

**CRITICAL CONCEPTS AND DEFINITIONS**  
**under the Maine Uniform Trust Code**  
**§§103(13), 105, 110 and 813 of Title 18-B MRSA**

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**I. INTRODUCTION**

The Uniform Trust Code with its official comments, as disseminated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), is over 225 pages long. With proposed legislation of that magnitude, it should come as no surprise that the Maine State Bar Association's UTC study committee made fairly extensive changes to the uniform version. Some of the changes were driven by issues of existing Maine law, some by issues of public policy debate within the study committee, and some by a desire to make the language more readable and user friendly.

The result is an expansive body of law that fills in gaps in Maine trust law for the benefit of settlors, trustees and beneficiaries. Many of the changes will present new drafting opportunities for estate planning lawyers. The purpose of this presentation is to highlight some of the significant new concepts introduced by the UTC with explanations and suggestions for how lawyers may incorporate the new concepts into their estate planning documents.

Following are selected sections of the UTC as adopted in Maine. The sections selected present new concepts for Maine trust law and drafting issues that lawyers should understand to

prepare trust documents competently under the Maine UTC. I have provided an explanation of the significance of the sections, have indicated how the language of the sections as adopted in Maine differs from the UTC in its “uniform” format, and in some instances, have suggested drafting options. Language of suggested drafting options is mine. I take full responsibility for any shortcomings in the suggestions. As with any new law, lawyers using the Maine UTC will learn “on the fly”. Drafting techniques and approaches will evolve as we become more familiar with the subtleties of the Maine UTC and as courts have an opportunity to weigh in by construing the various sections over time.

The uniform and Maine comments are essential reading for a full understanding of the Maine UTC. The comments explain policy decisions, provide cross references to other sections of the Maine UTC and in many cases provide citations to relevant case law or the Restatement of Trusts.

Governor Baldacci signed into law Maine’s version of the UTC on April 14, 2004, with an effective date of July 1, 2005. In November and December 2004, the Maine State Bar Association’s UTC study committee reconvened to consider (i) amendments to the UTC that were adopted by NCCUSL in August 2004, and (ii) issues and criticism concerning the UTC that were raised in a number of articles published in national estate planning journals during the summer and fall of 2004. As a result of its November and December meetings, Maine’s UTC study committee has recommended amendments to be adopted by Maine legislature, with all such amendments intended to be effective as of July 1, 2005. As of the date of this writing (early January 2005), the legislature has not yet considered the recommended amendments, but the discussion that follows assumes that the amendments recommended by the UTC study committee will be adopted by the legislature with an effective date of July 1, 2005.

References in this article to the “UTC” are to the UTC in its uniform format as published by NCCUSL. References to the “Maine UTC” are to the version as adopted in Maine *and* as recommended to be amended in the current legislative session. In other words, the discussion of the Maine UTC below assumes the adoption of all recommended amendments. I have included, however, both the text of the sections as currently adopted, and the text of the sections as recommended for further amendment, showing deleted text by ~~strikeout~~ and added text by underline. Note that the 2005 edition of the Thompson-West Maine Estate and Probate Law soft cover desk book (with the burgundy colored cover) includes the text of the Maine UTC as currently adopted (but without National or Maine Comments) and does **not** include the amendments that the Maine legislature is being asked to approve prior to the July 1, 2005 effective date.

## **II. SELECTED SECTIONS OF THE MAINE UNIFORM TRUST CODE**

### **1. Section 103(13); Definition of qualified beneficiary**

#### **a. Text as adopted 4/14/04:**

**“Qualified beneficiary.** "Qualified beneficiary" means a beneficiary who on the date the beneficiary's qualification is determined:

- A. Is a distributee or permissible distributee of trust income or principal;
- B. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph A terminated on that date; or
- C. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

"Qualified beneficiary" does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest.

