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EstatePLANNING

A trustee's duty to disclose grows thanks to UTC

A trustee's duty to notify contingent beneficiaries and remaindermen of New York *situs* trusts may now be receiving more notifications concerning the specific terms of the trust, its value and the nature and extent of the trust assets.

The reasoning behind the notifications appears to rely on the latest version of the Uniform Trust Code (UTC), which mandates providing such notice.

The UTC was drafted by the National Conference of Commissioners On Uniform State Laws for the purpose of providing uniform laws throughout the United States. The latest version of the UTC was adopted in 2005 and has become the law in less than half of the states, many of which modified different provisions of the UTC. To date, New York has not adopted the UTC.

Apparently, the purpose of the disclosure requirement is to commence the running of the statute of limitations for any actions against a trustee. Thus, a burden is placed on any beneficiary receiving notifications from a trustee to review them and to determine whether or not to accept them, without having the benefit of seeing the overall fiduciary management over a longer time period.

Historically, the duty to disclose has been closely linked with other fiduciary duties, such as the duty to act in good faith. According to an American Bar Association presentation on Trusts, "which beneficiaries must be notified and when depends upon the applicable trust terms, governing law and nature of the trust."

New York laws regarding the duty of a trustee to disclose to anyone other than the primary beneficiary are to be found in both the Surrogate's Court Procedure Act (SCPA) and the Estates, Powers and Trust Law (EPTL). SCPA § 2306 contains the guidelines for a trustee's duty to inform. The section requires that a trustee furnish an annual statement to any beneficiary receiving income or any person interested in the principal of the trust who shall request such statements (emphasis added), which is contrary to the UTC mandatory requirement.

EPTL § 11-2.1(a) sets forth that the duty of a trustee is to administer the trust with "due regard to the respective interest of income beneficiaries and remaindermen." There is no specific duty to disclose the information to the remaindermen. Rather, the trustee's duty is only to act with loyalty and due regard.

The drafters of the UTC adopted the position of the Restatement (Third) of Trusts, which is diametrically opposed to the prior Restatement (Second) of Trusts. Section 173 of the Restatement (Second) of Trusts outlines the duty to disclose. This duty is required when the beneficiary reasonably requests. The SCPA, EPTL and Restatement (Second), are all consistent in this regard.

Query: Why are some corporate trustees changing their policies on notification when they are not required to do so under New York law? I don't know. My guess is that they are, first, trying to limit their liability and, second, that they are trying to standardize their procedures throughout their system.

I understand the first. I do not fully understand the second for the following reasons: It is very common for our clients to create trusts (either mandatory or contingent) for their spouses and descendants. Many of these trusts contain "sprinkle" provisions that give the trustee the discretion to distribute income and/or principal to members of each generation.

The vast majority of those clients want to favor the oldest generation beneficiary. A husband would want his wife to receive the income and principal invasions before the children. And he would prefer that the children get the benefit of the trust before the grandchildren.

These clients generally want to provide flexibility in the administration of the trust, just in case a member or members of the succeeding generations have valid financial needs. That being said, they do not want the grandchildren to know about the size of the trust because the clients are worried that a grandchild might not complete his/her education or seek

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By **DAVID C. PETTIG**

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gainful employment.

That is a very valid concern and I have personally seen it happen. These clients do not want the succeeding generations to know all of the trust details unless and until there is a need which, almost always, is conveyed to and through the primary beneficiary to the trustee.

Historically, there has been reliance on a trustee to stand in

the shoes of the maker of the trust and to exercise its discretion to do what the maker of the trust would do under the specific circumstances. That requires flexibility which, in my opinion, is lost. It is one thing for the state to adopt a new law. It is quite another for the trustee to unilaterally make the change.

David C. Pettig, principal with Pettig Torres PC, has been practicing trust and estate law for more than 30 years. He can be contacted at dcpettig@pettig.com or (585) 586-1430.