



WEALTH MANAGEMENT

Estate Planning Council of Broward County
Fort Lauderdale, Florida

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**JUST BECAUSE YOU CAN,
DOESN'T ALWAYS MEAN YOU SHOULD**

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ATTRIBUTES OF MODERN TRUST LAW

It is the combination of the following items that is often discussed

Favorable
tax treatment

The ability to
have long-
term or
“Dynasty”
trusts

Trust
instrument
flexibility

A developed
body of law
regarding
flexible trust
provisions

Directed
Trusts

Confidential
trusts

The ability to
modify an
otherwise
irrevocable
trust

WHAT WE'LL COVER TODAY



Confidential
Trusts

Trust
Modifications

Directed
Trusts

Confidential Trusts

“I know that I am intelligent,
because I know that I know nothing.”
- Socrates

CONFIDENTIAL TRUSTS – DESCRIPTION AND USES

Most states impose some type of requirement to keep beneficiaries of a trust reasonably informed of their beneficial interest in the trust.

However, the creator of the trust might not be comfortable with their children (or other beneficiaries) knowing they are beneficiaries of a trust for various reasons including the following:

- Concern that the child will become less motivated, less productive in life
- Concern that the child has creditors
- Perhaps a family business, or similar entity, is owned by the trust



DISCLOSURE REQUIREMENTS – THE UNIFORM TRUST CODE

Uniform Trust Code (“UTC §813 ”) has been adopted in 36 states.

- Trustee’s duty to keep beneficiaries informed runs to all beneficiaries whether present or future, vested or contingent; however, the duty differs among the type of beneficiary. The UTC has **default requirements** and **mandatory requirements**.
- **Default requirements:**
 - To keep **qualified beneficiaries** reasonably informed about the trust’s administration and of material facts necessary to allow them to protect their interests, UTC §813(a).
 - To promptly respond to a **beneficiary’s** request regarding information related to the trust’s administration, unless unreasonable under the circumstances, UTC §813(a). Note that “beneficiary” is not limited to the narrower definition of qualified beneficiary.

DISCLOSURE REQUIREMENTS – THE UNIFORM TRUST CODE,

- Default requirements, continued
 - To promptly furnish a copy of the trust instrument to a beneficiary upon request, UTC §813(b)(1).
 - Within 60 days of acceptance, to notify qualified beneficiaries of acceptance of trusteeship.
 - Within 60 days after acquiring knowledge of an irrevocable trust's creation or that a revocable trust has become irrevocable, to notify qualified beneficiaries of the existence of the trust, the identity of the settlor, the right to request a copy of the trust instrument, and the right to a trustee's report, UTC §813(b)(3).
 - To provide advance notice to qualified beneficiaries of a change in the rate of compensation, UTC §813(b)(4).
 - At least annually and at the termination of the trust, to send to distributees or permissible distributees of trust income or principal, as well as qualified or nonqualified beneficiaries who request it, a report of the trust property, UTC §813(c).

DISCLOSURE REQUIREMENTS – THE UNIFORM TRUST CODE,

- **Mandatory requirements.** UTC §105(b) states that the terms of a trust instrument will prevail over the provisions of the UTC except for the following:
 - A trustee's duty under §813(a) to respond to a request by a qualified beneficiary for reports and information reasonably related to the trust's administration, UTC §105(b)(9).
 - A trustee's duty under §§813(b)(2) and 813(b)(3) to notify qualified beneficiaries age 25 or older of the existence of the trust, the identity of the trustee, and the right to request a trustee's report, UTC §105(b)(9).

DUTY TO DISCLOSE – PUTTING IT ALL TOGETHER

- Depending on the law of a given state, generally the trustee will have the duty to disclose information about a trust to the beneficiaries.

- Unless the trust instrument creates a confidential trust under a statute similar to the Delaware statute, discussed ahead, a fiduciary generally has a duty to inform a beneficiary of their interest in a trust once the beneficiary reaches the age of majority, or other age specified by the statute.

- States that follow the UTC have enacted various versions, but generally there is, at a minimum, a duty to disclose to current beneficiaries upon their reaching the age of 25.

- The information that is generally required to be provided includes the following.
 - The settlor of the trust.
 - A copy of the trust instrument.
 - Trust statements showing assets, liabilities, receipts and disbursements.

DUTY TO DISCLOSE – CHANGES IN RECENT LAW

The following are some states that have enacted statutes that allow the trustee to delay providing information about a trust to beneficiaries.