**b. Text as proposed for adoption in current legislative session:**

**“Qualified beneficiary.** “Qualified beneficiary” means a living beneficiary who on the date the beneficiary's qualification is determined:

- A. Is a distributee or permissible distributee of trust income or principal;
- B. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph A terminated on that date, but the termination of those interests would not cause the trust to terminate; or
- C. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

“Qualified beneficiary” does not include a contingent distributee or a contingent permissible distributee of trust income or principal whose interest in the trust is not reasonably expected to vest.

**c. Explanation:** The “qualified beneficiary” concept is new to trust law. The purpose of identifying a class of beneficiaries as “qualified” is to define the class of beneficiaries (i) to whom notice must be given of a trustee resignation under section 705; (ii) to be kept informed of matters related to the trust’s administration under section 813; (iii) to whom notice must be given before a trust may be combined or divided under section 417; (iv) who have the authority to appoint a successor trustee under section 704; (v) to whom notice must be given before transferring a trust’s principal place of administration under section 108(4).

**d. Maine Comment:**

Maine has added the sentence beginning with, “Provided, however”, at the end of the definition to limit the class of beneficiaries to whom certain notices must be given or from whom consents must be received. The National Comments to section 103(13) state, “the Uniform Trust Code uses the concept of ‘qualified beneficiary’ (paragraph (13) to limit the class of beneficiaries to whom certain notices must be given or consents received. . . . The qualified beneficiaries

consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen.”

Despite the intention of the UTC drafters that the concept of qualified beneficiary be a limiting definition, under certain circumstances remote contingent distributees will fall within the scope of the definition as it appears in the Uniform Code. For example, a “dynasty” trust that gives the trustee discretion to distribute income and/or principal among settlor’s descendants, from generation to generation, or a credit shelter/bypass trust that gives the trustee discretion to distribute income and principal among “my spouse and my descendants” in equal or unequal shares, is likely to have an ultimate distribution clause leaving the trust assets to one or more charities in the unexpected event that at some time none of settlor’s descendants is living. Under sub-paragraph (B), the charitable beneficiaries would be distributees of trust principal if the interests of the descendants (or spouse and descendants in the case of the credit shelter/bypass trust), all of whom are permissible distributees described in subparagraph (A), terminated. The addition of the last sentence makes clear that the charities, as contingent distributees, do not come within the definition of qualified beneficiary.

- e. **Drafting considerations:** When preparing trust documents, the drafting lawyer should consider modifying the Maine UTC provisions that implicate the class of qualified beneficiaries. As discussed in more detail in the analysis of section 105 below, a settlor has the ability to modify all of the provisions of the Maine UTC except the provisions listed in section 105. The settlor has the ability to change all of the provisions implicating qualified beneficiaries.

Virtually all well drafted trusts contain provisions dictating the procedure for a trustee to resign and the procedure for removing and replacing trustees. Under section 105 of the Maine UTC, the provisions of the trust will control over the provisions of the Maine UTC to the contrary. For example, a revocable trust might contain the following provision related to trustee resignation:

Any Trustee may resign upon thirty days written notice to me, or if I am incapacitated to my legal representative and to any other Trustee then

serving, or if there is no other Trustee then serving, to the Trustee named to serve as the next successor Trustee. If I am deceased, notice shall be given to the income beneficiaries of the trust and to any other Trustee then serving, or if there is no other Trustee then serving, to the Trustee named to serve as the next successor Trustee.

Notice to a minor beneficiary or to an incapacitated beneficiary shall be given to the parent or legal representative of the beneficiary.

Such a provision will control over the Maine UTC's requirement that the trustee give notice of resignation to the qualified beneficiaries.

Similarly, most well drafted trusts contain detailed provisions giving the trustee the power to merge multiple trusts for administrative efficiency and the power to sever a single trust, usually for the effective allocation of generation skipping transfer tax exemption. Such provisions in the trust will not require notice to the qualified beneficiaries.

