable life insurance trust established in 1988. The trust benefitted his spouse and descendants and was administered by two non-beneficiary co-trustees. In 2009, one of the non-beneficiary trustees resigned. A beneficiary (one of the grantor's children) requested that the resigning trustee account for his actions while serving as trustee. The trustee refused, pointing to the trust instrument which explicitly provided that the trustee need only account to the grantor of the trust during the grantor's lifetime.

Despite the language of the trust instrument, the court ordered the resigning trustee to account to the beneficiary. In this case, the court's rationale was based in the statute of limitations—claims against the resigning trustee could expire while the grantor is still living. Given the beneficiary's pecuniary interest, the court held that the beneficiary's right to hold the trustee accountable superseded the provision of the trust instrument.

D. ***Sell v. Dorian***. In *Sell v. Dorian*, 421 P.3d 776 (July 6, 2018), the Kansas Court of Appeals ruled that unborn or unknown beneficiaries of a trust were entitled to representation to protect their interests.

William L. Graham executed a revocable trust on August 1, 1978, and executed an Amendment No. One the same day. William executed his will two days later, in which he stated that he believed the provisions he had made for his children during his lifetime were adequate to provide for their needs and the needs of their spouses and descendants, and that he made no further provisions for them. On July 18, 1980, he executed Amendment No. Two to the trust instrument which provided for his surviving spouse and his great-great-great-grandchildren. William passed away in February 1981, survived by his spouse and no great-grandchildren (let alone great-great-great-grandchildren).

In September 2014, one of William's children, Rebecca Dorian, filed a petition for declaratory judgment arguing that the trust was now invalid because William had died more than 21 years before (i.e. it violated the rule against perpetuities) and that the remaining trust assets should be distributed to William's heirs under state law. In November 2015, the co-trustees filed a petition for declaratory judgment seeking the court's "interpretation and application of the trust agreement," naming more than 60 defendants, including a guardian ad litem who was appointed by the co-trustees to represent unknown and unborn individuals who could become potential future beneficiaries of the trust. At the time, there were only two great-great-grandchildren (born out of wedlock) and no great-great-great-grandchildren.

On December 20, 2016, the district court granted the co-trustees summary judgment, finding that (i) the trust did not violate the rule against perpetuities, (ii) none of the defendants were entitled to an accounting, and (iii) the court had no authority to enter an order requiring periodic accountings to a guardian ad litem for beneficiaries who are unborn. Several defendants appealed the decision.

The Kansas Court of Appeals (i) affirmed the district court's holding that the trust did not violate the rule against perpetuities, (ii) reversed in part the district court's holding that none of the defendants were entitled to an accounting, and (iii) remanded with directions for further proceedings. The appellate court determined that, while William's children, grandchildren, and great-grandchildren are not beneficiaries, William's unborn great-great-grandchildren and great-great-great-grandchildren are potential beneficiaries and, under the trust, have the authority to inspect the co-trustees books of account. The appellate court found that the district court had the authority to appoint a guardian ad litem to represent the interests of potential beneficiaries who are unknown, unborn, or incapacitated.

On October 15, 2019, the district court (i) decreed that certain defendants had standing because they had an interest in protecting the interests of their descendants, (ii) directed the parties to continue to gather information on the identity of all of William's descendants who may be potential beneficiaries, and (iii) appointed a second guardian ad litem to represent William's great-great-grandchildren born out of wedlock.

Then, on October 26, 2020, the district court directed the trustee to select a certified public accounting firm to serve as neutral representative for the potential beneficiaries who are "under legal disability, unknown, or unborn" and provide annual accountings beginning with the 2021 calendar year. The court will review the accountings and adjudicate any objections by the neutral representative, but the proceedings will be under seal, and descendants who are not beneficiaries themselves (such as the grandparents of the beneficiaries) will not have access.

E. ***In Re 23 Partners Trust I, 138 Nev. Adv Op 84 (December 22, 2023).*** See detailed discussion above under Nevada law section. This case upheld the grantor's intent, recognized silent trust provisions, but ultimately permitted the release of the trust instrument and accountings based on the language the grantor had included in the instrument which defined the beneficiaries as persons entitled to an accounting. The Decision further recognized that the district court did not have carte blanche authority to ignore silent trust provisions.