- Alaska - AS 13.36.080(b)
- Delaware - 12 *Del. C.* § 3303(a)(1)
- Nevada - NRS 163.004
- South Dakota - SDCL §§ 55-2-13 and 55-2-14
- Tennessee - T.C.A. § 35-15-105
- Wyoming - W.S.1977 § 4-10-105

THE FLORIDA STATUTE – REQUIREMENT TO PROVIDE INFORMATION

- Trustee must notify qualified beneficiaries of an irrevocable trust of the existence of the trust, the identity of the trustee, and of their rights to trust accountings, Fla. Stat. §§736.0813(1)(a) and (b).
- Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument, Fla. Stat. §736.0813(1)(c).
- Trustee of an irrevocable trust must provide an accounting to qualified beneficiaries at least annually (with exceptions for family trust companies) and on termination of the trust or on change of the trustee, Fla. Stat. §736.0813(1)(d).
- Trustee must respond to the request of a qualified beneficiary of an irrevocable trust for relevant information about the assets and liabilities of the trust and the particulars relating to trust administration, Fla. Stat. §736.0813(1)(e).
- These are mandatory rules under Fla. Stat. §§ 736.0105(r), (s), and (t).

THE FLORIDA STATUTE – DESIGNATED REPRESENTATIVE

Fla. Stat. § 736.0306

- If specifically named in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report.
- The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.
- The designated representative is subject to a good faith standard.

THE DELAWARE STATUTE – ENABLING A “CONFIDENTIAL TRUST”

Section 3303(a) permits a trust instrument to eliminate or restrict a beneficiary’s right to be informed of the beneficiary’s interest in the trust “for a period of time”.

Although “a period of time” is not specifically defined in the statute, in 2015 the statute was amended to provide safe harbors for “a period of time” in which a trust can be a confidential trust. This list is nonexclusive and includes the following, §3303(c):

- A period of time related to the age of a beneficiary;
- A period of time related to the lifetime of each settlor and/or spouse of the settlor;
- A period of time related to a term of years or specific date; and/or
- A period of time related to a specific event that is certain to occur.

THE DELAWARE STATUTE – THE DESIGNATED REPRESENTATIVE

Section 3303(d) provides that unless the governing instrument provides otherwise, during the time that a beneficiary's right to be informed is restricted or eliminated, the beneficiary may be represented and bound by a "designated representative" for both judicial and non-judicial proceedings.

Methods for appointing a designated representative are found in §3339, and include the following:

- Appointment in the trust instrument;
- Authorization or direction in the trust instrument to represent or bind beneficiaries for judicial or non-judicial matters;
- Appointment by a person authorized in the trust instrument;
- Appointment by a beneficiary to act as their designated representative; and/or
- Appointment by the settlor.

CONFIDENTIAL TRUSTS – THE CURRENT STATUS

- Today over 30 states have modified the requirement to disclose information to beneficiaries, in various forms.
- Some statutes are similar to the Delaware statute, while others modify the requirement age for disclosure, and others have various other modifications.
- Many states that have confidential trust statutes, also have the role of a surrogate, such as Designated Representative under Delaware law, to receive the trust information and represent and bind the beneficiary who does not receive information, in judicial and non-judicial matters.

ISSUES THAT CAN ARISE WITH CONFIDENTIAL TRUSTS

- Plan ahead with the client. Do they assume the trust they are creating will be a confidential trust merely because it is created in a state with flexible trust laws? Generally, to have a confidential trust, the trust instrument must specifically provide that it is a confidential trust.
- Does the trust have both Crummey Powers and confidential trust provisions?
- If distributions are made *on behalf* of a beneficiary, perhaps directly to a school to pay tuition on behalf of the beneficiary, and the trust is a confidential trust, what happens if that distribution carries out distributable net income (DNI) and the beneficiary has received no other income and is not otherwise filing an income tax return?

ISSUES THAT CAN ARISE WITH CONFIDENTIAL TRUSTS, CONTINUED

- When disclosure is triggered by an age attainment, and there are multiple beneficiaries, what happens if the older beneficiary tells the younger siblings about the trust?
- Is the confidential trust mandatory (the trustee must not provide disclosure) or permissive (the trustee is not required to provide disclosure)? Permissive language can be problematic because the trustee might still provide notice, which likely is not the expectation of the settlor.
- What happens if a distribution is made to a beneficiary, and the beneficiary then realizes there is a trust? Will they be upset that they did not know about the trust before? This may turn in part on how long the trust is a confidential trust.

HOW LONG IS THE “CONFIDENTIAL” PERIOD?



- Until the beneficiary graduates from college?
- Until the beneficiary reaches a certain age?
- For the life of the settlor?
- The longer the confidential period, the more possibility for the beneficiary to be upset upon learning about the trust.