As an alternative to the Maine UTC's requirement that a trustee provide advance notice to the qualified beneficiaries before changing the trust's principal place of administration, a settlor may want to consider adding the following provision to a revocable trust:

After my incapacity or death, the Trustee of any trust created under this agreement may, in its sole and absolute discretion, remove all or any part of the property of, or the situs of administration of, the trust from one jurisdiction to another and elect, by an instrument filed with the trust records, to have the trust construed and governed as to administration by the laws of the new jurisdiction. The Trustee may do so for any purpose the Trustee deems appropriate, including minimizing any tax in respect of the trust or any trust beneficiary.

If necessary to a change of situs, the Trustee then serving may appoint a corporate fiduciary in the new jurisdiction to serve as the sole Trustee or as a Co-trustee with the then serving Trustee.

## 2. Section 110; Others treated as qualified beneficiaries

### a. Text as adopted 4/14/04:

1. **Charitable organization or person to enforce trust.** A charitable organization expressly designated to receive distributions 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 408 or 409 has the rights of a qualified beneficiary under this Code.

2. **Attorney General.** The Attorney General has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.

### b. Text as proposed for adoption in current legislative session:

1. A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this Code if the charitable organization, on the date the charitable organization's qualification is being determined:

- A. is a distributee or permissible distributee of trust income or principal;
- B. would be a distributee or permissible distributee of trust income or principal upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or
- C. would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Provided, however, a charitable organization whose interest in the trust as a contingent distributee or a contingent permissible distributee of trust income or principal is not reasonably expected to vest shall not have the rights of a qualified beneficiary.

2. A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified beneficiary under this Code.

3. The Attorney General has the rights provided in 5 MRSA section 194 with respect to a charitable trust having its principal place of administration in this state, but shall not be treated as nor have the rights of a qualified beneficiary.

**c. Explanation:** Section 110 expands the “qualified beneficiary” concept by adding two additional classes of beneficiaries - - charitable organizations and persons named to enforce a trust for the care of an animal (often referred to as a “pet trust”) or for a noncharitable purpose (*e.g.*, “I direct my trustee to distribute \$10,000 a year to a resident of the State of Maine, who, in my trustee’s opinion, has worked selflessly to improve the quality of life for all Maine citizens.”). The UTC contained another provision that was deleted in Maine. The deleted UTC provision stated:

Whenever notice to qualified beneficiaries of a trust is required under the UTC, the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

Maine also deviated from the UTC by removing the Attorney General from the class of qualified beneficiaries. Charitable organizations are qualified beneficiaries in their own right and are capable of enforcing their own rights upon receipt of notice from the trustee of their status as qualified beneficiaries. Although Maine removed the Attorney General from the class of persons treated as qualified beneficiaries, Maine added a new subsection 3 that acknowledges the existing role of the Attorney General under 5 MRSA §194. Section 194 requires that the Attorney General be made a party to all judicial proceedings in which the Attorney General is interested in the performance of its duty to enforce the proper use of funds given or appropriated to public charities.



**d. Maine Comment:**

Maine has deleted the Uniform Code's subsection (a), which stated:

- (a) Whenever notice to qualified beneficiaries of a trust is required under the UTC, the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

Uniform Code subsections (b) and (c) have been re-lettered 1 and 2 respectively in the Maine version. The National UTC Conference Comments, referring to subsections (a), (b) and (c), refer to the Uniform Code subsections before they have been re-lettered in the Maine version and should therefore be read accordingly.

Maine has also deleted the Uniform Code's subsection (d) which gave the Attorney General the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in Maine. In its place, Maine has added a new subsection 3 which acknowledges the Attorney General's existing enforcement role under 5 MRSA §194.

The purpose of this section is to expand the class of persons who are treated as a "qualified beneficiary" as defined in UTC Section 103(13). The qualified beneficiary concept of the UTC is used to narrowly define the class of beneficiaries who are entitled to notice of certain matters related to the trust. See the National UTC Conference Comments under this section for further explanation.