F. ***In the Matter of the Fund for The Encouragement of Self Reliance, 135 Nev. Adv. Op 10 (April 25, 2019*)**. This case involved a charitable trust with Co-Trustees who were in middle of heated divorce. Co-Trustee wife attempted to decant one half of the trust to another charitable foundation unilaterally. The Nevada Supreme Court declined to recognize the attempted decanting, confirming that the authority to decant followed the authority of the trustee(s) over the income and principal. If all trustees were required to make a distribution then the same was required for decanting

EXHIBIT A

Sample Silent Trust Provisions

Sample 1 –

(a) Notwithstanding any other provision of this Agreement and in accordance with 12 Del. C. § 3303(a) (1) and (c), none of the Trustee, the Investment Direction Adviser, the Distribution Adviser or the Trust Protector, if any, (i) shall furnish any account statement or other account information to any beneficiary of the Trust (other than the Notice Recipients, as defined in section (d) below), or provide any such beneficiary with notice of the existence of the Trust or any information regarding the Trust or its terms or assets, unless directed in writing to do so by the Trust Protector and (ii) shall be required to provide any notice or account statement to any contingent beneficiary of a trust or any information regarding the Trust or its terms or assets until such time as the interest of such beneficiary in the Trust vests.

(b) During such time or times as the Trustee is instructed not to, or by the terms of this Agreement is not permitted to, provide notice of the existence of the trust or furnish trust information to a beneficiary or beneficiaries hereunder, the Trustee shall furnish any notice, statement, accounting or other instrument permitted or required to be provided to a beneficiary under the terms of this Agreement, to the Notice Recipients. By delivery of said document to the Notice Recipients, the Trustee will be deemed to have satisfied its duties hereunder relating to the providing of such information and shall have no liability for the failure to provide such information to the beneficiary or beneficiaries or for the actions and/or omissions of the Notice Recipients. The Notice Recipients shall have the authority to acknowledge receipt of any said document provided to such person. Further, the Trustee may seek a release from the Notice Recipients on behalf of the applicable beneficiaries in a manner satisfactory to the Trustee.

(c) For purposes of this Agreement and in accordance with 12 Del. C. § 3303(c) and (d), any beneficiary who is prohibited from receiving notice of the existence of this Agreement whether by virtue of the privacy provisions of this Agreement or otherwise, may for all purposes of this

Agreement (including for purposes of any judicial proceeding and for purposes non judicial matters such as, but not limited to, the granting of releases pursuant to 12 Del. C. § 3588 and measuring the limitation period described in 12 Del. C. § 3585) be represented and bound by the Notice Recipients.

(d) Wherever the term "Notice Recipients" appears in this Agreement, in accordance with 12 Del. C. § 3339 relating to a designated representative, it shall mean the following individuals who have delivered to the Trustee his or her written acceptance of the office of Notice Recipient:

1. Prior to the division of the Trust estate in accordance with section __ of Article _____ of this Agreement, the Grantor, while living and competent, the Grantor's Spouse, while living and competent, and each adult beneficiary who is competent and at least thirty-five (35) years of age; and

2. After the division of the Trust estate in accordance with section ___ of Article _____ of this Agreement, the Grantor, while living and competent, the Grantor's Spouse, while living and competent, and the Primary Beneficiary of a trust held in accordance with section ___ of Article _____ of this Agreement, if the Primary Beneficiary is competent and at least thirty-five (35) years of age; provided, if the Primary Beneficiary is under the age of thirty-five (35) years or incapacitated, the Grantor's eldest descendant who is competent and has attained the age of thirty-five (35) years will become a Notice Recipient of such Primary Beneficiary's trust until the Primary Beneficiary attains the age of thirty-five (35) years and is competent.

3. Additionally, the Trust Protector may appoint a "Notice Recipient" to represent the beneficiaries' interests and may add to the class of Notice Recipients. Any

appointment of a Notice Recipient by the Trust Protector shall be by written notice to such Notice Recipient(s), the Trustee, the Investment Direction Adviser and the Distribution Adviser. Any appointment of a Notice Recipient shall become effective at such time as provided in the instrument of appointment and upon written acceptance by the designee. If a Notice Recipient shall not be a beneficiary of the Trust estate, such Notice Recipient shall be reimbursed by the Trustee for any expenses or costs incurred as a result of such role and may be entitled to reasonable compensation for his or her services as agreed upon by the Notice Recipient and the Trust Protector.

Sample 2 –

TWELFTH Silent Trust and Designated Representative. It is the Grantor's desire that the beneficiaries of the Trust support themselves independently, be productive members of their communities and not become dependent upon distributions from the Trust estate to the extent that they lose their ambition and incentive. The Grantor believes that disclosing the existence of this Trust to the beneficiaries prior to them attaining a certain level of majority age would be detrimental. As such, it is the Grantor's intent to create a silent trust as described in 12 Del. C. § 3303. In accordance with 12 Del. C. § 3303(a)(1) and (c), the Trustee, the Investment Direction Adviser, the Distribution Adviser or the Trust Protector (hereinafter collectively the "Advisers," and individually, an "Adviser"), (i) shall not provide any account statements, account information or notice of the existence of the Trust, its terms, assets, or rights conferred by the Trust, to any beneficiary of the Trust (other than the Notice Recipients, as defined in section (d) below), unless directed in writing to do so by the Trust Protector, and (ii) shall not provide any notice or account statement to any contingent beneficiary of a trust or any information regarding the Trust, its terms, assets or rights conferred by the Trust, until such time as the interest of such beneficiary in the Trust vests and provided at such time such beneficiary qualifies as a Notice Recipient.