IDEAS TO CONSIDER INSTEAD OF, OR WITH, A CONFIDENTIAL TRUST

First, if your client wants a confidential trust, ask the client to consider why, and to think about complications that can arise.

If the client wants the trust to be a confidential trust as a “will substitute” and therefore provide no disclosure to the beneficiaries until after the client’s death, consider the ideas presented in the next slide, *Secrets of Enterprising Families*, which includes the following concepts:

- Modeling financial behavior and leveraging teachable moments to keep children informed
- Articulating the purpose behind the estate plan for the beneficiaries and trustees
- Separating financial literacy from financial disclosure
- Creating a Cornerstone Statement
- Sharing the estate plan with the beneficiaries
- Engaging the whole family in discussions about succession planning
- Promoting transparency, rather than complete secrecy

Ultimately it is the client’s decision whether and how to utilize confidential trusts. But as advisors, we should discuss the implications and alternatives.

Confidential trusts can be a part of Modern Planning. They are not mutually exclusive.

SECRETS OF ENTERPRISING FAMILIES

TRADITIONAL PLANNING

Draft Will and Revocable Trust

New parents draft basic documents and name guardians for their young children.

Draft Irrevocable Trusts

Parents work with their attorney to draft technical estate planning documents.

Financial Disclosure

Financial education is typically linked to disclosure of financial assets and delayed until children are "ready" or "need to know". Financial literacy is left to chance.

Limited Family Engagement

Business minded family members are tapped to run the family business or manage joint assets. This is an all-consuming endeavor for some family members, while leaving others unengaged.

Reading of the Will

Estate plans were historically divulged after the grantor passed at a time when grief was driving tensions. Family members were left guessing as to goal of the plan and their own financial future.

Succession Planning

Just in time succession planning takes place when a succession is imminent, or perhaps, after an unexpected succession. Tensions are high and disruption is likely.

Silent Trust

Using available statutes to prevent beneficiaries from knowing about trusts.

MODERN PLANNING

Purposeful Parenting

Intentionally modeling financial behavior and leveraging teachable moments to teach children about financial decision making.

Statement of Grantor Intent

Create a plain language statement articulating the purpose behind your estate plan as guidance for beneficiaries and trustees.

Financial Literacy

Separate financial literacy from financial disclosure so we can empower young learners with the basics of personal finance, investments and wealth transfer to get them started on the right foot.

Cornerstone Statement

Broaden the path to engagement by inviting all adult family members to co-create of long-term vision of success. Based in shared values, family members find a common purpose for today.

Share your Estate Plan

Share the details of your estate plan with your beneficiaries so they can understand your objectives and priorities. Give adult family members the information they need to do their own planning.

Succession Planning

Engage the whole family and key advisors to objectively identify roles and responsibilities prior to succession events. Put a plan in place to prepare successors for their future roles.

Transparency

Transparent estate planning allowing opportunities to prepare inheritors for their roles and responsibilities.

Modifications

“Change is such hard work”
- Billy Crystal

MODIFICATION TECHNIQUES

➤ Under the terms of the trust agreement

➤ Judicial Proceeding

➤ Decanting

- Based on the ability to distribute trust assets outright, appointing the assets from the current trust (“the first trust”) to a different trust (“the second trust”) for the same (or some of the same) beneficiaries, which has different provisions.
- With most decanting statutes the second trust can be created as part of the decanting process, it does not have to already be in existence.
- The ability to decant might be limited by the distribution standards of the first trust.
- Statute might permit granting a power of appointment to beneficiaries of second trust.
- Notice to beneficiaries may be required, but not under all decanting statutes.
- The Uniform Trust Decanting Act has been enacted in 15 states and introduced into 3 other state and the District of Columbia, <https://www.uniformlaws.org/>

➤ Merger

- Merging the assets from the current trust (“the first trust”) with the assets of another trust with similar dispositive provisions (“the second trust”).
- With many merger statutes the second trust can be created as part of the merger process, it does not have to already be in existence.
- Generally, the merger cannot result in a material change in the beneficial interests of the trust beneficiaries.
- Notice to beneficiaries may be required, but not under all merger statutes.

➤ Non-Judicial Settlement Agreement or Non-Judicial Modification Agreement

- A non-judicial process for parties to enter into an agreement to clarify or modify provisions of the trust.
- Generally, requires the same “necessary parties” that would be part of a judicial proceeding.
- Generally, there are limitations against violating a material purpose of the trust.
- Notice does go to all adult beneficiaries and other necessary parties as part of the process.