The notice required to be given to "qualified" beneficiaries under the UTC should not be confused with the notice requirements of section 1-401 of the Maine Probate Code, which section requires that notice of a proceeding or hearing be given to any "interested person". The term "interested person" is a defined term under section 1-201(20) of the Maine Probate Code, and defines a more expansive group of persons than does the term "qualified beneficiary". The provisions of section 1-401 of the Maine Probate Code are limited to notice of a "proceeding or hearing"; *i.e.*, a matter involving the court. Note that the term "proceeding" is defined in section 1-201(32) of the Maine Probate Code as "including any civil action in any court of competent jurisdiction."

**e. Drafting considerations:**

There are no drafting issues under section 110 different from those addressed in the discussion of section 103(13) above. Most trusts routinely contain provisions that

obviate the role of qualified beneficiaries in all circumstance except those discussed more fully under section 105 below.

### **3. Section 105; Default and mandatory rules**

#### **a. Text as adopted 4/14/04:**

#### **§105. Default and mandatory rules**

**1. Code governs.** Except as otherwise provided in the terms of the trust, this Code governs the duties and powers of a trustee, relations among trustees and the rights and interests of a beneficiary.

**2. Terms prevail; exceptions.** The terms of a trust prevail over any provision of this Code except:

- A. The requirements for creating a trust;
- B. The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- C. 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;
- D. The power of the court to modify or terminate a trust under sections 410 to 416;
- E. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in chapter 5;
- F. The power of the court under section 702 to require, dispense with, modify or terminate a bond;
- G. The power of the court under section 708, subsection 2 to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;
- H. The duty under section 813, subsection 2, paragraphs B and C to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee and of their right to request trustee's reports;

- I. The duty under section 813, subsection 1 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;
- J. The effect of an exculpatory term under section 1008;
- K. The rights under sections 1010 to 1013 of a person other than a trustee or beneficiary;
- L. Periods of limitation for commencing a judicial proceeding;
- M. The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- N. The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 203 and 204.

**b. Text as proposed for adoption in current legislative session:**

**§105. Default and mandatory rules**

**1. Code governs.** Except as otherwise provided in the terms of the trust, this Code governs the duties and powers of a trustee, relations among trustees and the rights and interests of a beneficiary.

**2. Terms prevail; exceptions.** The terms of a trust prevail over any provision of this Code except:

- A. The requirements for creating a trust;
- B. The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- C. 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;
- D. The power of the court to modify or terminate a trust under sections 410 to 416;
- E. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in chapter 5;
- F. The power of the court under section 702 to require, dispense with, modify or terminate a bond;

- G. The power of the court under section 708, subsection 2 to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;
- H. Subject to subsection 3 of this section, tThe duty under section 813, subsection 2, paragraphs B and C to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee and of their right to request trustee's reports;
- I. Subject to subsection 3 of this section, tThe duty under section 813, subsection 1 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;
- J. The effect of an exculpatory term under section 1008;
- K. The rights under sections 1010 to 1013 of a person other than a trustee or beneficiary;
- L. Periods of limitation for commencing a judicial proceeding;
- M. The power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- N. The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 203 and 204.

**3. Waiver or modification.** The settlor, in the trust instrument or in another writing delivered to the trustee, may waive or modify the duties of a trustee under section 813, subsections 1 or 2 to give notice, information and reports to qualified beneficiaries by either:

- A. Waiving or modifying such duties during the lifetime of the settlor or the lifetime of the settlor's surviving spouse; or
- B. Designating a person or persons (any of whom may or may not be a beneficiary) to act in good faith to protect the interests of the qualified beneficiaries who are not receiving notice, information or reports, to receive any notice, information or reports required under section 813, subsections 1 or 2 in lieu of providing such notice, information, or reports to the qualified beneficiaries. The person or persons designated under this subsection shall be deemed to be a representative of the qualified beneficiaries not receiving notice, information or reports for purposes of the time limitation for a

beneficiary to commence an action against the trustee for breach of trust as provided in subsection 1005(1) of this Code.