(a) Appointment of Initial Designated Representative. During any such time that a beneficiary is prohibited from receiving notice of the existence of the Trust a Designated Representative shall be appointed for such beneficiary. Wherever the term "Designated Representatives" appears in this Agreement, in accordance with 12 Del. C. § 3339, it shall mean

the following individuals who have delivered to the Trustee his or her written acceptance of the office of Designated Representative: _____.

(b) Role and Function of Designated Representative. The Designated Representative shall serve in a fiduciary capacity and conform to the purposes of this Agreement. During such time or times as the Trustee or any Adviser by the terms of this Trust Agreement is not permitted to, provide notice of the existence of the trust or furnish trust information to a beneficiary or beneficiaries hereunder, the Trustee shall furnish any notice, statement, accounting or other instrument permitted or required to be provided to a beneficiary under the terms of this Agreement, to the Designated Representatives. By delivery of said document to the Designated Representatives, the Trustee will be deemed to have satisfied its duties hereunder relating to the provision of such information and shall have no liability for the failure to provide such information to the beneficiary or beneficiaries or for the actions and/or omissions of the Designated Representatives. The Designated Representatives shall have the authority to acknowledge receipt of any said document provided to such person. Further, the Trustee may seek a release from the Designated Representatives on behalf of the applicable beneficiaries in a manner satisfactory to the Trustee.

(c) Designated Representatives Scope of Responsibility. For purposes of this Agreement and in accordance with 12 Del. C. § 3303(c) and (d), any beneficiary who is prohibited from receiving notice of the existence of this Trust whether by virtue of the privacy provisions of this Agreement or otherwise, may for all purposes of this Trust (including for purposes of any judicial proceeding and for purposes non- judicial matters such as, but not limited to, the granting of releases pursuant to 12 Del. C. § 3588 and measuring the limitation period described

in 12 Del. C. § 3585) be represented and bound by the Designated Representatives. Furthermore, the Designated Representative shall be responsible for determining the need and requesting distributions on behalf of such beneficiary and shall represent the beneficiary for all tax matters in connection with a distribution made from the Trust including, but not limited to, receiving K-1s and signing W-9s.

(d) Distribution to a Beneficiary. Any distribution from the Trust to or for the benefit of a beneficiary who has reached the age of majority shall result in such beneficiary being deemed a Notice Recipient.

(e) Inadvertent Disclosure. In the event a Trustee or an Adviser mistakenly or unintentionally provides notice of the existence of the Trust to a trust beneficiary other than a Designated Representative or Notice Recipient, the Trustee or the Adviser, as the case may be, shall not be held liable unless the Trustee or Adviser has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust.

(f) Liability of Trustee. The Trustee shall have no duty or responsibility to inquire into or examine whether the certifications made by the Designated Representative are true and accurate. Further, the Trustee shall have no duty or responsibility to monitor or otherwise confirm that any Designated Representative is complying with his or her duties under this Article TWELFTH and shall not be liable to any person, including any beneficiary for any breach resulting from reliance on such representations or certifications unless the Trustee has acted with willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the

Trust which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust.

(g) Liability of Designated Representative. A Designated Representative shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith or through willful misconduct proven by clear and convincing evidence in the Court then having primary jurisdiction over the Trust, which such Court shall be the Delaware Court of Chancery for so long as Delaware remains the situs of the Trust.

(h) Indemnification. The Trustee shall, to the extent of the Trust assets and solely payable from the Trust assets, indemnify the Designated Representative for all losses, costs, damages, expenses and charges, public and private, including reasonable attorneys' fees, including those arising from all litigation, groundless or otherwise, that result from the performance or non-performance of the powers given to the Designated Representative under this Agreement (unless the Designated Representative has acted in a manner that does not comply with the standard of liability applicable to the Designated Representative).

(i) Resignation of Designated Representative. Any Designated Representative serving hereunder may resign at any time by providing written notice to the Trustee, any other Designated Representative then serving, the Trust Protector and the Notice Recipients. Such resignation shall become effective at such time as the resigning Designated Representative shall provide in the notice of resignation; provided, however, if there are no other Designated Representatives then serving for one or more of the beneficiaries for whom the Designated Representative was serving, then the resignation shall not become effective with respect to each

of those beneficiaries until the acceptance by a successor Designated Representative who shall represent them.

