

OKLAHOMA UNIFORM TRUST CODE

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The purpose of this presentation is to outline several features and issues related to the proposed Oklahoma Uniform Trust Code (UTC). The version quoted in this presentation is currently before the Oklahoma State House of Representatives as HB 2426 and can be found at www.lsb.ok.state.us. This presentation is not intended as a comprehensive review of the UTC, but rather a discussion of certain key provisions.

HISTORY

The UTC was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved at its annual conference in July of 2000. Its stated purpose as provided in the Prefatory Notes of the UTC is to provide uniformity in the laws related to trusts throughout the various States and to fill in gaps that exist in the trust law of many States. The Oklahoma version of the UTC has been through extensive review, which has resulted in numerous changes to the NCCUSL version of the UTC.

The initial review for Oklahoma was conducted by a sub-committee of the Tulsa Title and Probate Lawyers (TTPL). That committee worked for a year to review and modify the UTC for Oklahoma.

Subsequently, the UTC was introduced to the 48th legislative session of the Oklahoma Legislature. Following its introduction in the legislature, the Oklahoma Bankers Association became involved in the review and evaluation of the UTC. Numerous additional changes were identified to make the UTC function appropriately for both trustees and trust beneficiaries. Ultimately, the bill did not make it out of the House Judiciary Committee.

In 2002, the UTC, as modified, was recommended for approval to the Oklahoma Bar Association by the Probate and Trust Committee of the Oklahoma Bar Association (a committee no longer in existence). Prior to being taken before the Bar Association House of Delegates, representatives of the Oklahoma Bankers Association and the Estate Planning Probate and Trust Section (EPPT) of the Oklahoma Bar Association agreed to work together to address additional concerns expressed by both entities and develop a revised version of the UTC to address these concerns. As a result of that

cooperative effort and the understanding that the UTC was still “in progress” for Oklahoma, it was pulled from consideration pending further review.

In 2003, the EPPT – Legislation Committee first addressed concerns that there are no significant problems with Oklahoma trust law. While there may be some disagreement regarding that issue, the committee did not want to promote changes where the current law is working appropriately.

In addition, the EPPT - Legislation Committee discussed whether to only propose the portions of the UTC that fill in any “gaps” in the present Oklahoma trust law or that enhance it. That idea was rejected in deference to the broader overall goal of providing some level of uniformity among the States adopting the UTC.

As a result, the goal of the cooperative review effort was to take advantage of those provisions of the UTC that provide clarification to existing Oklahoma trust law and fill in any gaps, as needed.

Representatives from a broad range of legal backgrounds and practice areas were involved in the review process, including: estate planning, real estate, academia, banking and the judiciary. Broad representation was encouraged to minimize the chances of overlooking the impact on the various areas of law affected by the UTC.

Following approval by the EPPT in June, 2003, some additional changes were recommended by the Bankers Association and, after some cooperative review, approved by several key members of the EPPT – Legislation Committee. The version of the UTC that is now before the House as HB 2426 is the result.

All language cited within this presentation comes from HB 2426 and, therefore, its provisions may not coincide with the version of the UTC as approved by the NCCUSL. Reference to current Oklahoma statutes is designed to guide you to the existing law in Oklahoma, as it relates to a particular provision of the UTC.

FEATURES OF THE PROPOSED OKLAHOMA UNIFORM TRUST CODE

QUALIFIED BENEFICIARIES¹

“Qualified Beneficiary” is a newly defined term used within the UTC, and one with which all trust practitioners must become familiar.

“**Qualified beneficiary**” means, *unless the trust instrument provides otherwise*, a beneficiary who, on the date the qualification of the beneficiary is determined:

- a. is a *distributee or permissible distributee of a present interest in trust income or principal, or has a vested remainder interest in the trust,*
- b. is a *charitable organization* expressly entitled to receive benefits under the terms of a charitable trust or a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 29 or 30 of this act, or
- c. is the *Attorney General* of this state with respect to a charitable trust having its principal place of administration in this state.

Section 3(12) (emphasis added).

The Oklahoma definition of “qualified beneficiary” differs substantially from that of the NCCUSL in that it eliminates contingent remaindermen from the definition. This distinction is especially important as it impacts the rights of contingent remaindermen and the responsibilities of Trustees toward them.

