

MEMO TO THE PARTNER

IN TENNESSEE WE TRUST? AN OVERVIEW OF THE 2013 AMENDMENTS TO THE TENNESSEE UNIFORM TRUST CODE

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TO: Law Office Partner
FROM: Associate
RE: In Tennessee We Trust? An Overview of The
Tennessee Uniform Trust Code

I. INTRODUCTION

In July of 2013, the Tennessee legislature enacted several significant changes to the Tennessee Uniform Trust Code (TUTC), marking the most substantial alteration to Tennessee trust law since the creation of the Code almost ten years prior.² The modifications distinguish Tennessee trust law from any other state, and the provisions explicitly affirm that the TUTC is not to be construed uniformly to the laws of any jurisdiction.³ The changes to the TUTC represent the intention of the legislature to establish Tennessee as a competitive legal market for trust and trust-related amenities.⁴ In enacting the modifications, the legislature also sought to attract out-of-state businesses and to brand Tennessee as an attractive environment for trust business.⁵

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² J. Scott Griswold et al., *10 Things You Should Know: Big Changes to Tennessee's Uniform Trust Code*, 49 TENN. B.J. 20, 20 (2013).

³ TENN. CODE ANN. § 35-15-1101 (2013); Griswold, *supra* note 1, at 21.

⁴ Griswold, *supra* note 1, at 20.

⁵ *Id.*

Section II of this paper outlines the major changes made by the 2013 amendments to the TUTC. Section III compares the TUTC provisions after the 2013 amendments with the equivalent provisions of the laws of several other states that have adopted the Uniform Trust Code. Section IV evaluates the 2013 amendments to the TUTC and makes some predictions regarding possible outcomes of the amendments.

II. THE 2013 AMENDMENTS

The first set of major changes to the TUTC includes limitations placed on Tennessee courts to exercise discretion in construing trusts.⁶ Historically, the common law of the state of Tennessee has prohibited any trust provision that violated public policy, and the TUTC mandated such a requirement.⁷ The 2013 revision removed all language requiring a trust to comport with public policy; thus, the TUTC as written currently permits a trust that is in fact contrary to public policy.⁸ The motivation behind this removal stems from the desire of the Tennessee legislature to prevent another state's court from applying its own public policy concerns to Tennessee trusts.⁹ The TUTC choice of law provision defines trust activities in a broad manner to encompass a comprehensive set of trust related-matters and further provides that Tennessee law will govern all such issues.¹⁰ The choice of law provision also gives Tennessee courts mandatory jurisdiction over trusts and trust activities.¹¹

The TUTC's alter ego provision also limits the discretion of Tennessee courts and precludes the courts from considering an array of factors that may determine the extent of a beneficiary's or settlor's influence over a trust.¹² The factors relating to the exercise of dominion

⁶ *Id.*

⁷ *Id.* at 21.

⁸ TENN. CODE ANN. § 35-15-404, 2013 Restated Comments (2013); see Griswold, *supra* note 1, at 21.

⁹ Griswold, *supra* note 1, at 21.

¹⁰ TENN. CODE ANN. § 35-15-107 (2013).

¹¹ *Id.*

¹² TENN. CODE ANN. § 35-15-1104 (2013).

and control over a trust are to be disregarded in a court's determination of the appropriateness of influence over a trust.¹³ The 2013 official section comments accompanying the alter ego section state several reasons why a determination that a settlor is the alter ego of a trustee would have a negative impact on the trust.¹⁴ The main concern is related to taxes, as well as discretionary and spendthrift protections.¹⁵ Evidenced by the comments, the Tennessee legislature concluded that making it exceedingly difficult for a settlor to be considered an alter ego would be most consistent with the TUTC's substantial emphasis on fulfilling a settlor's intent and the old property adage of freedom of disposition.¹⁶ It is likely that the intent of the Tennessee legislature is to provide a clear indication of the permitted amount of control bestowed on the beneficiary and settlor.¹⁷ As a result of its transparency in explaining the reasons for enacting these amendments, the legislature hopes to invite trust business into the state of Tennessee.¹⁸ However, the limitations placed on the discretion of the Tennessee courts raises the issue of separation of powers, as well as constitutional concerns, with an arguable derailment of the checks and balance system.¹⁹

A second significant change to the TUTC is in the determination of the "material purpose" of a trust and its relation to the "dead hand control" of the settlor.²⁰ When it was adopted in 2004, the TUTC included a provision that permitted courts to terminate or modify an irrevocable trust after a settlor died, provided that such modification did not violate a material purpose of the trust.²¹ The allowance was especially beneficial when circumstances unanticipated by the settlor arose that

¹³ *Id.*

¹⁴ TENN. CODE ANN. § 35-15-1104 (2013) (referencing the 2013 Restated Comments).

¹⁵ *Id.* (referencing legislative comments).

¹⁶ *Id.* (referencing legislative comments).

¹⁷ Griswold, *supra* note 1, at 22.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; see TENN. CODE ANN. § 35-15-105 (2013).