(j) Removal. The Trust Protector shall have the power to remove any Designated Representative by providing written notice to such Designated Representative being removed, any other Designated Representative then serving, the Trustee and the Notice Recipients. The removal shall become effective at such time as the Trust Protector indicates in the notice of removal; provided, however, if there are no other Designated Representatives then serving for one or more of the beneficiaries for whom the Designated Representative was serving, then the removal shall not become effective with respect to each of those beneficiaries until the acceptance by a successor Designated Representative who shall represent them.

(k) Appointment of Additional or Successor Designated Representatives. The Trust Protector shall have the power to appoint additional Designated Representatives and shall have the power to designate a successor Designated Representative upon the resignation, removal or incapacity of a Designated Representative by providing written notice to such additional or successor Designated Representative, any other Designated Representative then serving, the Trustee and the Notice Recipients. The appointment of additional or successor Designated Representatives shall become effective at such time as the Trust Protector provides in the instrument of appointment and upon written acceptance by the designee. In the event of the death or incapacity of a Designated Representative which causes a beneficiary to be unrepresented by a Designated Representative, then the Trust Protector shall serve as the Designated Representative for that beneficiary until a successor Designated Representative has been appointed.

(e) Wherever the term "Notice Recipients" appears in this Agreement, in accordance with 12 Del. C. § 3339 relating to a designated representative, it shall mean the following individuals who have delivered to the Trustee his or her written acceptance of the office of Notice Recipient:

1. Prior to the division of the Trust estate in accordance with section __ of Article _____ of this Agreement, the Grantor, while living and competent, the Grantor's Spouse, while living and competent, and each adult beneficiary who is competent and at least thirty-five (35) years of age; and

2. After the division of the Trust estate in accordance with section ___ of Article _____ of this Agreement, the Grantor, while living and competent, the Grantor's Spouse, while living and competent, and the Primary Beneficiary of a trust held in accordance with section ___ of Article _____ of this Agreement, if the Primary Beneficiary is competent and at least thirty-five (35) years of age; provided, if the Primary Beneficiary is under the age of thirty-five (35) years or incapacitated, the Grantor's eldest descendant who is competent and has attained the age of thirty-five (35) years will become a Notice Recipient of such Primary Beneficiary's trust until the Primary Beneficiary attains the age of thirty-five (35) years and is competent.

3. Additionally, the Trust Protector may appoint a "Notice Recipient" to represent the beneficiaries' interests and may add to the class of Notice Recipients. Any appointment of a Notice Recipient by the Trust Protector shall be by written notice to such Notice Recipient(s), the Trustee, the Investment Direction Adviser and the Distribution Adviser. Any appointment of a Notice Recipient shall become effective at such time as provided in the instrument of appointment and upon written acceptance by the designee. If a Notice Recipient

shall not be a beneficiary of the Trust estate, such Notice Recipient shall be reimbursed by the Trustee for any expenses or costs incurred as a result of such role and may be entitled to reasonable compensation for his or her services as agreed upon by the Notice Recipient and the Trust Protector.

Sample 3 –

Limitation on Release of Trust Instrument. It is the Grantor's intent to limit access to the Trust instrument to the Trustee, the Trust Protector, the Investment Trustee, and the Distribution Trustee, but access should be limited in a manner designed to maintain the privacy of the Grantor's dispositive provisions contained therein, the privacy of the interests of each of the beneficiaries' interests, and to minimize the risk that disclosure will disincentive beneficiaries from accomplishing the educational, professional, and/or social objectives set forth by the Grantor herein. The Trustee is prohibited, absent Order of the Court, from releasing the Trust instrument, including the original Trust instrument and all amendments and restatements thereto, including copies thereof (collectively "the Instrument"), to any person who is not otherwise entitled to demand an accounting under NRS 165.1207 or who are otherwise entitled to an accounting under the terms of the Trust instrument. Further, it is the Grantor's intent that any Order of the Court authorizing or directing the Trustee to release the Instrument in a manner that is contrary to the Grantor's intent be limited to the greatest extent possible so as to respect the Grantor's freedom of disposition recognized under NRS 163.004(4), taking into the consideration the Grantor's right to restrict the rights and interests of the beneficiaries to receive a copy of the Trust instrument and accountings; and to further restrict the information that is provided to them. Further, any such release authorized by the Court shall be limited to release to a Court confirmed Reviewer, who is independent from the demanding beneficiary, and who is not related or subordinate to the demanding beneficiary, with such review to occur *in camera*, pursuant to NRS 164.145.