- c. **Explanation:** Section 105 contains the Maine UTC's compilation of mandatory rules. The Maine UTC is primarily law that applies by default. In other words, if the trust document is silent, the Maine UTC will provide the rules required to provide the needed answer. Most of the rules of the Maine UTC are subject to override by the settlor. Section 105 lists the exceptions to the rule that the trust document overrides the Maine UTC. Therefore, as to the subject matters listed in section 105, the settlor, via the trust document, **may not** change the default rules. Most of the subject matters listed in the section 105 of the UTC have received little or no comment nationally. However, subsections (H) and (I) have become two of the most controversial subsections of the UTC and appear to be the subsections most likely to be changed by states adopting the UTC.

Section 105 ties into section 813 and it is therefore impossible to understand the full import of one without understanding the other. Section 813 is discussed in further detail below, but in brief, section 813 contains a series of ground rules for the trustee's obligation to provide information and reports to the trust beneficiaries.

Subsections 105(2)(H) and (I), in their uniform format, limit the settlor's ability to keep a beneficiary from learning of the existence of the trust or learning of information about the trust administration. In the March 2004 issue of *Trusts & Estates*, in an article entitled *In Defense of Quiet Trusts*, Donald D. Kozusko

contends that the UTC goes too far in mandating the amount of trust information that must be disclosed to beneficiaries and in limiting a settlor's ability to control the answer to the question of how much information a beneficiary should receive. Kozusko argues that if a settlor can disinherit a child entirely, grant unfettered powers of appointment over a trust to a third party and grant a trustee such broad discretionary distribution authority that the trustee's decisions are virtually unreviewable, it "is incongruous that a settlor can control a beneficiary's economic enjoyment, but not his information rights." *Trusts & Estates*, March 2004 at page 22.

But, in contrast, John H. Langbein, the Sterling Professor of Law and Legal History at Yale University, in his article titled *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. Rev. 105 (Spring 2004), argues that a trust provision that prevents the beneficiary from obtaining information needed to enforce the trust makes the trust unenforceable and therefore illusory.

States enacting the UTC have adopted various approaches to the issue. Kansas, Tennessee, Utah and Wyoming, in their adoption of the UTC, eliminated subsections 105(2)(H) and (I) entirely. In those states, a settlor is therefore permitted to maintain as much secrecy and non-disclosure as he desires. In an effort to find a middle ground on this issue, the District of Columbia, in its adoption of the UTC, permits a settlor to have notice of the existence of the trust and trustee's reports to be given to a designated third party instead of to the beneficiaries. Maine has chosen a modified version of the District of Columbia solution. Under this

approach, a settlor may choose one or more persons, who may, but need not be a trust beneficiary, to receive information about the trust administration, in lieu of and on behalf of the beneficiary who is being kept in the dark. The third party “protector” is required to act in good faith on behalf of the beneficiary for whom the protector is receiving the notices and reports. As a result, the protector will be treated as a fiduciary and will be at risk of incurring liability to the beneficiary for failure to maintain his watch in good faith.

Note that under subsection 105(2)(H), a settlor has the power to keep the existence of a trust secret from a qualified beneficiary who has not yet attained 25 years of age. Subsection 105(2)(I) however, highlights the “hide and seek” nature of the UTC disclosure rules. Although 105(2)(H) permits the settlor to prohibit the trustee from making affirmative disclosures to a qualified beneficiary who has not attained 25 years of age, 105(2)(I) requires a trustee to respond to the request of a qualified beneficiary of any age for trustee’s reports and other information about the trust. In other words, although the settlor may prohibit a trustee from proactively providing information about the trust to a qualified beneficiary who has not attained the age of 25, if the underage qualified beneficiary discovers the existence of the trust on his or her own and asks the trustee for trustee’s reports or other information reasonably related to the administration of the trust, the trustee must provide the requested information. In order to prohibit an under age 25 qualified beneficiary from obtaining information about the trust who may have learned about it on his or her own, the settlor may name a representative, or “protector” to receive the information on behalf of the qualified beneficiary.

