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Longmeyer Exposes (or Creates) Uncertainty About the Duty to Inform Remainder Beneficiaries of a Revocable Trust

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Editor’s Synopsis: This article discusses the surprising Longmeyer decision, handed down by the Supreme Court of Kentucky earlier this year, in which a predecessor trustee was held to have a duty to give certain notifications to former remainder beneficiaries of a revocable trust. The authors then examine how Longmeyer might have been decided in other states and under other statutory schemes. The article concludes with observations concerning when certain notices to trust beneficiaries may be conducive to effective trust administration and suggestions to those who administer trusts on how best to comply with beneficiary notice requirements.

The Decision

In *J. P. Morgan Chase Bank, N.A. v. Longmeyer,* a trustee of a revoked trust, suspecting that a settlor may have been unduly influenced, informed certain charities that the settlor had revoked the trust under which they had been named as beneficiaries. The charities thereupon brought an action to invalidate the revocation and a new trust executed by the settlor on grounds of undue influence, which case was settled for a large cash payment. The trustee of the successor trust then sued the trustee of the predecessor trust, arguing that the predecessor trustee was personally liable for the settlement amount because the notification of the charitable beneficiaries was a breach of trust and that had the charitable beneficiaries not been notified, no settlement payment would have been necessary.

The Kentucky Supreme Court ruled in favor of the predecessor trustee. The court not only held that the predecessor was protected from liability for giving the notice, but more broadly ruled that the predecessor trustee had an affirmative duty to inform the remainder beneficiaries of their removal. Although the opinion does not define “living trust,” the case concerned and the court’s opinion focused on the use of a revocable trust used as a will substitute. The court’s rationale was simple and direct—the Kentucky statute requiring a trustee to “keep the beneficiaries of the trust reasonably informed of the trust and its administration” did not provide any limitations on that duty nor, contrary to the views of many if not the great majority of trust practitioners, any carve-out for revocable trusts.

In reaching its decision, the court recognized that its opinion was contrary to “modern trends” in the law, referring to various provisions of the Uniform Trust Code, which has not yet been enacted in Kentucky. The relevant Kentucky statute in this case had instead been selectively drawn from the much older trustee notice provision of the Uniform Probate Code. The Court was well-aware, although seemingly not at all concerned, that its ruling would come as a surprise to many and run contrary to the general understanding of trust law and revocable trusts:

In fact, many laypersons who create revocable living trusts as will substitutes might be shocked to learn that a trustee has a duty to inform contingent beneficiaries of their potential interests, given the understanding of many settlors that so long as they are living and competent the trust assets remain essentially under their control and that they may freely change their mind about beneficiaries’ interests. But if our trust statutes are out of touch with modern policy or with the expectations of today’s community, it is the legislature’s task to amend the statutes, not this Court’s role to re-write them.

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1 275 S.W.3d 697 (Ky. 2009).
3 275 S.W.3d at 701-02 & n. 9
4 275 S.W.3d at 701 n. 8 (discussing Unif. Prob. Code § 7-303).
5 275 S.W.3d at 702 (footnote omitted).
More on the Facts

Despite the sweeping statements of the court, it is possible that other courts will choose the undeniably sensible approach of limiting Longmeyer to its extraordinary facts. The majority opinion certainly contains sufficient standout facts to facilitate such a limitation. The settlor, Ollie Skonberg, was a long-time customer of Bank One (predecessor to JP Morgan Chase Bank) and Ms. Skonberg named Bank One as trustee of her revocable living trust. The trust, which was drafted by Ms. Skonberg’s attorney in 1984, provided for the income to be paid to Ms. Skonberg for her lifetime with the remainder to go to various beneficiaries at her death. Three years later, Ms. Skonberg amended her trust, retaining Bank One as her trustee, and adding certain charities as remainder beneficiaries following her death. The court notes in its opinion that Ms. Skonberg, a “wealthy widow known to be frugal,” paid the drafting attorney (an ACTEC Fellow and now retired partner of one of the authors of this article) the generous sum of $100 to revise her estate plan.

The facts surrounding the changes to Ms. Skonberg’s estate plan read like a law school hypothetical on will contest litigation, and provide a sober look at the circumstances that will likely be faced by an aging population with a significant accumulation of wealth and increased exposure to dementia and deterioration. In 1997 Ms. Skonberg, nearly bedridden at 93 years old, hired John M. Longmeyer to make changes to her estate plan at the suggestion of Vicki Smothers, Ms. Skonberg’s main caregiver at the time. The new estate plan outlined by the caregiver grossly inflated the bequest to the caregiver from $20,000 to $500,000, appointed Longmeyer himself as trustee of the revocable trust replacing Bank One (and specified annual compensation of $100,000), and removed the charities as beneficiaries. The rewriting of Ms. Skonberg’s estate plan was very much a family affair for Longmeyer. The actual draftsman of the documents was Longmeyer’s son-in-law, an out-of-state lawyer not licensed to practice law in Kentucky. Longmeyer, his wife, and his secretary witnessed Ms. Skonberg’s revised documents. Longmeyer’s brother-in-law, a physician but not Ms. Skonberg’s physician, spent 45 minutes with Ms. Skonberg at some point to assess her testamentary capacity.