²¹ TENN. CODE ANN. § 35-15-411 (2004).

made the trust ineffective or obsolete.²² The 2013 revisions provide that any material purpose deemed as such will be given effect, thus empowering the settlor's dead hand control.²³

A third change to the TUTC limits a beneficiary's ability to bring an action to challenge the terms of the trust or performance of a trustee.²⁴ The revised no-contest provisions of the TUTC provide that the terms of the trust will be administered in accordance with their precise meaning, regardless of whether an action in good or bad faith is brought against the trust.²⁵ As revised, the no-contest provisions allow a beneficiary to challenge the terms of a trust only in a limited number of circumstances, as in the event of undue influence, fraud, or lack of testamentary capacity.²⁶ In the aforementioned cases, the beneficiary is required to prove the existence of probable cause in order to bring an action to successfully challenge a trust.²⁷ While the no-contest provision may be attractive to a settlor of a trust, as one commentator has pointed out, such a provision has the undesirable ability to disinherit beneficiaries who bring a good faith action against the trust.²⁸ Such a result could ultimately be contrary to the settlor's intent in the creation of the trust.²⁹

An additional revision to the TUTC is reflected in the inclusion of a new category of fiduciaries designated as "excluded fiduciaries."³⁰ According to the TUTC, an excluded fiduciary is:

any trustee, trust advisor, or trust protector to the extent that, under the terms of a trust, an agreement of the qualified beneficiaries, or court order:

²² Griswold, *supra* note 1, at 22.

²³ *Id.*; see TENN. CODE ANN. §35-15-105 (2013).

²⁴ Griswold, *supra* note 1, at 22.

²⁵ TENN. CODE ANN. § 35-15-1014 (2013); see Griswold, *supra* note 1, at 22.

²⁶ TENN. CODE ANN. § 35-15-1014 (2013).

²⁷ *Id.*

²⁸ Griswold, *supra* note 1, at 23.

²⁹ *Id.*

³⁰ *Id.*

- (A) The trustee, trust advisor, or trust protector is excluded from exercising a power, or is relieved of a duty; and
- (B) The power or duty is granted or reserved to another person[.]³¹

A person can be designated as an excluded fiduciary by court order, under the terms of a trust, or by an agreement between authorized beneficiaries.³² The significance of the designation as excluded fiduciary allows the party to avoid liability for losses caused by a trustee's failure to follow the advice of the excluded trustee, failure to follow the recommendations of the trustee, or losses resulting from inaction of the trustee.³³ The revisions permit elasticity in the creation of trusts and may encourage reluctant parties to accept fiduciary roles in certain circumstances.³⁴

Another 2013 revision includes an expansion to the portion of the TUTC governing a fiduciary's duty to inform and report to any party holding a power of appointment.³⁵ The modification clarifies that all fiduciaries, and not solely trustees, may either be required or relieved from the duty to report based on the terms of the trust or the statute.³⁶ As a result, any fiduciary owing a duty to inform and report must be able to differentiate which parties in a trust hold a power of appointment, and subsequently, the fiduciary must report and keep those designated parties adequately informed.³⁷

The 2013 amendment also refined when a trustee can exercise discretion in distributing under a trust and more explicitly sets forth the instances in which a trustee may be held liable for such distributions.³⁸

³¹ TENN. CODE ANN. § 35-15-103 (2013).

³² *Id.*

³³ TENN. CODE ANN. § 35-15-1205 (2013); Griswold, *supra* note 1, at 23.

³⁴ Griswold, *supra* note 1, at 23; *see* TENN. CODE ANN. § 35-15-1205 (2013).

³⁵ TENN. CODE ANN. § 35-15-813 (2013).

³⁶ *Id.*; Griswold, *supra* note 1, at 23.

³⁷ Griswold, *supra* note 1, at 23.

³⁸ TENN. CODE ANN. § 35-15-814 (2013); Griswold, *supra* note 1, at 23.

The revisions articulating when a trustee can be held liable are narrow and limit a beneficiary's ability to bring an action against a trustee to cases of improper motive or denial of distribution as a result of the trustee's own self-interest.³⁹ A clarification mandates that a trustee need not consider a beneficiary's other assets or resources in making determinations regarding distributions under the trust.⁴⁰ The amendment also elaborates on the nature of a discretionary interest in a trust, stating that a discretionary interest is not "an enforceable right; it is a mere expectancy[.]"⁴¹ The amendment continues, stating that the court has limited ability to review discretionary distributions and may only do so in the case of a dishonest trustee, a trustee who acts with an improper motive, or a trustee who has failed to act when the trustee in fact has a duty to perform.⁴² Another notable revision is the absence of the requirement that a trustee act reasonably in distributing a trust, and in fact, a trustee may favor one beneficiary over another and make disproportionate distributions under a trust without exposure to liability, unless doing so would contradict express terms of the trust.⁴³ In contrast, the revision does impose liability on a trustee in a situation involving mandatory or support distributions.⁴⁴ Under the TUTC, a beneficiary may rightfully bring an action against a trustee who fails to make a mandatory or support distribution and has an enforceable right under the TUTC.⁴⁵ In this narrow context, the court is permitted to consider the trustee's reasonableness in failing to distribute appropriately in addition to whether the trustee was acting honestly, had an ulterior motive, or failed fulfill a duty⁴⁶

³⁹ TENN. CODE ANN. § 35-15-814(a)(1) (2013).

⁴⁰ Griswold, *supra* note 1, at 24.

⁴¹ TENN. CODE ANN. § 35-15-814(b) (2013).