Keeping a trust “quiet” from a qualified beneficiary who has attained 25 years of age will only be possible by naming a protector to receive notices or reports on behalf of the qualified beneficiary.

A settlor has complete discretion to control the information available to a beneficiary who is not a qualified beneficiary, including denying the beneficiary all information about the trust’s existence. See the discussion under section 813 below for more information on these options.

Under section 105(3)(A), a settlor may mandate complete non-disclosure of information about the existence of the trust during the settlor’s lifetime and during the lifetime of settlor’s surviving spouse. Therefore, a settlor may, should he desire to do so, require that trustee’s reports for a credit shelter trust or a marital trust be provided only to his surviving spouse during her lifetime, even if the children are also discretionary beneficiaries of income and principal of a “spray and sprinkle” credit shelter trust. Under those circumstances, the settlor does not need to designate a protector to receive trustee’s reports on behalf of the qualified beneficiaries who are not receiving reports. However, if the surviving spouse is the sole trustee of a credit shelter trust that permits distributions of principal for the surviving spouse’s health, education, support or maintenance, it may be prudent to make sure that the surviving spouse/trustee provides trustee’s reports to a qualified beneficiary with an interest that is adverse to the interest of the surviving spouse. To ensure that the credit shelter trust is not included in the taxable estate of the surviving spouse, someone should keep an eye on the trust to make sure that the surviving spouse is limiting



distributions to ascertainable standards and is not using the trust as her personal checking account.

**d. Maine Comment:**

Subsection (2)(H) has been changed by adding the word “qualified” before “beneficiary”. The change is consistent with section 813(1), which, as adopted in Maine, requires that a trustee respond to a “qualified beneficiary’s” request for trustee’s reports and other information reasonably related to the administration of a trust.

Notwithstanding the trustee’s duty under section 813(2)(B) and (C) to provide qualified beneficiaries with notice of certain information about the trust, under subsection 105(2)(H) a settlor may, by the terms of the trust, prohibit the trustee from notifying a qualified beneficiary who has not yet attained 25 year of age, of the existence of the trust, of the identity of the trustee and of the qualified beneficiary’s right to request trustee reports. However, once a qualified beneficiary attains 25 years of age, the only way he may be “kept in the dark” as to the existence of the trust is for the settlor to name a person or persons to receive trustee reports on behalf of the qualified beneficiary as provided in subsection (3). The “protector” named in subsection (3) must act in good faith to protect the interests of the qualified beneficiary on whose behalf the protector is receiving trust information. Subsection (3) is not a uniform provision of the Uniform Trust Code. Maine added subsection (3) as a means to provide settlors with an option to prevent disclosure of the existence of the trust and details of the trust administration to qualified beneficiaries. A settlor has the power to prohibit the disclosure of the existence of the trust and details of the trust administration to all non-qualified beneficiaries without the need to name a third person to receive such information on behalf of the beneficiaries. Note that a settlor may not name a protector to receive notice, information or reports in lieu of providing the notice, information or reports directly to the settlor’s surviving spouse.

The UTC has built into its default provisions a hierarchy of rights relating to providing various beneficiaries with information about a trust. The default provisions will govern unless the settlor chooses to modify them by the terms of the trust document:

- i. Some classes of beneficiaries have a right to information whether they request it or not (*e.g.*, under section 813(3) distributees or permissible distributees of trust income or principal have a right to receive annual reports without request).