After being informed of its removal as trustee and the other changes to the trust agreement, Bank One entered into an agreement with Longmeyer as trustee to serve as investment agent for the trust. Bank One did not take any other action at that time and did not object to its removal or question the circumstances of the new documents. Six weeks after the new documents were signed, Ms. Skonberg died. About a month after her death, Longmeyer terminated the investment arrangement with Bank One and transferred the funds to another investment advisor. Subsequently, Bank One obtained an opinion letter [from another ACTEC Fellow] that it had an obligation to notify the charities that they had been removed as trust beneficiaries and also of their status and the circumstances surrounding the Ms. Skonberg’s new estate plan. The court noted that “[o]nly when Longmeyer terminated the investment agreement after Skonberg died and the trust funds were moved from the bank did Bank One give notice to the ousted beneficiaries.”

The charities as former beneficiaries filed a lawsuit alleging that Ms. Skonberg’s new estate plan was the product of undue influence. Ultimately, Longmeyer settled with the charities on the brink of trial by paying the charities $1,875,000. Longmeyer in turn sued Bank One to recover the $1,875,000 paid to the charities, based on his allegation that “if Bank One had kept quiet about the 1997 revisions, the former beneficiaries would have been unaware that they had been ousted as Skonberg’s beneficiaries and would not have brought the suit that resulted in the settlement.” Longmeyer contended that Bank One breached its fiduciary duties when it disclosed information about the trust to the charities.

More on the Decision

The court could have issued a narrower opinion. For instance, it could have held that Bank One was permitted, but not obligated, to notify the charitable beneficiaries and therefore was immune from liability because courts will not generally interfere with the exercise of discretion by the trustee acting within the scope of its powers. Perhaps the court was concerned with having to reconcile Bank One’s delay and agency agreement with Longmeyer as trustee, or preferred an absolute rule of law that would allow the court to avoid having to deal with difficult facts, such as the proof or lack of proof in the trial court record concerning Ms. Skonberg’s capacity. The court could also have decided the issue on other grounds unrelated to the duty to disclose—for example, that Longmeyer was not “harmed” by making a voluntary settlement payment, or that his own unclean hands were a bar to his claims. Instead, the court concluded that the right to notice was absolute:

One who creates a living trust, revocable or irrevocable, necessarily involves one or more parties. There must be a trustee and, by operation of

4 275 S.W.3d at 703.
The most significant thing to note about this duty imposed by the court is the failure to distinguish between the beneficiaries of an irrevocable trust and those of a revocable trust while the settlor is still living and capable of revoking the trust. The court went even further. Bank One provided two pieces of information to the charitable beneficiaries: that they had been removed and that Ms. Skonberg may have been subject to undue influence when she reached that decision. The opinion holds that Bank One was required under the Kentucky statute to provide this information also—going beyond mere notice of the existence of the trust and its amendment. Further, the Court rejected any argument that Bank One’s duties ended when it was removed as trustee.

What of the argument that Bank One had a duty only to Ms. Skonberg as settlor because the trust was revocable by her? The Court rejected any such narrow view of the trustee’s duty, noting that there is no statutory duty to a settlor in Kentucky and stating that it could find no Kentucky cases expressly recognizing the existence of such a duty.8

The court in Longmeyer did not address whether a settlor in the trust instrument may eliminate or reduce the duty of the trustee to notify beneficiaries through the trust instrument itself. Nor does the opinion discuss what sorts of information about the operation of a trust, if any, must be provided to the beneficiaries. The easiest reading of the opinion is that the Kentucky Supreme Court does not distinguish between revocable trusts and irrevocable trusts, although perhaps the unfunded revocable trust could be argued to have a different status.

The Dissent

A lone dissenter, Justice Schroeder, agreed with the majority that a trustee has a duty to inform the beneficiaries whether the beneficiaries’ interests are vested or contingent. But Justice Schroeder would have created a limited carve-out for revocable trusts. Assuming that Ms. Skonberg was competent when she revoked the trust, then title to the trust assets would have reverted to Ms. Skonberg, at least momentarily, and the trustee’s duty to keep the beneficiaries informed would have run to Ms. Skonberg, since she was now in title. On the other hand, if the Trustee were concerned about undue influence, fraud, or some other irregularity the trustee could have filed a suit for instructions. Assuming that Ms. Skonberg’s revocation was valid, the trustee, in notifying the charitable beneficiaries of their removal, may have revealed confidential information, and Justice Schroeder voted to remand the case to determine whether the trustee was liable for such improper disclosure.

Policy Issues

While it may be difficult to digest the ease by which the court stepped around principles of trust law and the nature of revocable trusts, the question must be asked—does the Longmeyer decision represent bad policy? We are in the early stages of what has been called the largest inter-generational transfer of wealth in the nation’s history (albeit diminished in sheer numbers due to recent economic difficulties). Much of that wealth is in the hands of an aging population. As a result of improvements in medical technology, the lives of many will be extended, which will also widen the exposure to dementia and elder abuse. The Brooke Astor elder abuse situation in New York, although certainly unique in the amount of money at issue, is unfortunately becoming all too common. The current high unemployment rate and severe market losses will no doubt tempt others to try and drain resources from aging parents and family members through abuses of powers of attorney and positions of confidence or otherwise. We are likely to see an increasing number of cases concerning challenges to dramatic deathbed or post-incapacity changes to wills and trusts. In view of this, should the policy of the law encourage or require a trustee to alert beneficiaries, regardless of whether current, present, vested, contingent, or subject to revocation, of suspicious circumstances concerning a change to a trust and protect them when they provide it?