⁴² Griswold, *supra* note 1, at 24.

⁴³ *Id.*

⁴⁴ TENN. CODE ANN. § 35-15-814(c) (2013).

⁴⁵ *Id.* § 35-15-814(c)(1); *see* Griswold, *supra* note 1, at 24.

⁴⁶ TENN. CODE ANN. § 35-15-814 (2013); *see* Griswold, *supra* note 1 at 24.

Another important revision further limits trustee liability.⁴⁷ In the provision that governs the specific powers of trustees, trustee liability is reduced in two different ways. The first is a safeguard that prevents a transfer that would cause a generation-skipping tax to be assessed to the trust or cause a forfeiture of the ability to qualify for marital or charitable deductions or federal annual exclusions.⁴⁸ A second limitation to trustee liability is the capability of a trustee to decant without fear of suit by a beneficiary.⁴⁹ Designating a trustee creates a power of appointment that is not subject to the imposition of fiduciary duties, and therefore, the 2013 modification grants trustees the authority to appropriately decant free from the possibility of incurring liability.⁵⁰

The 2013 TUTC amendments to creditor's rights largely preclude creditors from collecting against the assets contained in a trust.⁵¹ Generally, attachment of future or present distributions can enable creditors to reach the interest of a beneficiary.⁵² However, recent changes have left the general rule lacking weight, as the exceptions are numerous and leave the rule weakened without sufficient authority to enable creditors to collect.⁵³ Spendthrift provisions now prevent creditors from reaching mandatory distributions of assets held in trust.⁵⁴ First, according to the TUTC, the trustee has the authority to withhold such mandatory distributions.⁵⁵ Second, even in the absence of a spendthrift provision, a trustee is permitted to make distributions on behalf of the beneficiary, rather than directly to the beneficiary.⁵⁶ If a trustee has the authority to exercise discretion over beneficiary

⁴⁷ TENN. CODE ANN. § 35-15-816 (2013).

⁴⁸ *Id.*

⁴⁹ TENN. CODE ANN. § 35-15-816 (2013); *see* Griswold, *supra* note 1, at 24.

⁵⁰ *See* TENN. CODE ANN. § 35-15-816 (2013); Griswold, *supra* note 1, at 24.

⁵¹ Griswold, *supra* note 1, at 24.

⁵² *Id.*; GEORGE GLEASON BOGERT ET AL., *BOGERT'S TRUSTS AND TRUSTEES*, § 193 (2015).

⁵³ Griswold, *supra* note 1, at 24.

⁵⁴ *Id.*

⁵⁵ *See* TENN. CODE ANN. § 35-15-502 (2013).

⁵⁶ Griswold, *supra* note 1, at 24.

distributions, the beneficiary's creditor is unable to reach trust assets regardless of the existence of a spendthrift provision.⁵⁷ Creditors are also prohibited from collecting trust assets in cases where the beneficiary's interest can be classified as a support interest.⁵⁸ If a trustee has the discretion or has been instructed to distribute to a beneficiary for the purpose of support, maintenance, health, or education, a creditor cannot reach such distributions.⁵⁹ Lastly, a creditor is not empowered to reach trust assets because a beneficiary may also be a fiduciary, have the ability to replace an existing fiduciary, or have some other control over the trust.⁶⁰ Thus, the general rule enabling a creditor to reach the trust assets of a beneficiary is limited to situations where there is the absence of a spendthrift provision, distributions to the beneficiary are not used for support, the distribution of a remainder interest will occur within a one year period, and the beneficiary has contributed to the amount.⁶¹

A final 2013 amendment has a significant impact on creditors involving the limitations period set forth in the Uniform Fraudulent Transfer Act (UFTA).⁶² The revision shortens the limitations period, which previously was approximately four years.⁶³ The amendment allows creditors to challenge qualifying fraudulent dispositions and set aside transfers to the Tennessee Investment Service Trusts (TIST).⁶⁴ In accordance with the 2013 amendment, a creditor can make a claim (a) within two years after the qualifying disposition or (b) within six months from when "the creditor discovered or should have discovered the qualifying disposition" if the creditor was also a plaintiff when the qualifying disposition was made to the TIST.⁶⁵ The creditor can opt for

⁵⁷ TENN. CODE ANN. § 35-15-504 (2013); Griswold, *supra* note 1, at 24.

⁵⁸ TENN. CODE ANN. § 35-15-506 (2013); *see* Griswold, *supra* note 1, at 24.

⁵⁹ Griswold, *supra* note 1, at 24.

⁶⁰ TENN. CODE ANN. § 35-15-508 (2013), -509 (2013); Griswold, *supra* note 1, at 24-25.

⁶¹ Griswold, *supra* note 1, at 25; *see* TENN. CODE ANN. § 35-15-501 (2013).

⁶² TENN. CODE ANN. § 66-3-310 (2013); Griswold, *supra* note 1, at 25.

⁶³ Griswold, *supra* note 1, at 25.

⁶⁴ TENN. CODE ANN. § 35-16-104(b) (2013); Griswold, *supra* note 1, at 25.