For practitioners, it is imperative to note the distinction within the UTC between a “qualified beneficiary” and “beneficiary”. The “beneficiary” nomenclature may include contingent beneficiaries and those holding a power of appointment over trust property in its definition. (see Section 3(2)). As you would imagine, these terms are used throughout the UTC and are integral to proper compliance with its provisions. Throughout this presentation, I have attempted to highlight the use of the terms “qualified beneficiary” and “beneficiary” to call attention to the importance of this terminology and the distinctions within the UTC.

The definition of “qualified beneficiary” is a default provision, thereby allowing the practitioner to draft around it. If you feel that it is in your client’s best interest to use an alternative definition of “qualified beneficiary”, you will need to incorporate that definition into your trust document(s).

¹ 60 O.S. §§175.3(E), .102(2).

DEFAULT AND MANDATORY RULES

The UTC contains limited mandatory provisions, which are referenced below and found in Section 5(C) of the Oklahoma UTC. By inclusion of the phrase “except as otherwise provided in the terms of the trust” in Sections 5(A) and 5(B) of the Oklahoma UTC, practitioners are provided wide latitude in the drafting of trusts for their clients.

Default Rules Generally: ²

*Except as otherwise provided in the terms of the trust, the Oklahoma Uniform Trust Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a **beneficiary**.* Section 5(A) (emphasis added).

Mandatory Provisions: ³

*The terms of a trust prevail over any provisions of the Oklahoma Uniform Trust Code **except**:*

1. The requirements for creating a trust;
2. The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
3. The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
4. The power of the court to modify or terminate a trust under Sections 31 through 37 of this act;
5. The **effect of a spendthrift provision** and the rights of certain creditors and assignees to reach a trust as provided in Sections 39 through 45 of this act;
6. The power of the court under Section 51 of this act to require, dispense with, or modify or terminate a bond;
7. The power of the court under subsection B of Section 57 of this act to adjust the compensation of a trustee specified in the terms of the trust which is unreasonably low or high;
8. The duty under subsection A of Section 71 of this act to respond to the request of a **qualified beneficiary** of an irrevocable trust for reports of a trustee and other information reasonably related to the administration of a trust;
9. The effect of an exculpatory term under Section 90 of this act;
10. The rights under Sections 92 through 95 of this act of a person other than a trustee or **beneficiary**;
11. Periods of limitation for commencing a judicial proceeding;
12. The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

² 60 O.S. § 175.16.

³ 60 O.S. § 175.16

13. The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 15 and 16 of this act.

Section 5(C) (emphasis added).

SPENDTHRIFT PROVISIONS

The portion of the UTC dealing with spendthrift provisions is located in Sections 39 through 45. Those provisions are made mandatory by Section 5(C)(5) addressed above.

The spendthrift provisions of the NCCUSL version of the UTC were rewritten in the Oklahoma version to more closely follow those currently in place under Oklahoma law. Due to the mandatory nature of the spendthrift provisions, these provisions need to be fully understood by practitioners.

It is also important to note that when determining whether modification or termination of a trust will affect a material purpose of a trust “a spendthrift provision . . . is not presumed to constitute a material purpose of the trust.” (see Section 32(C)).

CAPACITY OF A SETTLOR OF A REVOCABLE TRUST

Section 46 clarifies that the capacity required of a grantor to validly execute a revocable trust does not rise to the standard necessary to enter into a contract, but rather equates to the standard required to execute a will. Since most revocable trusts serve as a will substitute, it only makes sense that the same standard of capacity should apply.

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. *This section does not impose the same formalities in execution of a trust as in the execution of an attested will.* Section 46 (emphasis added)

INCORPORATION OF THE OKLAHOMA UNIFORM PRUDENT INVESTOR ACT

Both the NCCUSL version of the UTC and the proposed Oklahoma version incorporate the Uniform Prudent Investor Act. Any modifications currently incorporated in the Oklahoma Uniform Prudent Investor Act remain intact.

MOVING A TRUST'S PRINCIPAL PLACE OF ADMINISTRATION

An unfortunate result of the numerous bank mergers of the 1990's was that administration of many trusts was centralized by the acquiring institutions in locations outside of Oklahoma. In turn, we have seen many unhappy trust beneficiaries. It also had a major impact on the expectations by those Settlers, who; having named corporate trustees, intended their trusts to be administered within Oklahoma by an institution with whom they had developed a certain relationship and comfort level.

It was the intent of the NCCUSL and those involved in the proposed Oklahoma UTC to eliminate that issue with corporate trustees, as well as similar issues that might arise from the relocation of an individual trustee.