There are competing policy concerns. On the one hand is the importance of recognizing the freedom to change a revocable trust without unnecessary hindrances and without having to give notice to persons whose interests have not vested, in keeping with the nature of a revocable trust. There must also be beneficiaries and, at a minimum, certain expectations are created in that process. A trust instrument differs in concept from a will whereby one may execute and revoke the instrument without the involvement of others or creation of legal duties upon others. KRS 386.715 supports the view that, at a minimum, trust beneficiaries have a right to notice from the trustee.7

7 275 S.W.3d at 702-03. 8 275 S.W.3d at 703 n.12.
cable trust as a will substitute. On the other hand is the risk of abuse and the argument that, while an inconvenience or a nuisance in ordinary circumstances, in the abusive situation the expanded notice obligation can help expose bad actors earlier before assets are improperly taken and squandered or put beyond the practical reach of judgments and the court’s enforcement powers.

Regardless of how one views the policy debate, it is worthwhile to consider an alternative approach that might have been taken by Bank One in this case and which Justice Schroeder suggested in his dissent. A trustee presented with a doubtful or uncertain situation, including the validity of a trust instrument purporting to remove the trustee, could seek the aid and direction of the court. A petition for instructions would have required notice to the charities as well as Longmeyer, and arguably would have brought the issues and the parties before the court in a way that was less risky for the corporate trustee. Also, it could have avoided turning assets over to a potential bad actor while the court sorted through everything. While the litigation would have no doubt been messy, it would be difficult for any court to find fault in the trustee and by the nature of the proceedings the trustee would not have taken a position in favor of the charities or Longmeyer. Because Ms. Skonberg died mere weeks after the revocation and new trust were signed, a petition for instructions in this case would have been short-lived and would have been replaced quickly with the traditional will and trust contest litigation. However, if Ms. Skonberg had lived longer, a petition for instructions would have insulated her assets for her benefit while the court sorted through the situation.

Implications for Kentucky Practitioners

The court cried out for the Kentucky legislature to address the issues raised in the opinion. Until such time as the legislature acts (for example, through enacting the Uniform Trust Code with provisions concerning disclosure that closely follow the UTC), clients who want to create funded revocable trusts without creating a duty in the trustee of notification have few options. One approach would be to create a non-Kentucky trust or at least to opt out of Kentucky law governing administrative aspects of the trust if a Kentucky trustee is used.

A second approach would be an admittedly odd estate plan in which a funded revocable trust is created that requires distribution at death to the settlor’s estate, subject, however, to the settlor’s testamentary power of appointment. By will, the settlor appoints the assets of the funded revocable trust to a new trust that has been unfunded until death and over which the settlor is trustee until death. Suppose settlor decides to remove Beneficiary Fred from her estate plan and thus amends the unfunded revocable trust to do so. She does not tell Fred. May Fred sue the settlor’s estate for breach of the duty? In principle, under Longmeyer the answer would be yes but presumably any damages would be minimal or nonexistent. Of course, if the changes occurred when the settlor was of questionable competence Fred would have all of his usual rights.

A third approach would be to rely on a Kentucky statute insulating corporate fiduciaries from liability when following the direction of the grantor or advisors if provided in the instrument. Unfortunately, the statute applies only to limit the liability of corporate fiduciaries and not individuals. If a corporate fiduciary is trustee of a trust that allows notice to be given to beneficiaries only at the direction or with the consent of the settlor or imposes an advisory committee to direct the trustee on such matters, then this statute by its terms insulates the corporate fiduciary from liability.

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1. 275 S.W.3d at 702.
2. Ky. Rev. Stat. § 286.3-275 provides as follows:
   (1) When an instrument, under which a bank empowered to act as a fiduciary or trust company acts, reserves in the grantor, or vests in an advisory or investment committee or in one (1) or more other persons, any power, including, but not limited to, the authority to direct the acquisition, disposition, or retention of any investment or the power to authorize any act that the bank or trust company may propose, the fiduciary is not liable, either individually or as a fiduciary, for either of the following:
      (a) Any loss that results from compliance with an authorized direction of the grantor, committee, person, or persons; or
      (b) Any loss that results from a failure to take any action proposed by the bank or trust company that requires the prior authorization of the grantor, committee, person, or persons if the bank or trust company timely sought but failed to obtain that authorization.
   (2) The bank or trust company referred to in subsection (1) of this section is relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the grantor, an advisory or investment committee, or one (1) or more other persons have authority to direct the acquisition, disposition, or retention of any investment.
   (3) This section shall not apply to the extent that the instrument, under which the bank or trust company referred to in subsection (1) of this section acts, contains provisions that are inconsistent with this section.
Implications for Other States

The Kentucky statute at issue in Longmeyer was copied from Section 7-303 of the Uniform Probate Code, approved by the Uniform Law Commission in 1969. Although Section 7-303 was at one time enacted in twenty or so states, this number is rapidly declining as states enact the Uniform Trust Code, which has very different provisions. There are also a sizeable number of states that have enacted neither uniform act or have enacted other statutory provisions. Without attempting a complete 50-state survey, this article will address the implications of Longmeyer for the UPC states, the UTC states, and what will be referred to here as the common law states. Also discussed is an interesting Delaware statute. The implications of Longmeyer are greatest for the UPC states, less significant for the UTC states, and, like so many other issues of trust law, less certain for states still relying on the common law. The article then concludes with practice suggestions relevant to all states.