⁶⁵ Griswold, *supra* note 1, at 25.

the longer of either alternative.⁶⁶ The amendment provides that a creditor is considered to have discovered a qualifying disposition upon the recordation of a financing statement, deed, or other comparable document.⁶⁷ An action must be initiated within two years of a qualifying disposition if an individual becomes a creditor of a settlor after a qualifying disposition has been made.⁶⁸ The result of this amendment is significant because the UFTA contains no cross-reference to the new, shorter limitations period, and creditors may be unaware and neglect to bring a claim in the required timeframe.⁶⁹

The amendment also places a greater evidentiary burden on creditors challenging qualifying dispositions.⁷⁰ A creditor is barred from bringing a claim unless the creditor is able to show a settlor made a fraudulent property transfer for the purpose of deceiving that particular creditor.⁷¹ A creditor must be able to prove the aforementioned by clear and convincing evidence, placing a heavier burden on the creditor making the claim.⁷²

The 2013 revisions to the TUTC span vastly across many facets of Tennessee trust law. This paper seeks to provide a comprehensive overview of the major changes in addition to their impact on settlors, beneficiaries, creditors, and Tennessee lawyers alike. First, however, I will undertake a comparison of the 2013 amendments with the equivalent provisions in other states' laws.

III. OTHER JURISDICTIONAL APPROACHES

In 2000, the Uniform Law Commissioners enacted the Uniform Trust Code ("UTC") in an effort to nationally codify the law governing

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 25-26.

⁷⁰ *Id.* at 26.

⁷¹ TENN. CODE ANN. § 35-16-104(b)(2)(B); Griswold, *supra* note 1, at 26.

⁷² TENN. CODE ANN. § 35-16-104(b)(2)(B); Griswold, *supra* note 1, at 26.

trusts.⁷³ The UTC represents an attempt to codify existing common law, but includes reforms that are directed at addressing the modern needs of trust law.⁷⁴ The UTC provisions apply to voluntary trusts.⁷⁵ Thirty states have enacted the UTC in its entirety or have modified the uniform provisions to correspond to the law of the jurisdiction.⁷⁶ This section seeks to analogize and distinguish several of the 2013 amendments to the TUTC with the approaches governing the trust law of other jurisdictions.

A. Trust Purposes, Material Purpose, Modification, and Termination

One of the most radical changes to the TUTC is the exclusion of a requirement that a trust be formed in compliance with public policy.⁷⁷ The trust purposes set forth in the TUTC need only be “lawful and possible to achieve.”⁷⁸ Any indication or condition that a trust provision must comport with the public policy of the state has been removed.⁷⁹ The 2013 Restated Comments expressly state that to the degree that the provision regarding public policy conflicts with the Uniform Code or various restatements or other law, the TUTC is presumed to prevail, and other approaches are expressly rejected.⁸⁰ The comments state that there may in fact be situations in which trust purposes are deemed so offensive as to violate public policy, but under the TUTC, such a circumstance will be difficult to find and found only on rare occasion.⁸¹ The comments seek to justify the deletion of the public policy provision by stating that one of the paramount purposes of the TUTC is to give full effect to a

⁷³ In the United States, trust law is primarily drawn from common law, and the American Law Institute’s Restatement of the Law of Trusts, 2nd as well as 3rd. Various states have enacted laws that govern the trust relationship, and several states, such as California, have undertaken a state codification of trust law. *Trust Code Summary*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Trust%20Code> (last visited October 15, 2015).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ TENN. CODE ANN. § 35-16-404 (2013).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ TENN. CODE ANN. § 35-15-404, 2013 Restated Comments (2013).

⁸¹ *Id.*

settlor's intent in a trust document, and to give full credence to a settlor's freedom to dispose of assets in any method and to any individual that he or she desires.⁸²

The 2013 Tennessee amendment omitting any requirement to comport with public policy is in stark contrast to other jurisdictions. Many states prohibit the creation of a trust that is contrary to public policy.⁸³ Many states also mandate that any provisions within a given trust must be lawful and will not be given effect if doing so would be in conflict with a significant public policy of the state.⁸⁴

The 2013 amendments to the TUTC also empower what is referred to as a "material purpose" of a trust enumerated by the settlor. In regard to modification or termination of a non-charitable irrevocable trust, the qualified beneficiaries must consent to such a change, and a court must conclude that the change is not inconsistent with a trust's material purpose.⁸⁵ The 2013 Restated Comments add that if a material purpose dictates that the trust must continue, modification and termination of the trust will not be available.⁸⁶

Many jurisdictions allow for modification or termination of trusts in various circumstances. Most jurisdictions include the limitation that any trust provision is subject to the default and mandatory rules within the jurisdiction's code. In turn, most state codes' default and mandatory rules provide that a trust or its provisions cannot be at odds with public policy. The Florida Trust Code provides that trust terms conveying the intent of the settlor will be given legal effect in regards to dispositions consistent with the trust.⁸⁷ The code mandates that the provision is subject to the default and mandatory rules that require a trust to be created for a lawful purpose, not in conflict with public policy, and for

⁸² *Id.*

⁸³ *See, e.g.*, FLA. STAT. ANN. §736.0107 (2007); N.C. GEN. STAT. ANN. §36C-4-404 (2006).

⁸⁴ *Id.*

⁸⁵ TENN. CODE ANN. § 35-15-105 (2013).

⁸⁶ *Id.* (referencing the 2013 Restated Comments).