The trustee shall notify the **qualified beneficiaries** of a proposed transfer of the principal place of administration of the trust to a location outside the State of Oklahoma, not less than sixty (60) days before initiating the transfer. Section 8(D) (emphasis added).

The authority of a trustee under this section to transfer the principal place of administration of the trust to a location outside of this state, terminates if a **qualified beneficiary** notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice. Section 8(E) (emphasis added).

The NCCUSL went further than the Oklahoma drafters by not incorporating the phrase "to a location outside of the State of Oklahoma" or "to a location outside of this state". The Oklahoma drafters felt that limiting transfers within the state was too restrictive for both corporate and individual trustees.

NOTICE PROVISIONS

In the following situations, the UTC makes specific reference to notice requirements:

SITUATION REQUIRING NOTICE	NOTICE TO WHOM / TIME REQUIREMENTS	CITE
Trustee notice of <i>transfer of principal place of administration outside Oklahoma</i>	Qualified Beneficiaries / 60 days before initiating transfer	Section 8(D)
Qualified Beneficiary notice of <i>objection to transfer of principal place of administration outside Oklahoma</i>	Trustee / <i>On or before</i> date specified in notice of proposed transfer	Section 8(E)
Trustee notice of <i>modification or termination of uneconomic trust</i> ⁴	Qualified Beneficiaries / No time specified	Section 35(A)
Trustee notice of <i>combination or division of trusts</i> ⁵	Qualified beneficiaries / No time specified	Section 38
Contestants notice of judicial proceeding to contest a trust that was revocable at settlor's death	Trustee / <i>Within 60 days</i> of actual commencement of judicial proceeding	Section 49(B)(2)
Notification of dissent by dissenting trustee who joins in an action of majority of cotrustees ⁶	Any cotrustee / At or before the time of the action	Section 52(H)
Trustee resignation ⁷	Qualified beneficiaries, Settlor, if living and all cotrustees / 30 days prior to resignation	Section 54(A)(1)
Qualified beneficiary request for information	Trustee / Promptly	Section 71(A)
Qualified beneficiary request for copy of trust	Trustee / Promptly	Section 71(B)(1)
<i>Acceptance of trusteeship</i>	Qualified beneficiaries / <i>Within 60 days</i> after accepting	Section 71(B)(2)
Notice by Trustee of <i>creation of irrevocable trust or that a formerly revocable trust has become irrevocable</i>	Qualified beneficiaries / <i>Within 60 days</i> after trustee acquires knowledge	Section 71(B)(3)
Notice by Trustee of <i>any change in the method or rate of trustee's compensation</i>	Qualified beneficiaries / In advance	Section 71(B)(4)

Note that in all of the situations referenced above dealing with beneficiaries' rights to give or receive notice, only "qualified beneficiaries" are addressed.

Note also the impact of eliminating contingent remaindermen from the definition of "qualified beneficiaries" as that definition applies to the notice requirements under Section 71. Without that change, Section 71 would have required that contingent remaindermen be notified in all of the circumstances identified in that section as well as giving them the right to request detailed information from the trustee, including a copy of the trust.

⁴ 60 O.S. § 175.23(E).

⁵ 60 O.S. § 175.23(E).

⁶ 60 O.S. §§ 175.17(A), 175.57(H).

⁷ 60 O.S. §§ 175.23(E), 175.37.

Default Rule Regarding Notice:⁸

*Unless the trust instrument provides otherwise, the trustee shall have a duty under paragraphs 2 and 3 of Subsection B of Section 71 of this act to notify the **qualified beneficiaries** of an irrevocable trust who have attained twenty-five (25) years of age of the existence of the trust, the identity of the trustee, and their right to request reports of the trustee. Section 5(B) (emphasis added).*

Acceptable Methods of Notice:

Notice to a person under the Oklahoma Uniform Trust Code or the sending of a document to a person under this code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in the receipt of the notice or document. Permissible methods of notice or for sending a document include *first-class mail, personal delivery, delivery to the person's last-known place of residence or place of business, or a properly directed electronic message.* Section 9(A) (emphasis added).

Notice to a Person Whose Identity or Location is Unknown and Not Reasonably Ascertainable:

Notice otherwise required under the Oklahoma Uniform Trust Code or a document otherwise required to be sent under the Oklahoma Uniform Trust Code need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee. Section 9(B) (emphasis added).

Waiver of Notice:

Notice under the Oklahoma Uniform Trust Code or the sending of a document under this code may be waived by the person to be notified or sent the document. Section 9(C) (emphasis added).