Common Law States

Despite its considerable importance to trustees, beneficiaries, and their counsel, the trustee’s obligation to disclose information to beneficiaries was not well-defined at common law. There is so little actual case law, that resort is usually made to the Restatement of Trusts when attempting to describe the common law, which will largely be the case here. Furthermore, such law review articles as exist on the trustee’s duty to disclose are all recent.11

Pursuant to the Restatement (Second) of Trusts, which was approved in 1957 and published in 1959, a trustee must give the beneficiary complete and accurate information about the trust assets, provided the information is both requested by the beneficiary and the requests are made at reasonable times.12 The beneficiary also has the right, upon request and at reasonable times, to inspect or have his agent or accountant inspect the trust records.13 Although the trust terms may attempt to set the parameters of the information to be provided and its frequency, at common law the trust terms could not eliminate the beneficiary’s right to the information reasonably necessary to enforce the beneficiary’s rights or prevent or redress a breach of trust.14 The Restatement (Second) and such case law as exists does not generally distinguish between classes of beneficiaries, current or future, vested or contingent, and so these rights to information arguably extend to all beneficiaries however their interest is described. Under the more recent Restatement (Third), the trustee’s duty to disclose runs to a “representative” group of beneficiaries, with the group of representatives varying depending on the issue to be considered.15

Even in the absence of a request, there are circumstances where the trustee has an affirmative duty to provide information to the beneficiaries. Where the trustee is engaged in any transaction with a beneficiary concerning the trust (or if the trustee is “dealing on his own account”), the trustee has as part of the duty of loyalty an affirmative obligation to communicate to the beneficiary all material facts the trustee knows or should known in connection with the transaction.16 Also, the trustee has an affirmative duty, without request, to provide the beneficiary with the material facts affecting the beneficiary’s interest in the trust that the trustee knows the beneficiary does not know and that the beneficiary needs to know for his protection in dealing with third parties with respect to his trust interest.17 The Restatement (Third) adds some affirmative disclosure requirements to the “representative” beneficiaries, including disclosure of the trust’s existence, of their status as beneficiaries and their right to obtain further information, and, most significantly for purposes of the Longmeyer facts, of changes in beneficiary status.18

In addition to these general disclosure obligations, the trustee is also required to provide accountings to the beneficiaries when ordered to do so by the appropriate court on motion of a beneficiary.19 Both current and future beneficiaries, either vested or contingent, may move to compel an accounting.20 The trust terms may authorize the trustee to account to one beneficiary, and have the approval of that designated person discharge the trustee from liability provided that person acts in good faith and the trustee bas made adequate disclosure of relevant facts.21 The Restatement (Third) of Trusts clarifies that the beneficiaries are entitled to

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12 Restatement (Second) of Trusts § 173 (1959). The “reasonable time” requirement, perhaps implicit in Restatement (Second) is made explicit in Restatement (Third). See Restatement (Third) of Trusts § 82 cmt. c (2007).

13 Id.

14 Restatement (Second) of Trusts § 173 cmt. c (1959).


16 Restatement (Second) of Trusts § 173 cmt. d (1959).

17 Restatement (Second) of Trusts § 173 cmt. (1959).

18 Restatement (Third) of Trusts § 82 (2007).

19 Restatement (Second) of Trusts § 172 cmt. c (1959).

20 Id.

21 Restatement (Second) of Trusts § 172 cmt. d (1959).
the accounting (or a less formal but comparable report) on request, and not only on motion to a court. The Restatement Third also clarifies that the terms of the trust may provide that one or more designated beneficiaries may receive accountings or reports on behalf of other beneficiaries but that the designated beneficiary’s approval is subject to court review for possible abuse even if the trust purports to preclude court review.

The Restatement (Third) of Trusts also addresses issues not addressed in Restatement (Second) that are pertinent to Longmeyer. While the trust is revocable by the settlor and the settlor has capacity, the trustee’s duties with respect to reporting trust information and accounting are owed only to the settlor. During that time, the trustee is not to provide reports, accountings, or other information concerning the trust to presumptive remainder of contingent beneficiaries or third parties without the express consent of the settlor, either through the trust terms or a direction. These principles are derived from the notion that where a trust is revocable, the interests of all beneficiaries are subject to the settlor’s power to revoke (the principle that was sidestepped by the majority in Longmeyer).

Applying these principles to the facts in Longmeyer, the issue of whether the trustee had a duty to inform the removed remainder beneficiaries of their removal would appear to turn on the question of the settlor’s capacity. Assuming Ms. Skonberg had capacity, the trustee’s duty to disclose ran only to the settlor. However, if Ms. Skonberg did not have capacity, then the trustee would appear to have an obligation to disclose. Unfortunately, since the issue of Ms. Skonberg’s capacity appears to have been a key issue in the case, the trustee is left in a difficult position. The simplistic decision of the Kentucky Supreme Court at least provides more certainty.