NONJUDICIAL MODIFICATION METHODS IN VARIOUS STATES

Florida

- Decanting, Fla. Stat. §736.04117.
- Merger, Fla. Stat. §736.0417.
- Modification by Consent of Parties, Fla. Stat. §736.0412.
- NJSA, Fla. Stat. §736.0111.

Delaware

- Decanting, 12 *Del. C.* §3528 *et seq.*
- Merger, 12 *Del. C.* §3325 (29).
- Modification During Life of Trustor, 12 *Del. C.* §3342.
- NJSA, 12 *Del. C.* §3338.

Nevada, NRS 163.553.

- Decanting, NRS 163.556 *et seq.*
- NJSA, NRS 164.940, 164.942.

Uniform Trust Decanting Act, <https://www.uniformlaws.org/>

- Enacted in 18 states and the District of Columbia.
- Legislation introduced in 1 state.

MODIFICATION EXAMPLES

- Migrate situs or governing law of a trust.
- Convert to a “directed trust”.
- Alter administrative provisions.

- Divide a pot trust.

- Eliminate a trustee’s duty to notify or report to beneficiaries (create a confidential trust).
- Grant a beneficiary a power of appointment.
- Postpone a withdrawal or distribution right.
- Eliminate an income interest.
- Eliminate a beneficiary from a class of discretionary beneficiaries.

ISSUES THAT CAN ARISE WITH MODIFICATIONS

- Changing beneficial interests.
- Converting a trust to a confidential trust.
- Potential tax issues – including CCA 202352018.
- Notice to, or release from, beneficiaries is with a designated representative, rather directly with the beneficiary.

MODIFICATIONS - LET'S CONSIDER SOME ACTUAL EXAMPLES

Matters that I have encountered.

- Settlor created a trust at yearend 2012 for her children. Six years later settlor asked the trustee to decant the trust into a second trust which will have an inter-vivos power of appointment so a beneficiary of the second trust can exercise that power of appointment to create a third trust which will include the settlor's stepchildren as beneficiaries.
- Settlor (G1) created a trust in 1997 for his descendants. Settlor died several years ago. Current beneficiaries are settlor's son (G2), and grandson (G3). Grandson does not have any children. Under the terms of the trust, the assets are distributed outright to the grandson (G3) upon the son's (G2) death. **The son has asked the trustee to modify the trust so that the grandson's interest continues in trust, and to create a \$5 million trust for the son's (G2's) wife (grandson's mother).** The trust instrument provides for a \$5 million trust for son's spouse if son is not survived by descendants. Son does not want to involve the grandson (his son) in the proceedings.

MODIFICATIONS - LET'S CONSIDER SOME ACTUAL EXAMPLES

Recent cases.

- *Overdeck* case, 2023 – New Jersey case, Wyoming trust. Forbes article, *Hedge Fund Billionaire's Estranged Wife Sues Over Movement of Trust Assets to Wyoming Before her Divorce Filing*, November 1, 2023. Case filed in New Jersey Superior Court. Complaint alleges an improper decanting.
 - Husband and wife divorcing. Husband is a well-known hedge fund manager.
 - In 2023 wife brought action against the law firm and one of its partners (co-head of its Private Clients/Trust and Estates Group).
 - CLAIM: The law firm committed malpractice and fraud by not informing her that documents which moved marital assets to Wyoming trusts also ended her claim on those assets if either filed for divorce.
 - The complaint filed in New Jersey Superior Court claims that the attorneys included provisions in the Wyoming trusts, without informing her, that would remove her as a beneficiary “upon either spouse commencing a legal proceeding seeking a divorce.”
 - Instead, she claims all she was told was that “the trusts were being moved to Wyoming to shield them from certain taxes.”
 - Wife believed she was represented by the law firm.
- *Tesak* case, 2024 – Delaware. Improper decanting, trust did not have provisions for distributions from principal.
- *Murdoch* case, 2024 – Nevada.

Directed trusts

“An extraordinary affair. I gave them their orders and they wanted to stay and discuss them.”

- Duke of Wellington

DIRECTED TRUSTS - BACKGROUND

- Delaware has had directed trusts at common law since early 1900's. Delaware enacted a directed trust statute, 12 *Del. C.* §3313, in 1986.
- Several states have enacted directed trust statutes in various forms. At the current time at least 46 states have statutes that permit some form of directed trusts.
- Florida has enacted the Florida Uniform Directed Trust Act, Fla. Stat. §§736.1401 to 1416.
- The Uniform Law Commission promulgated the Uniform Directed Trust Act in 2017. Currently it has been enacted in 21 states, <https://www.uniformlaws.org/>.
- A very common use for directed trusts is to allow a structure where the trustee is directed on some or all investments.
- However, depending on the state statute a trustee can also be directed on distributions, administration, tax compliance, and other matters.

