

BETTR Section committee to recommend modified version of Uniform Trust Code

By E. Edwin Eck

A committee of the Business, Estates, Trust, Tax and Real Property (BETTR) Section of the State Bar will recommend that the Montana Legislature adopt a modified version of the Uniform Trust Code, which the committee calls "the Montana Uniform Trust Code" (Montana UTC). The Montana UTC clarifies a number of aspects of current law and will provide Montana settlors, trust beneficiaries, trustees, and their advisors with the benefits of a uniform act.

Many states have enacted the UTC. Since the UTC was promulgated by the Uniform Law Commission in 2000, 23 states and the District of Columbia have enacted it. The UTC is more popular than the Uniform Probate Code, which has been adopted by 17 states and the Virgin Islands since it was first proposed in 1969. Unlike the Uniform Commercial Code, the UTC contemplates variations among the states, and the committee adopted many of them. The UTC has been endorsed by the American Bar Association, the ABA Real Property, Probate and Trust Law Section, and the AARP.

Many of Montana's neighboring states and states where retired Montanans spend their winters have adopted the UTC, including Wyoming, North Dakota, Utah, Oregon, Arizona, New Mexico and Florida. Because Montanans are mobile and because some Montanans are settlors of trusts holding real property in UTC states, these Montanans will benefit from the same basic trust code. Adopting the UTC will also reduce some of the costs incurred researching trust law issues.

Advantages of a Uniform Act

Montana's courts can take advantage of case law from the 24 jurisdictions that have adopted the UTC. Montana's current trust code, on the other hand, is based upon a 1987 version of the California Trust Code, which has not been adopted by any other state. Since Montana adopted its act, California has made significant changes to its trust code. As a result, our courts can look only to California courts for another state's statutory interpretations, and given California's statutory changes, even that is problematic.

Further, Montana will benefit from having an act that is a product of the Uniform Law Conference, which from time to time proposes code revisions in response to new cases and other developments. For example, in 2006 the Fourth Circuit Court of Appeals ruled that a trust did not have an insurable interest in the life of an insured who was the settlor of the trust. The decision had a substantial adverse impact on irrevocable life insurance trusts.

In response, the Uniform Law Commission proposed a new

section be added to the UTC that resolved the issue.

Finally, like other Uniform acts, the UTC includes substantial section-by-section comments, which help explain the law. Additional comments are being drafted for those Montana UTC sections that differ from the corresponding sections of the national UTC.

Most of trust law is default law

Under the UTC, settlors and their advisers have great latitude to write provisions in trust instruments concerning the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary. Most of the UTC consists of default rules that apply only if the terms of the trust fail to address, or insufficiently cover, a particular issue. With 12 specific exceptions set forth in one section, the proposed Montana UTC provides that the terms of the trust instrument prevail over provisions of the Code. The exceptions include the requirements for creating a trust, the trustee's duty to act in good faith and in accordance with the terms and purposes of the trust, and courts' subject matter jurisdiction over trusts.

Advantages of the Montana Uniform Trust Code over existing law

1) One advantage of the UTC is its recognition that some trust beneficiaries hold more significant interests in a trust than other beneficiaries. For example, the current income beneficiary and the current remainderman have greater stakes in a trust than a remote, contingent remainderman. Reflecting these differences, the UTC introduces the concept of "qualified beneficiaries" who have greater rights than other beneficiaries. The following notices need only be given to qualified beneficiaries:

- notice of a trustee's resignation;
- notice of a trustee's intent to combine or divide a trust; and
- notice of the trustee's proposal to transfer a trust's principal place of administration to another jurisdiction.

2) Under the proposed Montana UTC, if there is a vacancy in the trusteeship and the trust instrument does not effectively designate a successor, the qualified beneficiaries may unanimously appoint a successor trustee. There is no need for a court order.

3) The Montana UTC also effectively eliminates the need for court action in other specified circumstances. For example, a trustee may transfer the principal place of administration of a trust without a court order so long as no qualified beneficiary objects. Existing Montana law requires a court order for all transfers of the principal place of trust administration.

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4) Another advantage is that the Montana UTC provides that a trust has an insurable interest if the insured is the settlor or another individual in whom the settlor has an insurable interest. There is no corresponding provision in existing Montana law.

5) Additionally, the Montana UTC permits the settlor of a charitable trust, a charitable organization expressly designated to receive trust distributions, and other specified individuals to initiate a proceeding to enforce the trust. Existing Montana law precludes the settlor from initiating such a proceeding.