Restatements are advisory. Courts are free to reject any and all principles. The issue of disclosure to beneficiaries of revocable trusts is dealt with in detail only in the recent Restatement (Third), and not the Restatement (Second). Whether the Restatement (Third) is now the law in particular states will not be definitively determined until a local court confirms that it is now the law. The court may of course decide instead to follow particular cases in other states. Unfortunately, case law to date is not particularly helpful. The efforts to determine New York law on the topic are illustrative. In In re Trust of Malasky (New York case) the court refused to allow presumptive remainder beneficiaries to challenge accountings for a revocable trust for any years where the settlor was living and capable of revoking the trust. However, in Siegel v. Novak27 (Florida case but decided under New York law), the court allowed presumptive remainder beneficiaries of a revocable trust to sue a corporate co-trustee concerning withdrawals while the settlor was alive.

**UTC States**

The Uniform Trust Code (“UTC”), which was approved in 2000, is a codification of trust law drafted by the Uniform Law Commission (“ULC”). The goal of the UTC is to make trust law more uniform across the country. The UTC, with state specific variations, has been enacted in twenty-three states. All enacted versions of the UTC include provisions concerning trustee disclosure.

The UTC bears some similarity to the Restatement (Third), although on issues of trustee disclosure, the UTC came first. The comments to Section 105 of the UTC summarize the heated policy debate over the issue of trustee disclosure, although the big debate was over the extent to which a settlor should be able to waive otherwise required disclosure, less so over the basic requirements absent a contrary provision in the instrument. On one side of the debate are concerns that increased access to trust information will have a depressing effect on the productivity of younger generations or encourage meddling. On the other side are concerns about the ability to redress breaches of trust, prudent and open administration, and the ability of a trustee to start statutes of limitation on surcharge claims.

In order to understand the application of the UTC disclosure provisions, it is necessary to understand a handful of concepts used throughout the UTC. A small number of UTC provisions are “mandatory,” meaning that they apply regardless of the terms of the trust. These mandatory provisions are specified in Section 105. Trustee disclosure is mentioned on the list, although these provisions are placed in brackets, indicating that the Commissioners expect state variation, which has in fact occurred. The remainder of the UTC provisions are “default” rules that apply only where there is no contrary provision in the trust terms. The default provisions for trustee disclosure are locat-

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21 RESTATEMENT (THIRD) OF TRUSTS § 83 cmt. b (2007).
23 RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. e (2007).
24 Id.
27 The policy arguments are crisply summarized in Joseph Kartiganer & Raymond H. Young, The UTC: Help for Beneficiaries and Their Attorneys, PROB. & PROP., Mar./April 2003 18, 20
ed in Section 813, although for revocable trusts, Section 603 is also relevant. The concept of the "qualified beneficiary" is also important because most of the UTC disclosure duties run only to qualified beneficiaries, rather than to all beneficiaries. A qualified beneficiary generally includes current beneficiaries, successor current beneficiaries (where the interest of the current beneficiaries terminates but the trust continues), and presumptive remainder beneficiaries upon trust termination. Contingent remainder beneficiaries who are not also presumptive remainder beneficiaries are excluded. Finally, the UTC allows for the providing of notice to a representative for a minor, unborn, and certain other beneficiaries.

Section 813 sets forth seven duties with respect to trustee disclosure. The trustee must keep the qualified beneficiaries reasonably informed about the administration, and the material facts necessary for them to protect their interests. The trustee must promptly respond to reasonable requests for information by any beneficiary. The trustee must, upon request, provide any beneficiary with a copy of the entire trust instrument. The trustee must, within 60 days of accepting the trusteeship, notify the qualified beneficiaries of the appointment and provide contact information. Within 60 days of learning of the creation of an irrevocable trust, or that a revocable trust has become irrevocable (i.e. the settlor has died), the trustee must notify the qualified beneficiaries of the existence of the trust, the identity of all settlors, the right to request a copy of the trust, and the right to receive trustee’s reports under the UTC. The trustee must notify the qualified beneficiaries of any change in the trustee’s compensation. Finally, in a major change for some states but consistent with the prior law in many states, the trustee must send to current beneficiaries, and upon request to any other beneficiary, at least annually and at the trust termination a report of the trust assets and financial activity (i.e., receipts, disbursements, etc.), and the trustee’s compensation. Beneficiaries may waive their rights to any UTC disclosures and withdraw previous waivers.

Settlor waiver is dealt with in Section 105(b)(8) and (b)(9). Under the pure UTC, not waiveable is the duty to notify qualified beneficiaries of an irrevocable trust who have attained the age of 25 years of the existence of the trust, of the identity of the trustee, and of the right to request trustee’s reports. Also not waiveable under the pure UTC is the duty to respond to the request of a qualified beneficiary of an irrevocable trust for trustee’s reports and other information reasonably related to the trust’s administration. Recognizing that states were taking a diversity of approaches on the issues of settlor waiver, the Commissioners placed 105(b)(8) and (b)(9) in brackets in 2004, making their enactment optional. At least five trends have emerged:

- Enact Section 105(b)(8) and (b)(9) in its original form or with minor tweaks;
- Retain (b)(8) and (b)(9) but to then add language providing that a settlor may designate a surrogate to receive notice or request information on behalf of a beneficiary;
- Allow a settlor to totally waive notice but not the obligation to respond to a beneficiary’s request for information;
- Delete both (b)(8) and (b)(9) in their entirety, thereby presumably allowing a settlor to dispense with all information reporting to beneficiaries, whether mandatory or in response to a beneficiary request; and
- Regardless of which one of the other approaches the state may have adopted, make the UTC disclosure provisions prospective only.