This section will help alleviate certain time constraints within the Oklahoma UTC for certain actions to occur, such as the 30 day notice requirement for a trustee's resignation, as required in Section 54(A)(1).

Notice of Judicial Proceeding:

Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure. Section 9(D).

Notice to Representative:

Notice to a person who may represent and bind another person under the Oklahoma Uniform Trust Code has the same effect as if notice were given directly to the other person. Section 17(A).

⁸ 60 O.S. § 175.16

DISTRIBUTIONS AFFECTED BY NOTICE REQUIREMENTS

Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property.

- A. A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the death of the settlor within the earlier of:
 - 1. *One (1) year after the death of the settlor; or*
 - 2. *One hundred twenty (120) days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the existence of the trust of the name and address of the trustee, and of the time allowed for commencing a proceeding.*
- B. Upon the death of the settlor of a trust that was revocable at the death of the settlor, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:
 - 1. *The trustee knows of a pending judicial proceeding contesting the validity of the trust; or*
 - 2. *A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty (60) days after the contestant sent the notification.*
- C. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

Section 49 (emphasis added).

Distributions in General:

As a result of Section 49, trustees will want to take steps to limit the time frame for a potential contest by providing notice where required or receiving waivers of notice.

Section 49(B) and the notice provisions found in Section 9 provide some level of protection to trustees for distributions or sales of trust assets absent knowledge of a contest. In certain situations, trustees may need to provide notice to all potential parties, however remote, that might contest a trust or wait the full year before making distributions.

Title Issues:

For distributions or sales of real property, Section 49 may require particularly close attention. In the event of a sale of real property, title insurers will likely require complete documentation of compliance with the notice provisions. If there are questions about a trustee's compliance with notice provisions, it is possible that some situations could potentially require the passing of the full year from the time the trust became irrevocable before insuring the property.

MODIFICATION OR TERMINATION OF IRREVOCABLE TRUSTS

Noncharitable Irrevocable Trusts:

While the settlor is living:

Section 32(A)⁹ allows for modification or termination of noncharitable irrevocable trusts by consent of the settlor and all beneficiaries without court intervention and provides as follows:

A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A power to consent of the settlor to the modification or termination of a trust may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the conservator of the settlor with the approval of the court supervising the conservatorship if an agent is not so authorized; or by the guardian of the settlor with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed. Section 32(A) (emphasis added).

When the settlor is deceased:

Look to Sections 32(B)¹⁰ and 32(E)¹¹, which allow for modification or termination with court approval.

A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. Section 32(B) (emphasis added).

If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection A or B of this section, the modification or termination may be approved by the court if the court is satisfied that:

1. If all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
2. The interests of a beneficiary who does not consent will be adequately protected.

Section 32(E) (emphasis added).

⁹ 60 O.S. §§ 175.23(C), 175.41.

¹⁰ 60 O.S. § 175.23(C).

¹¹ 60 O.S. §§ 175.23(E), 175.49.

Charitable Trusts:

Modification or termination of charitable trusts falls under the doctrine of Cy Pres, which is found in Section 34 of the Oklahoma UTC. In all situations involving modification or termination of charitable trusts, court intervention is required.

Uneconomic Trusts:¹²

A common challenge for trustees is how to handle the administration of a trust whose assets have decreased to the point that it no longer makes economic sense to continue. Many documents contain “small trust termination” provisions that allow the termination of trusts that are no longer economically feasible to manage. When such a provision is absent, the trustee is forced to exercise its discretion of whether to distribute the assets to the beneficiaries or go to court for a judicial determination on the ability to distribute the balance of the trust. Whether the exercise of their discretion poses a dilemma for the trustee depends on the situation and any limitations on the exercise of that discretion.

The Oklahoma UTC addresses this issue by codifying its own “small trust termination” default provision in the event such a provision is not contained within the trust.

After notice to the **qualified beneficiaries**, the trustee of a trust consisting of trust property having a total value less than Fifty Thousand Dollars (\$50,000.00) **may** terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Section 35(A) (emphasis added).

The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.¹³ Section 35(B).

Section 35(A) allows the trustee to terminate a trust with a value of less than \$50,000 without court intervention. If the drafter and settlor feel that a higher value is more appropriate, or that the trustee should have broader discretion on what constitutes an uneconomic trust, such a provision may be incorporated in the trust. If the value of the trust exceeds \$50,000 and the trust instrument does not allow the trustee additional discretion, the trustee continues to have the option of going to court to terminate what is believed to be an uneconomic trust.