ISSUES THAT CAN ARISE WITH DIRECTED TRUSTS

- Trustee being directed to modify a trust in a manner the trustee is not comfortable with, whether this involves investments, distributions, tax compliance, or otherwise. The trustee's role is to follow the direction.

- Trustee becomes uncomfortable with direction(s) it receives. Is there a point where the trustee should seek instruction from the court?
 - See the *Mennen* case, C.A. No. 8432, Delaware Supreme Court, October 11, 2016.

- Trustee is being directed to modify beneficial interests of a trust.

- Trustee is being directed to decant (or otherwise modify) a trust to create a confidential trust.
 - Trustee received a letter of direction from the trust's distribution direction advisor directing the trustee to decant the trust into a new trust. The only difference between the first and second trust is that the second trust will be a confidential trust. The beneficiary of the first trust was turning 25 within two months and would be entitled to notice of the trust and statements upon reaching 25.

- Can the trustee seek a release if it is directed? If it does obtain a release, is it from the designated representative, or directly from the beneficiary?

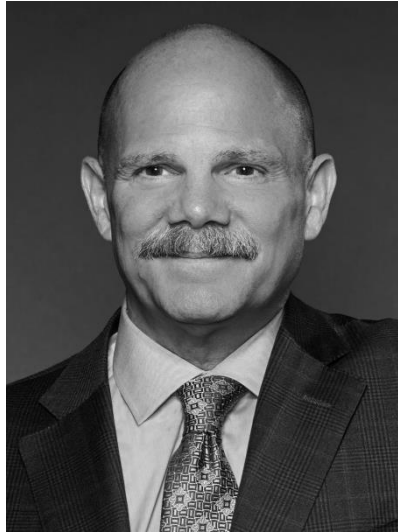
Closing, and quote from November 2023 Forbes article

PUTTING IT ALL TOGETHER

- The modernization of trust laws across the country has led to many useful capabilities that are helpful to trustors and to beneficiaries.
- However, sometimes these laws might be used in ways that may have gone beyond the original intention of the laws.
- Just because you can . . . doesn't always mean you should.

Thank You

BIOGRAPHY



David A. Diamond
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“Trust laws are always evolving, and I help clients and their advisors use these flexible laws in trust and estate planning.”

EXPERIENCE

Dave is the President of The Northern Trust Company of Delaware, a Delaware limited purpose trust company in Wilmington, Delaware. Prior to managing Northern’s Delaware office, he served as the National Trust Specialist for Northern, developing client solutions involving Northern’s Nevada and Delaware trust capabilities. He is Chair of the Board of Directors for The Northern Trust Company of Delaware and on the Board of Directors for Northern Trust Cayman International and The Northern Trust Company of Nevada.

Prior to joining Northern, Dave was an attorney with Gordon, Fournaris & Mammarella (GF&M), where he focused on the unique aspects of Delaware trust law. Prior to practicing law with GF&M, Dave was with J.P. Morgan for 25 years. There he began his career as a trust officer and ultimately served as Managing Director & President of J.P. Morgan Trust Company of Delaware.

EDUCATION

Dave holds a Juris Doctor degree from The University of North Carolina School of Law and an M.B.A. and B.A. from The University of Miami.

CREDENTIALS

Dave is a Fellow of the American College of Trust and Estate Counsel (ACTEC).

He is a member of the Society of Trusts and Estates Practitioners (STEP), and the Estate Planning Council of Delaware. He has earned a Certified Financial Planning® designation.

He is a member of the New York and Pennsylvania bars, and Associate Member of the Delaware Bar.

EXPERTISE

With over 30 years of experience in the trust, wealth, and estate management industries, Dave works with domestic and international clients who are seeking guidance on ways to leverage various jurisdictions in the United States. He publishes articles and speaks to audiences regularly on these topics. Dave was an adjunct professor of estate planning at The University of Delaware.

INTERESTS

He is married to a veterinarian, and he and his wife have many animals including horses and German Shepherds. He enjoys listening to all types of music, whether recorded or at live events.

COMMUNITY INVOLVEMENT

Dave is a past President of the Palm Beach Easter Seals Society, and past member of the Florida Easter Seals Society. He participated in Leadership Delaware, a program administered by the Delaware Community Foundation to connect business leaders with charitable organizations.

3 THINGS PEOPLE ASK ME

- **Why are states like Delaware and Nevada so popular for creating trusts?**
- **Should I include trusts in my overall planning?**
- **How do I provide for my children and grandchildren without spoiling them?**



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