With respect to the issues raised in Longmeyer, UTC Section 603(a) adopts the rule, later also adopted in Restatement (Third), that while a trust is revocable and the settlor has capacity, the duties of the trustee are owed exclusively to the settlor. For a state that has adopted Section 603(a), applying the UTC to the Longmeyer facts raises similar issues as in trying to apply the Restatement (Third). If the settlor has capacity, the trustee is prohibited from giving notice to the remainder beneficiaries. But if the settlor has lost capacity, the duties specified in Section 813 would kick in. Why Section 813 doesn’t expressly mention change of beneficiaries as being a material fact, a beneficiary whose interest is being sought to be eliminated would doubtless regard that as a most material of facts and would expect disclosure.

Section 603(a), however, does have one significant difference than from the Restatement (Third). Recognizing that states were taking a diversity of approaches on the question, the word “capacity” was placed in brackets, meaning that states are free, if they wish, to enact Section 603(a) to provide that the trustee’s duties are owed exclusively to the settlor.

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26 UTC § 103(13).
27 UTC § 301.
28 Florida, Maine, Nebraska, New Mexico.
29 District of Columbia, Missouri, Ohio, Oregon.
30 Alabama.
34 Arkansas, Kansas, New Hampshire, North Carolina, South Carolina, Tennessee, Utah, Virginia, Wyoming.
35 Arkansas, Missouri.
36 RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. e (2007).
regardless of the settlor’s capacity. States deleting the capacity test have done so in part because of the difficult issues raised in trying to apply the UTC disclosure requirements to a settlor of uncertain capacity. Another argument is that since a revocable trust is used primarily as a substitute for a will, the rules ought to be the same. Since disclosure of a will is generally not required while the testator is alive, than neither should the existence of the revocable trust while the settlor is living. About half of the UTC states have deleted the capacity limit. In those states, the trustee in Longmeyer would have been prohibited from contacting the remainder beneficiaries, although one wonders how enforceable such a restriction would be if the trustee has well-founded concerns of undue influence, which appears to have been the case. Missouri enacted a middle alternative. While it retains the capacity limit it provides a procedure for determining capacity, derived from its guardianship and conservatorship law. If the procedure has not been implemented, the settlor is presumed to have capacity and all duties of the trustee continue to be owed exclusively to the settlor. Section 603 is not a mandatory provision, and may be freely rewritten by the settlor.

California is not a UTC state but it has a provision in its Trust Law comparable to Section 603. California provides that a trustee need not account or report during any period while the trust is revocable. California also provides that the settlor, and not the beneficiary, has the rights otherwise afforded beneficiaries under the Trust Law. Presumably, had a California court been presented with the Longmeyer facts, it would have started from the assumption that the remainder beneficiaries were not entitled to disclosure.

**UPC States**

Although Kentucky is not a UPC state generally, the statutory provision in Longmeyer was copied verbatim from Section 7-303 of the Uniform Probate Code. Article 7 of the UPC was a mini-trust statute, dealing with only a handful of trust issues, one of which was trustee disclosure. Section 7-303 of the UPC provides that a trustee must keep the beneficiaries of the trust reasonably informed of the trust and its administration. Section 7-303 also requires that the trustee must inform the current beneficiaries and if possible, one of more remainder beneficiaries, of the trust’s existence, upon a beneficiary’s reasonable request, provide a beneficiary with a copy of the portions of the trust that describe or affect the beneficiary’s interest (UTC Section 813 provides that the trustee, upon request, must provide the beneficiary with a copy of the complete trust instrument), and must provide the beneficiary, upon reasonable request, with a statement of accounts annually and upon termination of the trust or change of trustee.

The UPC has been enacted in about twenty states. However, not all of these states enacted Article 7, and those that did are repealing it upon enactment of the UTC. There are also states, such as Kentucky, that enacted portions of Article 7 but did not otherwise enact the UPC. Had Kentucky enacted the full UPC, Longmeyer might have been decided very differently. Another provision of the UPC relevant to the issue of trustee disclosure is Section 1-108, which provides that the holder of a general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries whose interests are subject to the power. This statute was applied in Montrone v. Valley Bank & Trust Co., to deny a remainder beneficiary of a revocable trust a request for information concerning the trust. In Williams v. Northern Trust Bank of Florida/Sarasota, the court granted the beneficiary’s request but in that particular case the beneficiary was also a current beneficiary of the trust. Had Kentucky also enacted Section 1-108, the result would appear to be comparable to the result under the UTC. If Ms. Skonberg had capacity to revoke the trust, there would have been no application to inform the beneficiaries. However if Ms. Skonberg did not have capacity, the trustee, pursuant to Section 7-303, would have been obligated to inform at least one of the remainder beneficiaries of the revocation.

