

Your Secret Trust Ain't No Secret Anymore... It Might Not Even Exist

By Nancy S. Hearne

On July 17, 2016, New Jersey' version of the Uniform Trust Code ("UTC") became effective. This set of laws changes the landscape of trust law in some important ways.

One change, and among the most troubling for some clients, is that the new law limits the ability of a settlor to keep an irrevocable trust "secret" from a beneficiary after the age of 35. Clients have myriad reasons for wanting to keep their trusts secret. They might include concerns that their child's knowledge of the value of a trust will be a disincentive to work, that a child's marriage is unstable and knowledge of the trust might be shared with the child's spouse, or that a child has been slow to develop a reasonable level of maturity or has a weakness for drugs or alcohol.

On the other hand, an important argument for informing a beneficiary of a trust, and one which the drafters and legislature felt overrides the desire for secrecy, is that with information, a beneficiary can oversee the activities of the trustee.

The UTC requires a trustee to keep a "qualified beneficiary" reasonably informed about a trust, the administration of the trust, and material facts necessary for the beneficiary to protect his or her interests. A "qualified beneficiary" is a beneficiary who is currently receiving income or principal from the trust, would be receiving income or principal if the current beneficiary's interests terminated, or would receive income or principal if the trust terminated. A trust cannot override this duty unless a qualified beneficiary has not reached the age of 35.

Another change is that the law permits beneficiaries and trustees of an irrevocable trust to modify or terminate the trust, even without the approval of the testator, if the modification or termination is not inconsistent with a material purpose of the trust. Flexibility is the watchword for many clients and their advisors. There is a risk that beneficiaries and trustees might form coalitions to accomplish changes, and that sometimes the motivation to make changes may be ill conceived. Are the changes really necessary or desirable?

On the other hand, there are trusts that contain antiquated provisions that need to be addressed. Some trusts might not be serving a useful purpose and should be terminated. The key is to analyze the facts with a thoughtful legal advisor, exercise good judgment and not be too quick to destroy a plan that might have been thoughtfully conceived and could turn out to be excellent for the beneficiaries in the long run.

Finally, what might work well on paper could have serious adverse tax consequences that some beneficiaries may not be thinking about in a move to modify or terminate a trust. As a consequence, it is advisable to first discuss the move to modify or terminate a trust with a legal advisor.

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