⁸⁷ FLA. STAT. ANN. § 736.0105(2)(c) (West 2009).

the benefit of the beneficiaries.⁸⁸ The default rules also command that the trust provisions are possible of achievement.⁸⁹ The South Carolina Uniform Trust Code contains the phrase “not contrary to public policy” in order to be consistent with the common law principle that invalidates those trust instruments that conflict with public policy.⁹⁰

In comparison to the TUTC’s material purpose provision, the Arkansas Trust Code allows a court to modify or terminate a trust or its provisions if unanticipated circumstances arise that are not foreseeable to the settlor, and such action will further the trust purpose.⁹¹ Modification or termination of a trust because of unanticipated circumstances or inability to effectively administer a trust is a common characteristic of most state’s trust codes. The Arkansas Uniform Trust Code provides that the settlor’s probable intent will influence the modification.⁹² The Arkansas approach seems to give the settlor’s intent credence, without providing the settlor with an absolute power to deem any purpose material and therefore precluded from modification by the court.⁹³

The South Carolina Trust Code contains a Reporter’s Comment that explains the state’s view on balancing a settlor’s intent with the need to benefit the beneficiaries. The comment explains that the courts are to give the settlor “considerable latitude” in designating trust purposes; however the precept that a trust is created for the benefit of the beneficiaries will restrict unjust constraints on the use and disposition of

⁸⁸ *Id.*

⁸⁹ *Id.* The mandatory and default rules of most states tend to mirror those of Florida and are fairly universal, representing that same fundamental principle that a trust or its provisions may not contradict public policy, must be lawful, and must be for the benefit of the beneficiaries. *See* ALA. CODE § 19-3B-105 (2016); ALA. CODE § 19-3B-404 (2016); ARK. CODE ANN. § 28-73-105 (West 2005); ME. REV. STAT. ANN. tit. 18-B, § 404 (2005); S.C. CODE ANN. § 62-7-404 (2014); W. VA. CODE ANN. § 44D-4-404 (West 2011); W. VA. CODE ANN. § 44D-4-404 (West 2011).

⁹⁰ S.C. CODE ANN. § 62-7-404 (2014).

⁹¹ ARK. CODE ANN. § 28-73-412 (West 2005).

⁹² *Id.*

⁹³ Other states such as Kentucky and Virginia have similar provisions that permit modification or termination of trusts in particular circumstances. *See* KY. REV. STAT. ANN. § 386B.4-120 (West 2014); VA. CODE ANN. § 64.2-730 (West 2012).

trust property.⁹⁴ The comments indicate that in South Carolina, any competing interests between a settlor's freedom of disposition and the benefits to a trust's beneficiaries are to be resolved in favor of the beneficiaries.⁹⁵ The comments conclude stating that any unjustified restrictions on trust property will ultimately fail, upholding the notion that the principle purpose of a trust in South Carolina is to benefit those individuals deemed to be beneficiaries in the trust instrument.⁹⁶

The TUTC's removal of the requirement that a trust and its terms be consistent with public policy may open the floodgates to litigation in years to come. The amendment is in contrast with the vast majority of other jurisdictions, and seems fundamentally inconsistent with the common law of trusts. Further, the requirement that a trust's purposes must be lawful, but can also be contrary to public policy seems contradictory. A better approach is to refuse to give effect to any terms in a trust that violate public policy. An amendment designating that a material purpose can be any purpose that the settlor desires may also be problematic as well. A material purpose designated by the settlor that may be harmful will be given effect and will be upheld, even if doing so would not otherwise be advisable and termination or modification would be more appropriate. The amendment allowing for inconsistencies with public policy, in concert with the amendment that a material purpose is any purpose that the settlor so desires, appear troublesome in that they seem to give the settlor unrestricted power when drafting the terms of his or her trust. A term of a trust may be offensive to many, and may be deemed to be in violation of public policy in other jurisdictions. But if a settlor indicates that such a term is a material purpose of a trust, then modification or termination of the trust instrument will be unavailable. The consequence of these two amendments could be increased litigation in years to come.

B. *No-Contest Clauses*

⁹⁴ S.C. CODE ANN. § 62-7-412 (2014) (referencing comments).

⁹⁵ *Id.*

⁹⁶ *Id.*

Next, the TUTC now includes an amendment that upholds a trust instrument's use of a "no-contest clause," thus limiting a beneficiary's actions against a trustee.⁹⁷ The provision states that a no-contest clause will be enforced in accordance with its explicit terms regardless of whether the beneficiary's action is taken in good or bad faith.⁹⁸ The provision also makes no distinction between beneficiaries that are represented by legal counsel and those that are without the assistance of counsel.⁹⁹ Under the TUTC, the only exception that would render a no-contest clause ineffective would be the presence of trustee wrongdoing such as undue influence, fraud, duress, or evidence that the trust was erroneously created because of mistake or lack of testamentary capacity.¹⁰⁰ The 2013 TUTC amendments greatly limit remedies available to a beneficiary of a trust against a trustee when a no-contest clause is included in a trust instrument.