- ii. Other beneficiaries have a right to be affirmatively told of their right to request information (*e.g.*, under section 813(2)(C) qualified beneficiaries have to be informed of their right to request a copy of the trust instrument and of trustee's reports).
- iii. Non-qualified beneficiaries have a right to obtain a copy of the trust instrument only if they request a copy, but a trustee is under no affirmative obligation to inform them of the existence of the trust or of their right to request a copy; the non-qualified beneficiaries are on their own to learn of the existence of the trust (see section 813(2)(A)).

Section 105 permits the settlor, by the terms of the trust, to alter the beneficiaries' rights and trustee's duties under section 813, except as specified in subsections 105(2)(H) and (I).

**e. Drafting considerations:** Sections 105 and 813 present a number of significant drafting options for the settlor, depending on how much information the settlor wants the trustee to disclose to various beneficiaries and the timing of the disclosures. Attached to this article are samples of some variations of notice provisions to meet a settlor's intent. The samples are not intended to be exhaustive of the available options, but they should be a good starting point for addressing the concerns of most clients. The drafting lawyer should be as specific as possible in laying out the rules for how a trustee is to disseminate information about the existence of the trust and its administration. In conjunction with the sample language provided, the trust instrument should also include a definition of "qualified beneficiary" either in the definitions section of the governing instrument, or if there is no such separate section, then perhaps as an additional subparagraph of the section addressing the dissemination of trust reports and information.

- i. Exhibit A: Definition of Qualified Beneficiary
- ii. Exhibit B: Trust Reports and Information: No restrictions; acceptance of default provisions of Maine UTC
- iii. Exhibit C: Trust Reports and Information: No restrictions; acceptance of default provisions of Maine UTC except for non-qualified beneficiaries' right to obtain copy of trust instrument
- iv. Exhibit D: Trust Reports and Information: No information to qualified beneficiaries under age 25
- v. Exhibit E: Trust Reports and Information: No information to a named qualified beneficiary under age 25
- vi. Exhibit F: Trust Reports and Information: No information to qualified beneficiaries under age 40
- vii. Exhibit G: Trust Reports and Information: No information to a named qualified beneficiary regardless of age
- viii. Exhibit H: Trust Reports and Information: No information to qualified beneficiaries other than surviving spouse during surviving spouse's lifetime; after second to die of settlor and surviving spouse, no information to qualified beneficiaries under age 25

#### **4. Section 813; Duty to inform and report**

##### **a. Text as adopted 4/14/04:**

##### **§813. Duty to inform and report**

**1. Inform beneficiaries.** A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless a request is unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for trustee's reports and other information reasonably related to the administration of the trust.

##### **2. Information.** A trustee:

- A. Upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
- B. Within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address and telephone number;
- C. Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument and of the right to a trustee's report as provided in subsection 3; and
- D. Shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

**3. Report.** A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values and tax bases. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative of a deceased trustee or a conservator of the estate or, if no conservator has been appointed, a guardian of an incapacitated trustee may send qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

**4. Waiver.** A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

**b. Text as proposed for adoption in current legislative session:**

**§813. Duty to inform and report**

**1. Inform beneficiaries.** A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless a request is unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for trustee's reports and other information reasonably related to the administration of the trust.

**2. Information.** A trustee:

- A. Upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;
- B. Within 60 days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address and telephone number;
- C. Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument and of the right to a trustee's report as provided in subsection 3; and
- D. Shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

**3. Report.** A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values and tax bases. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative of a deceased trustee or a conservator of the estate or, if no conservator has been appointed, a guardian of

an incapacitated trustee may send qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

**4. Waiver.** A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

**5. Applicable date.** Subsection 2 paragraphs B and C of this section shall apply only to a trustee who accepts a trusteeship on or after July 1, 2005, to an irrevocable trust created on or after July 1, 2005, and to a revocable trust which becomes irrevocable on or after July 1, 2005.