**Delaware Approach**

Delaware, in an apparent response to the Delaware Supreme Court’s decision in McNeil v. McNeil, has refined its trust statutes to ensure the power of a settlor to control and shape the duties of the trustee. McNeil illustrates how the duty to treat the beneficiaries equitably may be forcefully applied in the context of the duty to disclose. In 1959, Mr. McNeil established five trusts from the sale of his pharmaceutical company. Four of the trusts (the “Sibling Trusts”) were for the separate benefit of each Mr. McNeil’s four children.
The fifth trust was for the benefit of his wife, Lois (the "Lois Trust"). The Lois Trust provide for current discretionary distributions among Mr. McNeil's descendants, their spouses, and his wife. All four trustees of the Lois Trust (three individual trustees and a corporate trustee) were aware that all of Mr. McNeil's descendants were current permissible distributees of the Lois Trust. Mr. McNeil's son, Hank, became estranged from his parents and siblings, and was shore-changed under his parents' wills.

Hank sued the trustees of his separate trust for additional discretionary distributions, and that lawsuit was resolved in a separate suit. Hank then sued the trustees of the Lois Trust on the basis that he was misled about his status as a current beneficiary. The trial court found that the trustees of the Lois Trust continued Hank's "outside status," while Hank's siblings were made aware of information about the administration of the Lois Trust (largely through their participation in a family holding company). The trial court also found that the trustees resisted Hank's efforts to learn information about the Lois Trust, and that the trustees breached their fiduciary duty by failing to inform Hank about his status as a current beneficiary and favoring the other siblings.

The trial court ordered a 7.5 percent makeup distribution to Hank and his children, removed one of the trustees, and surcharged each of the trustees one-fifth of their commissions from 1987 to 1996. On appeal, the Delaware Supreme Court affirmed most of the trial court's decision. The Supreme Court held that (1) Mr. McNeil did not expressly relieve the trustees of the duty to disclose information, (2) Hank's attempts to obtain information should have put the trustees on notice that he did not know he was a current beneficiary of the Lois Trust, (3) a trustee has a duty to inform beneficiaries of essential facts, and (4) the status as a current beneficiary is an essential fact, and the trustees wrongfully denied Hank information, and even misled Hank about his status as a beneficiary, whilst providing information with the other siblings (through the family holding company). The Supreme Court also held that large distributions to Hank from his other trust is not a defense to the blatant failure to fail to inform Hank about his status as a beneficiary of the Lois Trust.

In an apparent response to McNeil, Delaware now has a statute that provides that notwithstanding any other provision of statutory or common law, the terms of a trust governing instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries, and specifically including the right to be informed of the beneficiary's interest in the trust for a period of time. To emphasize the goal of the statute, the statute also provides that the rule that statutes in derogation of the common law are to be strictly construed does not apply to the section, and it is the policy of the section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments. The statute does not allow the trust terms to excuse willful misconduct by a trustee.

**Practice Suggestions from the Perspective of the Estate Planning Lawyer**

As noted earlier in the suggestions for Kentucky practitioners, practice suggestions for the instrument drafter fall into three categories. First, an attempt to incorporate notice provisions that the client desires could be made by including a choice of law provision in the trust document. This objective could be accomplished most effectively by choosing a trustee in a state with desirable law and providing that the law of that state governs the administration of the trust. Less desirable is naming a trustee in a state with unclear or "bad" law on the issue of trustee notice, and then providing that administration will be governed by the law of a state with "good" law. There is doubt whether such a designation could be enforced. While a drafter is normally free to specify any law the drafter wishes, such provisions are unenforceable if they implicate significant issues of public policy in the forum state.

Second, in UTC states, settlors of revocable trusts are free to limit otherwise required notices. As noted above, in about half the UTC states all notice provisions are waiveable. Even in states that make some notice provisions mandatory, Section 105, which lists the mandatory duties, applies only to irrevocable trusts. Section 603, relating to the duties of a trustee in the case of a revocable trust, is a waiveable provision.

The results are less certain in UPC and common law states. The extent to which an otherwise required notice can be waived under UPC Section 7-303, the provision at issue in Longmeyer, has never been pinned down. For common law states, the waiver standard of Restatement (Second) of Trusts may still be quite relevant. Although the trust terms may attempt to set the parameters of the information to be provided and its frequency, pursuant to Restatement designated in the terms unless the designation is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.

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41 12 Del. C. section 3309(a).
42 See, e.g., UTC Sec. 107(1) ("The meaning and effect of the terms of the trust are determined by...the law of the jurisdiction designated in the terms unless the designation is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue").
(Second), the trust terms could not eliminate the beneficiary’s right to the information reasonably necessary to enforce the beneficiary’s rights or prevent or redress a breach of trust. 46 Had they not received notice, the charities in Longmeyer may never have known that their interests had been eliminated pursuant to alleged undue influence. Protecting their rights to information would therefore appear essential for them to be able to enforce their rights.

On a more sophisticated level, in states that recognize that advisory committees can be granted broad authority and act in a beneficiary’s stead, a provision limiting notice to beneficiaries may perhaps have a greater chance of success. But the issue then becomes the potential liability of the advisors. Traditionally, advisors are presumptively held to fiduciary standards. 47 The extent to which an advisor’s fiduciary duties are equivalent to those of a trustee is uncertain but a court could conceivably apply the same notification rules. In McNeil, the role ascribed to certain trustees would be analogous to that of advisors in many other situations.