In contrast, other jurisdictions take a differing approach that favors the beneficiary's right to bring suit against a trustee. The Florida Trust Code includes a penalty clause for contesting parties.¹⁰¹ The code states that any provision included in a trust with the purpose of penalizing an interested party for contesting the institution of trust proceedings regarding trust assets or the trust estate, or the trust instrument itself will be deemed unenforceable.¹⁰² In South Carolina, the code provides that as long as probable cause exists, any provision that penalizes an individual for contesting a trust's validity or initiating suit will be deemed unenforceable.¹⁰³

Under the Arkansas Uniform Trust Code, the Uniform Law Comment under the section governing "Limitation on

⁹⁷ TENN. CODE ANN. § 35-15-1014 (West 2013).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ FLA. STAT. ANN. § 736.1108 (West 2007).

¹⁰² *Id.* (The Florida Uniform Trust Code specifically provides that FLA. STAT. ANN. § 736.1108 applies only to those trusts that were created on or following October 1, 1993).

¹⁰³ S.C. CODE ANN. § 62-7-605 (2014).

action contesting validity of revocable trust--Distribution of trust property” states that a trustee should not be restricted in making trust distributions because of concerns of liability or contest because few trusts are in fact contested.¹⁰⁴ The comment concludes that a trustee can be held liable for erroneous distributions of trust assets absent a statute to protect the trustee.¹⁰⁵ Liability will attach to the trustee regardless of whether the trustee believes that he or she was acting reasonably under the circumstances or if he or she believed the distribution was appropriate.¹⁰⁶

The TUTC’s no-contest amendment seems to severely limit a beneficiary’s remedies against a trustee when a trust contains a no-contest provision. The TUTC mandates that a no-contest provision will be given full effect according to its express terms, and in the event that a beneficiary brings an action to contest, challenge, or vary the terms of the trust, the beneficiary risks having his or her interest in the trust eliminated or reduced.¹⁰⁷ Other jurisdictions take a more equitable approach for beneficiaries who wish to contest a trust instrument or its terms. For example, South Carolina requires that a beneficiary has probable cause, and if such cause can be shown, any trust provision that penalizes the beneficiary for bringing an action will be unenforceable.¹⁰⁸ This appears to be a better alternative because the provision protects a dissatisfied beneficiary’s interests under a trust and his or her right to bring an action, while requiring that the beneficiary prove that such an action is warranted under the circumstances. This allows a beneficiary who has a valid claim to initiate a proceeding without fear of penalty.

C. *Excluded Fiduciary*

The 2013 Amendments added the term “excluded fiduciary” to the TUTC, providing that an excluded fiduciary can be designated by an agreement among the qualified beneficiaries, pursuant to the trust

¹⁰⁴ ARK. CODE ANN. § 28-73-604 (West 2005).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ TENN. CODE ANN. § 35-15-1014 (West 2013).

¹⁰⁸ S.C. CODE ANN. § 62-7-605 (2014).

provisions, or by court order.¹⁰⁹ An excluded fiduciary can be any party that is a trust advisor, trust protector, or trustee and is an individual that is relieved of a specific duty or is prevented from exercising power when such a power is bestowed upon another person.¹¹⁰

The Tennessee legislature's reasoning in providing the TUTC's excluded fiduciary role is to limit liability to individuals that serve to administer a trust in a limited manner.¹¹¹ Under the TUTC, an excluded fiduciary is not liable for any of the following actions: (1) any action taken in compliance with a request by a trust advisor, trust protector, or trustee; (2) any loss resulting from an action of the foregoing parties; or (3) failure of a party to act in accordance to the excluded trustee's direction.¹¹²

The added designation of an excluded fiduciary to the TUTC may encourage parties that would otherwise be reluctant to aid in the administration of a trust to serve in a fiduciary capacity. Other jurisdictions have also adopted an excluded fiduciary designation, and it is likely that the 2013 TUTC amendment providing for the same is to ensure that Tennessee is able to compete with other jurisdictions in providing an attractive place for trust business.¹¹³

D. Trustee's Duty to Inform and Report

The 2013 amendment to the TUTC governing a trustee's duty to inform and report expands the existing duty beyond the beneficiaries of a trust to those individuals holding a power of appointment.¹¹⁴ The statute provides that in addition to current, mandatory and permissible distributees and beneficiaries of a trust, the trustee is obliged to keep any

¹⁰⁹ TENN. CODE ANN. § 35-15-1013 (West 2007).

¹¹⁰ TENN. CODE ANN. § 35-15-103 (West 2015).

¹¹¹ TENN. CODE ANN. § 35-15-1205 (West 2015).

¹¹² *Id.*

¹¹³ *See, e.g.*, MINN. STAT. ANN. § 501C.0808 (West 2016); WYO. STAT. ANN. § 4-10-717 (West 2005).