6) Similarly, unlike current Montana law, the Montana UTC gives the settlor standing to petition the court to apply *cy pres* if the charitable trust's purpose has become unlawful, impracticable, impossible to achieve, or wasteful. Further, existing Montana law requires evidence of a general charitable intent prior to a court's application of the doctrine of *cy pres*. Because such evidence can be difficult to obtain, the Montana UTC presumes that the settlor of a charitable trust had the requisite general charitable intent.

7) Existing Montana law permits the trustee to terminate a trust if the trust contains less than \$20,000 of assets. The Montana UTC increases the threshold to \$100,000 of trust assets.

8) The Montana UTC permits a trustee to combine two or more trusts or to divide a trust into two or more separate trusts after notice to the qualified beneficiaries. If no objection is made, the trustee may undertake this action without a court order. Current Montana law requires a court action for such a reorganization of a trust, even if the reorganization is merely for administrative efficiency.

9) The Montana UTC provides that the required capacity to create, amend, or revoke a revocable trust is the same as that required for a will. Further, the Montana UTC applies the same rules for recovery of attorney fees incurred in defending a revocable trust that currently apply in defending a will. The Montana UTC has an express provision voiding a trust if its creation was induced by fraud, duress, or undue influence. There are no comparable, express provisions in existing Montana trust law.

10) The Montana UTC includes an express provision for nonjudicial settlement agreements. No such provision is part of existing Montana trust law. Further, the Montana UTC has a provision that permits a trustee to notify beneficiaries of a proposed action to ascertain in advance whether a beneficiary objects to the proposed action. Existing Montana law does not include these provisions.

11) The Montana UTC clarifies the trustee's obligation to provide notice to beneficiaries. The trustee is obliged to keep qualified beneficiaries reasonably informed about trust administration and the material facts necessary for those beneficiaries to protect their interests. However, the trustee has a lesser obligation to other beneficiaries whose interests are more remote. This will result in some cost savings and privacy protection.

12) Finally, the Montana UTC clarifies the roles of charities

Proposed UTC online

You may review the proposed Montana UTC online. Go to <http://www.baskettlawoffice.com/utc/>. Click on "UTC Committee as a Whole." Then click on "Current Revised Draft."

and expressly indicates that a charity may serve as trustee of a trust for the charity's benefit.

Many of the principles of Montana's existing law have been retained. Committee members critically reviewed the UTC and concluded that some provisions of existing trust law should be retained. Rather than include UTC exceptions to the effectiveness of spendthrift provisions, the Montana UTC retains the existing principles of Montana law. Further, the Montana UTC continues the same statute of frauds provisions of existing Montana trust law. The BETTR Section committee does not recommend UTC provisions that would permit the oral creation of trusts. Further, the Montana UTC continues existing Montana provisions concerning constructive and resulting trusts. Finally, the Montana UTC does not change Montana's abbreviated judicial procedure for trust proceedings.

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Members of the Montana Committee that drafted the Montana UTC. All members of the BETTR Section of the State Bar were invited to participate in a review of the UTC. Twenty-four attorneys from around Montana responded to the call. Attorney members of the committee include solo practitioners, members of large Montana firms, government attorneys, general practitioners, academics, litigators, officers of non-law businesses, and attorneys who practice exclusively in the trusts and estate field. In addition, seven trust officers had integral roles on the committee.

Over the course of six months, the committee conducted four day-long meetings. In between meetings, subcommittees met by phone and individual committee members researched and circulated dozens of drafts of possible revisions.

The attorney members of the committee include Kurt Alme (Billings), Eric Anderson (Billings), Valerie Balukas (Helena), Rick Baskett (Missoula), Iris Basta (Helena), Bruce Bekkedahl (Billings), Marc Buyske (Helena), Pat Dougherty (Missoula), Ed Eck (Missoula), Elaine Gagliardi (Missoula), Tim Geiszler (Missoula), Jeff Glovan (Helena), Doug Harris (Missoula), Larry Johnson (Hamilton), Cecil Jones (Dillon), Mike Lawlor (Helena), Stuart Lewin (Great Falls), Dan McLean (Helena), Judy Peasley (Seeley Lake), Julie Sirrs (Missoula), Jim Thompson (Billings), Dirk Williams (Missoula), and Tim Wylder (Great Falls).

The trust officer committee members include Penny Doak (Billings), Bruce Haswell (Helena), Martin Lewis (Helena), Kathleen Magone (Missoula), Sue O'Neil (Missoula), Steve Polhemus (Helena), and Art Sims (Great Falls).

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