Finally, an attempt could be made to limit the potential beneficiaries to be notified. In the revocable trust context that could be done most effectively by creating a trust with the settlor’s estate as the sole remainder beneficiary, subject to a general power of appointment in the settlor which the settlor exercises by Will. Here, however, care must be taken that the trust not be destroyed or never created under the doctrine of merger. 48 Thus, during the settlor’s lifetime there would be no other beneficiaries to be notified. But this procedure would be cumbersome. As a matter of routine the settlor would execute the revocable trust and then execute a Will containing an “activation” clause. But it might be difficult for a court to read the two together because the Will does not speak until the time of death.

That the holding in Longmeyer may be so easily avoided suggests its weakness.

Practice Suggestions from the Perspective of the Fiduciary

Surcharge litigation is increasing, making it increasingly important that trustees identify and manage all aspects of their fiduciary risk—including that risk that either arises directly or is affected by the trustee’s disclosure obligations. The risk of a surcharge action is increased where the trustee is not aware of or does not fully understand the scope of the trustee’s fiduciary obligations. The scope of the trustee’s disclosure obligations will be defined by the terms of the governing instrument and applicable law, making a thorough examination of both an important task for the trustee. Attempts to provide uniformity to state laws concerning the duty to disclose have been only partially successful, increasing the burden on trustees attempting to define the scope of their obligations with respect to disclosure of information and uniquely adding to the burden of corporate trustees administering trusts in multiple jurisdictions and facing financial pressure to standardize practices and reduce operating costs. Longmeyer now complicates that task even further, especially in states that still have the UPC, rather than the more thorough codification of the UTC.

Fiduciary risk should be evaluated prior to accepting the appointment, and throughout the administration, especially where a significant transaction or distribution is contemplated. As part of the evaluation of fiduciary risk, the trustee must understand and define the scope of the trustee’s duty to disclose information to the beneficiaries. The trustee should also be mindful of common sense and well established practices for managing potential risks, which traditionally has included communicating with beneficiaries.

Trustee disclosure relates directly to all of the trustee’s duties and the trustee’s fiduciary risk. Generally speaking, a trustee who acts in good faith in carrying out his fiduciary duties will not be liable to the beneficiaries for losses to the trust. Historically, open disclosure of information to beneficiaries has been viewed as indicia of a trustee acting in good faith. Conversely, a trustee who acts secretly may be viewed as acting in bad faith. Because of this connection, trusts that restrict a trustee from disclosing information to beneficiaries may expose the trustees to increased risk of a surcharge action. Also, depending on state law, disclosure of information may commence the running of the statute of limitations on a surcharge action against the trustee. Trusts that restrict a trustee from disclosing information to beneficiaries increase the exposure of the trustee by preventing the trustee from using communication with beneficiaries to avoid litigation, denying the trustee the full access to defenses to liability based on good faith, and preventing the trustee from starting the running of statutes of limitation on surcharge actions.

A trust agreement that restricts a trustee’s ability to disclose information may also prevent the trustee from taking advantage of risk management tools under the Uniform Trust Code (where enacted), which include

46 Restatement (Second) of Trusts § 173 cmt. c (1959).
47 UTC Sec. 808(d); Restatement (Second) of Trusts Sec. 185 (1959).
48 On the doctrine of merger, see UTC Sec. 402(a)(5).
entering into binding nonjudicial settlement agreements with trust beneficiaries, shortening the statute of limitations on trust contests and surcharge actions, limiting objections to terminating distributions, and obtaining beneficiary consents, releases, and ratifications.

Because of this increased exposure, trustees should consider whether it is appropriate to serve as trustee under an agreement that restricts the trustee’s ability to disclose information to trust beneficiaries, and where accepting an appointment, whether the additional risk should be reflected in the fiduciary fee.

The specific information that must or should be disclosed to beneficiaries will vary depending on the terms of the governing instrument and the grantor’s intent, state law, beneficiary factors, the trust assets and economic conditions, and other factors. The timing of disclosure may be imposed by state law, or may be driven by the trustee’s desire to take advantage of tools under the UTC. Absent these, prudence dictates that the trustee send disclosure to the beneficiaries no less frequently than annually, and also at the termination of the trust and the end of the trusteeship. More frequent disclosures may be preferable for various reasons, including beneficiary relations reasons. In addition, the trustee must monitor the trust and the beneficiaries for events that may modify the trustee’s duties or give rise to new duties or new notice recipients, such as the death of the grantor or the grantor’s spouse, the birth or death of beneficiaries, changes in institutional rates for fiduciary compensation, and significant law changes.

The evolution of the law concerning the trustee’s duty to disclose information to the trust beneficiaries, through cases like Longmeyer for example, creates new risks for trustees who are unaware of their obligations, and also opportunities for trustees to use disclosure to manage their risk. Trustees must review governing instruments and applicable law carefully to understand and comply with their obligations, and seek the advice of counsel as appropriate.

Trustees will also face an increasing number of difficult situations as in Longmeyer as a result of the trends of increased elder financial abuse and abuses of powers of attorney. While it can be a difficult decision to make under pressure, trustees should give strong consideration to policies that favor prompt and complete disclosure even in difficult circumstances. Also, trustees should remember that the courts are available for their protection where confronted with genuine doubt and difficulty in the administration of the trust. Where a trust is significantly amended under questionable circumstances, it is hard to imagine any court finding fault in a trustee that seeks clarification and confirmation from the court through a suit for aid and direction.

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9 UTC § 1005.
10 UTC § 817.

51 UTC § 1009.