¹¹⁴ TENN. CODE ANN. § 35-15-813 (West 2013).

parties with a power of appointment informed during the trust's administration.¹¹⁵

The duty to inform and report under the TUTC is similar to other jurisdictions in regard to the requirements to keep beneficiaries informed, but not in the duty owed to parties holding a power of appointment. The Florida Trust Code mandates that a trustee is to keep qualified beneficiaries informed of a trust and matters pertaining to trust administration.¹¹⁶ The Florida Uniform Trust Code provides a non-exhaustive list including actions required of trustees in fulfilling the duty to report to beneficiaries.¹¹⁷ Some of the provisions include the duty for a trustee to comply with a beneficiary's reasonable request regarding trust assets and liabilities, as well as details regarding trust administration.¹¹⁸ The duty of trustees under the South Carolina Uniform Trust Code vary slightly in that while a trust is revocable, the trustee owes a duty only to the settlor, unless the terms of a trust state otherwise.¹¹⁹ The South Carolina trust code calls for the same duty to keep beneficiaries reasonably informed, but qualifies the duty stating that the foregoing is required unless there is a violation of the attorney-client privilege involving the trustee and the trustee's attorney.¹²⁰ Under the Virginia Uniform Trust Code, the failure of a trustee to keep a beneficiary reasonably informed during the course of trust administration, when failing to do so would be unreasonable in the given situation, may subject the trustee to sanctions or removal by the court.¹²¹

The TUTC amendment not only expands on the trustee's duty to inform and report to the beneficiaries, but also allows holders of powers of appointment to help improve the administration of a trust.

¹¹⁵ *Id.*

¹¹⁶ FLA. STAT. ANN. § 736.0813 (West 2013). *See also* ARK. CODE ANN. § 28-73-813 (West 2005); KY. REV. STAT. ANN. § 386B.8-130 (West 2014); ME. REV. STAT. ANN. tit. 18-B, § 813 (2011).

¹¹⁷ FLA. STAT. ANN. § 736.0813 (West 2013).

¹¹⁸ *Id.*

¹¹⁹ S.C. CODE ANN. § 62-7-813 (2014).

¹²⁰ *Id.*

¹²¹ VA. CODE ANN. § 64.2-775 (West 2012).

Beneficiaries would be informed of trust matters that affect their interests, and holders of powers of appointment would be informed so that they may administer a trust more effectively. Keeping all involved parties informed and updated will likely aid to a more cost- and time-effective trust administration.

E. Clarification of Liability for Trustee Exercise of Discretion

The TUTC's 2013 amendments clarify liability assumed by a trustee when exercising discretion in distributing trust assets. A trustee has an "improper motive" under the TUTC when he or she is motivated by his or her own self-interest in a trust instrument and he or she stands to benefit under the trust terms.¹²² A trustee is precluded from making an excessive distribution to himself, and limiting distributions to others when the trustee possesses a beneficial interest in the assets of the trust.¹²³ The TUTC also clarifies that any discretionary interest is not an enforceable right, nor a property interest, but rather a simple expectancy.¹²⁴ A court is permitted to review a trustee's discretionary distribution in limited circumstances, such as when a trustee is motivated improperly, acts in a dishonest manner, or fails to act in accordance with a duty.¹²⁵ In absence of the foregoing, a court is precluded from mandating a distribution and lacks jurisdiction to examine a trustee's discretion.¹²⁶ The 2013 amendments also clarify that support and mandatory distributions under a trust give the beneficiary an enforceable right and entitle the party to review by a court.¹²⁷ In regard to a support or mandatory distribution, a court may review a trustee's distribution for "improper motivation," "dishonesty," or "unreasonableness."¹²⁸

The TUTC amendment clarifying trustee liability for exercise and discretion mandates when a court is permitted, required, and precluded

¹²² TENN. CODE ANN. § 35-15-814(a)(1)(A) (West 2015).

¹²³ TENN. CODE ANN. § 35-15-814(a)(1)(B) (West 2015).

¹²⁴ TENN. CODE ANN. § 35-15-814(b)(1) (West 2015).

¹²⁵ TENN. CODE ANN. § 35-15-814(b)(2) (West 2015).

¹²⁶ TENN. CODE ANN. § 35-15-814(b)(4) (West 2015).

¹²⁷ TENN. CODE ANN. § 35-15-814(c)(1) (West 2015).

¹²⁸ TENN. CODE ANN. § 35-15-814(c)(2) (West 2015).

from reviewing a trustee's distribution. This section prohibits a court from reviewing a trustee's discretionary distribution unless a trustee has acted dishonestly or breached a duty, giving a trustee broad discretion over discretionary distributions. In conjunction with other provisions that limit a beneficiary's ability to bring an action against a trustee, this could be problematic and could leave a beneficiary without adequate recourse against a trustee.¹²⁹ In contrast, mandatory and support distributions provide a beneficiary without an enforceable right to have a court review a trustee's distribution.

F. Reduction of Trust Liability Exposure & Tax Benefit Safe Haven

The 2013 amendments to the TUTC reduce liability exposure and provide trustees with a safe haven to prevent the loss of desirable tax benefits. If an original trust contribution qualifies for a charitable or a marital deduction under the Internal Revenue Code, qualifies for generation-skipping treatment, or any other tax benefit and would be precluded from such benefits because of a trustee's authority for gift, income, generation-skipping or estate tax purposes, then the trustee shall not have the power to distribute that which would prevent the contribution from qualifying for tax benefits or would reduce the such benefit.¹³⁰ In addition, when a trust contains stock in an S corporation under the Internal Revenue Code, a trustee shall not exert a power to distribute stock to a shareholder that is not permitted to such a distribution under the Internal Revenue Code.¹³¹

The TUTC amendment protects tax benefits available to a trust, and therefore the trustee is prohibited from taking action that would disqualify the trust from receiving favorable tax treatment. The amendment will likely be attractive to settlors creating trusts and who wish to take advantage of desirable tax benefits. Such an attribute may encourage trust business in Tennessee in accordance with the intent of the legislature.