- c. Explanation:** Section 813 sets forth the rules governing a trustee's obligation to keep beneficiaries informed about the trust. In order to appreciate fully the scope of Section 813, it is necessary to understand the distinction between "qualified beneficiaries" and mere "beneficiaries". All "qualified beneficiaries" are "beneficiaries" but not all "beneficiaries" are "qualified beneficiaries". Beneficiaries who do not enjoy the status of "qualified beneficiaries" are not entitled to receive information about the trust unless they happen to learn of its existence via their own devices, and even then, they are only entitled to receive a copy of the trust instrument if they ask for it (section 813(2)(A)). Section 813 does not require a trustee to provide trustee's reports to a beneficiary who does not enjoy the status of a "qualified beneficiary".

The trustee's duties under section 813 are all subject to modification under section 105. See the discussion under that section above.

In most cases, a settlor will not want to alter the default rules of section 813. Section 813, as written, provides maximum transparency about the trust

administration. The trustee has an affirmative obligation to tell qualified beneficiaries of the existence of the trust, and of their right to receive trust information on an annual basis. The trustee also has an obligation to “promptly respond” to a qualified beneficiary’s request for “information reasonably related to the administration of the trust.”

In those instances where a settlor prefers to restrict a qualified beneficiary’s access to information about the trust because the settlor is concerned that the information might undermine the beneficiary’s initiative, or for any other reason, section 105 provides the settlor with wide latitude to change the default rules of section 813.

A settlor who desires to restrict entirely a beneficiary from learning of the existence of the trust will have to accept the potential income tax trade offs that come with the restriction. The beneficiary will likely be in a lower income tax bracket than the trust, and as a result, distributing trust income to the beneficiary may be prudent from an income tax planning perspective. However, a distribution of income to the beneficiary will reveal the existence of the trust, and result in the issuance of a Schedule K-1 (Form 1041), *Beneficiary’s Share of Income, Deductions, Credits, etc.* for income tax reporting purposes. On the other hand, the beneficiary’s mere knowledge that a trust exists and that the trust produced some income, in most cases will not reveal any information about the size of the trust or the nature of its assets.

**d. Maine Comment:**

Section 813 was changed to require that, except for providing a copy of the trust to a beneficiary who requests it, the trustee is required to send reports and information only to qualified beneficiaries. The settlor may further restrict the information provided to qualified beneficiaries who are 25 years of age or older. See section 105.

Section 813, subsection 3 was amended to require that the trustee's report include information on the tax basis of the trust's assets. This information is commonly provided and should be required.

It is to be noted that, while there is an official Maine Probate Court form for estate accountings, Form DE-406, this section specifically contemplates that there will be no official form for trust accountings. In addition, while estate accountings only report personal property, this section makes no distinction between real estate and other kinds of property held in trust. Trust reports should reflect all property, whether real or personal.

**e. Drafting considerations:** A settlor has options with regard to how much information the settlor wants the trustee to disclose to the beneficiaries. Unless the trust says otherwise, section 813 will serve as the default rules for information given to the beneficiaries. A settlor should consider the following questions:

- i. Should beneficiaries who are not “qualified beneficiaries” have the right to obtain a copy of the trust upon request? If not, then the settlor must affirmatively prohibit their right to obtain a copy of the trust.
- ii. Should the trustee tell qualified beneficiaries who have not yet attained 25 years of age of the existence of the trust or should the trustee withhold information about the trust until the qualified beneficiaries reach 25 years of age? A settlor who wants information withheld until the qualified beneficiary attains age 25 must affirmatively state that restriction.



- iii. Should a trustee provide information about the trust to a qualified beneficiary who requests it, as opposed to affirmatively providing the information without first having received a request from the qualified beneficiary? A settlor who wants to prohibit a trustee from providing trust information to a qualified beneficiary who asks for it must expressly state the prohibition.
- iv. Does the settlor want to keep information from a beneficiary who has attained age 25? If so, the settlor will have to designate someone to receive the information on behalf of the beneficiary.

See the sample provisions in Exhibits A through H, discussed above under section 105.