¹² 60 O.S. § 175.23(E).

¹³ 60 O.S. § 175.23(C).

REPRESENTATION

The Oklahoma UTC contains several provisions allowing representation by one person that is binding upon the interests of another. Proper representation may be effective whether or not a judicial proceeding is involved as provided in Section 21(B). These provisions can be very important, as various issues arise in the administration of trusts.

In addition, due to the provisions of the Oklahoma UTC allowing for modification or termination of noncharitable irrevocable trusts, the ability of the parties involved to act by proper representation can be very important in the modification or termination of such a trust.

Representation: Basic Effect

- A. Notice to a person who may represent and bind another person under the Oklahoma Uniform Trust Code has the same effect as if notice were given directly to the other person.
- B. The consent of a person who may represent and bind another person under this code is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.
- C. Except as otherwise provided in Sections 32 and 47 of this act, a person who under this article may represent a settlor who lacks capacity may receive notice and give a binding consent on behalf of the settlor.

Section 17.

Representation by Holder of General Testamentary Power of Appointment

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests as permissible appointees, takers in default, or otherwise are subject to the power. Section 18.

Representation by Fiduciaries and Parents

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- 1. A conservator or guardian of the property may represent and bind the estate that the conservator or guardian of the property controls;
- 2. A guardian of the person may represent and bind the ward if a guardian of the property or conservator of the estate of the ward has not been appointed;
- 3. An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- 4. A trustee may represent and bind the beneficiaries of the trust;

5. A personal representative of the estate of the decedent may represent and bind persons interested in the estate; and
6. A parent may represent and bind the minor of the parent or unborn child if a conservator or guardian for the child has not been appointed.

Section 19.

Representation by Person Having Substantially Identical Interests

Unless otherwise represented, a minor, incapacitated or unborn individual or a person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented. Section 20.

Appointment of Representative

- A. If the court determines that an interest is not represented under the Oklahoma Uniform Trust Code or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, or unborn individual or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.
- B. ***A representative may act on behalf of the individual represented with respect to any matter arising under the Oklahoma Uniform Trust Code, whether or not a judicial proceeding concerning the trust is pending.***
- C. In making decisions, a representative may consider general benefit accruing to the living members of the family of the individual.

Section 21 (emphasis added).

TAX RELATED ISSUES – COMPLIANCE WITH ASCERTAINABLE STANDARDS

The Oklahoma UTC addresses the exercise of discretionary powers in compliance with “ascertainable standards” by trustees and provides in pertinent part as follows:

Discretionary Powers; Tax Savings

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- B. **Subject to subsection D** of this section, *and unless the terms of the trust expressly indicate that a rule in this subsection does not apply*:
1. *A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the personal benefit of the trustee may exercise the power only in accordance with an ascertainable standard relating to the individual health, education, support, or maintenance of the trustee within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Act of 1986, as in effect on the effective date of the Oklahoma Uniform Trust Code, or as later amended; and*
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- C. A power whose exercise is limited or prohibited by subsection B of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.
- D. **Subsection B** of this section **does not apply to**:
1. A power held by the spouse of the settlor who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(e) of the Internal Revenue Act of 1986, as in effect on the effective date of the Oklahoma Uniform Trust Code, or as later amended, was previously allowed;
 2. Any trust during any period that the trust may be revoked or amended by its settlor; or
 3. A trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Act of 1986, as in effect on the effective date of the Oklahoma Uniform Trust Code, or as later amended.

Section 72 (emphasis added).

As a practitioner, if the provisions of Section 72 create issues for a client, you may draft around them, as provided in Section 72(B).

CERTIFICATION OF TRUST¹⁴

Under the UTC, the Certification of Trust does not replace Oklahoma's existing statutory language governing Memorandums of Trust. 60 O.S. § 175.6a defining Memorandums of Trust is not being repealed by the UTC. While the current version of HB 2426 includes this section in the Repealer language, it is being removed in an upcoming Floor Substitute version of the bill.

For Oklahoma, the Certification of Trust provides another vehicle by which a trustee can verify the existence of a trust and the authority of the trustee to transact business on behalf of the trust. Existing Memorandums of Trust will remain effective.