G. Creditor of Beneficiary Obstacles

¹²⁹ TENN. CODE ANN. § 35-15-1014 (West 2013).

¹³⁰ TENN. CODE ANN. § 35-15-816(b)(27)(G) (West 2015).

¹³¹ TENN. CODE ANN. § 35-15-816(b)(27)(H) (West 2015).

The 2013 amendments brought about changes that provided more substantial obstacles to creditors seeking to reach the interests of a beneficiary under a trust. Under the TUTC, when a trust contains a spendthrift provision or words that are similar in nature, both voluntary and involuntary transfers of a beneficiary's interest are restrained.¹³² A creditor is precluded from reaching a beneficiary's present or future interest or prospective distribution under a trust.¹³³

Under the Florida Uniform Trust Code, without a spendthrift provision a court can permit a creditor to collect against a beneficiary's future or present interests in a trust by attachment.¹³⁴ The court may exercise discretion in determining the appropriate award that the court deems reasonable.¹³⁵ Maine has a similar provision that mirrors that of Florida. The Official Comment under the Maine Uniform Trust Code states that the allowance of a creditor to attach against a beneficiary's assets does not entitle the creditor to the entire amount of distributions to the beneficiary, and other State law can restrict what a creditor is able to collect.¹³⁶ The Alabama Uniform Trust Code is similar to that of Florida and Maine and a comment regarding creditor collections states that the section only applies when a trust instrument does not include a spendthrift provision or in the event that a beneficiary's interest is not subject to the given spendthrift provision.¹³⁷ A settlor may indicate that a spendthrift provision applies to particular beneficiaries, but excludes others.¹³⁸ A settlor is also permitted to limit spendthrift provisions to certain portions of a trust.¹³⁹ Under the Alabama Uniform Trust Code, a creditor of a beneficiary cannot force a trustee to distribute when such

¹³² TENN. CODE ANN. § 35-15-502(b) (West 2013).

¹³³ TENN. CODE ANN. § 35-15-502(d) (West 2013).

¹³⁴ FLA. STAT. ANN. § 736.0501 (West 2007).

¹³⁵ *Id.*; see KY. REV. STAT. ANN. § 386B.5-010 (West 2014); ME. REV. STAT. ANN. tit. 18-B, § 501 (2005). Under the South Carolina Uniform Trust Code, a court may consider the financial needs of a beneficiary and their family in determining how to limit relief. See S.C. CODE ANN. § 62-7-501 (2014).

¹³⁶ ME. REV. STAT. ANN. tit. 18-B, § 501 (2005) (referencing the official comments).

¹³⁷ ALA. CODE §19-3B-501 (2006).

¹³⁸ *Id.*

¹³⁹ *Id.*

distributions are at the trustee's discretion.¹⁴⁰ The foregoing is true regardless of if a trust contains a spendthrift provision, or if the trustee has abused his or her discretion.¹⁴¹

The 2013 TUTC amendments containing restrictions on creditors' rights will likely be considered a positive attribute by both settlors and beneficiaries. Settlor's can rest assured that trust assets will in fact be distributed in the manner in which they intend, and beneficiaries may confidently await such distributions made to their benefit. The TUTC largely protects a beneficiary's future interest in trust assets from creditors and precludes a creditor from reaching those assets given the exceptions in the TUTC. Combined with the shortened limitations period for claims and the higher burdens of proof required of creditors, the 2013 amendments added attractive provisions to the TUTC that may draw significant trust business to Tennessee.

IV. CONCLUSION

The 2013 amendments to the TUTC span vastly across many facets of Tennessee trust law affecting beneficiaries, trustees, and creditors alike. The intent behind the amendments was to establish Tennessee as a competitive legal market for trust and trust-related amenities. In enacting the modifications, the legislature also sought to attract out-of-state businesses and to brand Tennessee as an attractive environment for trust business.

While it is still uncertain exactly how the amendments will affect both residents of Tennessee and those that engage in trust business in the state, it seems that certain amendments may advance the intent of the legislature, while others may cause potential litigation. Significant restrictions placed on creditors will likely attract trust business to Tennessee. The amendments' significant obstacles facing creditors will serve as a selling point to settlors who wish to keep trust assets out of the hands of creditors. The amendment limiting the liability of excluded fiduciaries will likely encourage parties to aid in trust administration by serving in a fiduciary capacity. A trustee's duty to report extending to

¹⁴⁰ ALA. CODE §19-3B-504 (2006).

¹⁴¹ *Id.*

those holding a power of appointment will also aid in the administration of a trust by keeping involved parties informed and as a result increasing the efficiency of the trust administration.

In contrast, several other 2013 amendments may prove to be problematic. The removal of the requirement that a trust and its terms comport with public policy will likely spur litigation in the future, as well as the amendment that allows any trust purpose of a settlor to be considered a material purpose. The no-contest amendment will likely also cause conflict when beneficiaries dissatisfied with a trust or a trustee's performance are left without an adequate remedy.

Given the relatively recent enactment of the amendments, it is still uncertain how the TUTC will shape trust litigation in the state of Tennessee. While the legislature has made key improvements to the TUTC, other modifications seem likely to cause issues to Tennessee trust law.