- A. Instead of furnishing a copy of the trust instrument ***to a person other than a beneficiary***, the trustee may furnish to the person a certification of trust, which may vary depending on its purpose and whether the trustee is an individual or a corporation, but must contain at least the following information:
 - 1. That the *trust exists and the date the trust instrument was executed*;
 - 2. The *identity and address of the currently acting trustee*;
 - 3. The *powers of the trustee relevant to the transaction or transactions*;
 - 4. The *revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust*, and
 - 5. The *authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee*.
- B. The *recipient of a certificate of trust may also require that it contain the following information when necessary for the action requested to be effective*:
 - 1. The *identity of the settlor*, and
 - 2. The *manner of taking title to trust property*.
- C. Any trustee may provide a certification of trust which must be signed or otherwise authenticated by that trustee.
- D. A certification of trust *must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect*.
- E. A certification of trust *need not contain the dispositive terms of a trust*.
- F. A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

¹⁴ 60 O.S. § 175.6.

- G. A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.
- H. A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
- I. A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.
- J. This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.
- K. *Any recipient of a certificate of trust who is also in need of the **taxpayer identification number** of the trust may require that the trustee furnish it, but only in a separate document which shall not be recorded publicly.*
- L. *When the trustee is an individual, not a corporation, the recipient of a certificate of trust may also require that the trustee furnish supplemental information identifying the name and address of all the successor trustees who are named in the trust instrument and living.*
- M. *When the trustee is an individual, not a corporation, and no successor trustee is living, the recipient of a certificate of trust may also require that the trustee furnish a separate document that shall not be recorded publicly which identifies the name and address of each person who would be a qualified beneficiary immediately after the death of the trustee.*

Section 95 (emphasis added).

The NCCUSL version required inclusion of the trust's taxpayer identification number in the Certification of Trust. The Oklahoma drafters were extremely concerned with potential identity theft that could result from requiring the taxpayer identification number to be included in the Certification of Trust and, therefore, included language expressly governing how such information may be requested and prohibiting it from being publicly recorded. (see Section 95(K)).

Sections 95(L) and 95(M) were added in the Oklahoma version to address situations such as those faced by banks and brokerage firms in dealing with accounts for a trust when something happens to the initial trustee. Without information identifying the successor trustee and/or qualified beneficiaries, problems can arise in identifying who has appropriate authority to access the account or benefits from the account.

UNIFORMITY OF APPLICATION AND CONSTRUCTION

Numerous modifications from the NCCUSL version of the UTC were recommended for the proposed Oklahoma version of the UTC, which may create significant differences between the Oklahoma version of the UTC and the version adopted in other states. The EPPT Legislation Committee did not feel that interpretation of the requirements under the UTC should **require** that consideration be given to the need to promote uniformity of the law among the states enacting the UTC. As a result, the following language is found in Section 96:

In applying and construing this Oklahoma Uniform Trust Code, consideration **may** be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it. Section 96 (emphasis added).

The NCCUSL version of the UTC requires that consideration be given to the objective of promoting uniformity of the law with respect to its subject matter among the states that enact it, by using the word “*must*” instead of “*may*”.

APPLICATION TO EXISTING RELATIONSHIPS

- A. Except as otherwise provided in this act, on November 1, 2004:
1. The Oklahoma Uniform Trust Code ***applies to all trusts created before, on, or after November 1, 2004;***
 2. The Oklahoma Uniform Trust Code ***applies to all judicial proceedings concerning trusts commenced on or after November 1, 2004;***
 3. The Oklahoma Uniform Trust Code ***applies to judicial proceedings concerning trusts commenced before November 1, 2004,*** unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the Oklahoma Uniform Trust Code does not apply and the superseded law applies;
 4. Any rule of construction or presumption provided in the Oklahoma Uniform Trust Code ***applies to trust instruments executed before November 1, 2004, unless there is a clear indication of a contrary intent in the terms of the trust;***
 5. Any Memoranda of Trust which is in existence prior to the enactment of the Oklahoma Uniform Trust Code shall remain effective as to the information contained therein; and
 6. ***An act done before November 1, 2004 is not affected by the Oklahoma Uniform Trust Code.***
- B. ***If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before November 1, 2004, that statute continues to apply to the right even if it has been repealed or superseded.***

Section 99 (emphasis added).

As you can see, the proposed Oklahoma UTC is to be applied not only to trusts created after the UTC becomes effective, but, with certain exceptions, to actions and interpretations of trusts already in effect at the time of the effective date.

It is extremely important to note the provisions of Section 99(B) designed to protect rights in existence prior to the effective date of the Oklahoma UTC.