

MISSISSIPPI TRUST REFORM PACKAGE PROPOSAL



Report of the 2013 Secretary of State

*Uniform Trust Code Task Force
Directed Trustee Task Force
Qualified Disposition Trust Task Force
Trust Decanting Task Force
Extended Term Trust Task Force*

DELBERT HOSEMANN
Secretary of State

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The Need for Trust Reform in Mississippi

Trusts are an important estate planning tool and may be a strong economic driver for a state. Mississippi has limited trust laws. Though some statutory provisions exist, much of the current trust law is scattered and sparse, leading to uncertainty for both practitioners and citizens wishing to form a trust in Mississippi.

Trusts are easily established in any jurisdiction, regardless of the settlor's or beneficiary's state of residence. Many practitioners and trust professionals are under a fiduciary obligation to recommend the best location for the trust. Due to the updated trust laws in Tennessee and other states, many Mississippi citizens are taking their trust business elsewhere. Mississippi's antiquated trust laws not only hurt our State's banks and trust companies competitiveness, but also creates a hassle for citizens who are forced to identify an out-of-state trustee to oversee the trust.

In March 2013, a study group comprised of leading trust and estate attorneys, CPAs, financial advisors, and trust banking professionals was formed to review Mississippi's trust laws and recommend reforms to make Mississippi a more competitive jurisdiction for trust business. Its members unanimously agreed to form a separate Task Forces devoted to reviewing the Uniform Trust Code, Qualified Disposition Trusts, Trust Decanting, Directed Trustees, and Extended Term Trusts.

The Uniform Trust Code

The Uniform Trust Code: General Overview

The Uniform Trust Code (UTC) is the product of over a decade of study and drafting by the National Conference of Commissioners on Uniform State Laws. Uniform Law Commissioners are volunteer lawyers appointed by the Governors or Legislatures of their respective states to draft model state laws. The UTC was approved in August 2000, with amendments made in 2001, 2003, 2004 and 2005.

The UTC has been well-received. Since 2000, twenty-five states and the District of Columbia have enacted the UTC, and several other states are expected to introduce it in 2014. The American Bar Association, the ABA Section of Real Property, Probate and Trust Law, the Financial Planning Association, and the AARP have all endorsed the UTC.

The Uniform Trust Code Task Force began meeting on May 7, 2013. The Task Force had two goals. First, review the Uniform Trust Code and determine if it should be adopted in Mississippi. If the group decided the UTC should be adopted, the second goal was to draft the

Mississippi Uniform Trust Code by adding any necessary changes and Mississippi specific provisions.

Summary of UTC Task Force's Recommended Proposal

The Mississippi Uniform Trust Code borrows heavily from the structure and content of the UTC. Please see the appendix for the full proposed language of the Mississippi Uniform Trust Code.

The Uniform Trust Code is divided into eleven (11) Articles. Article 9 of the Code is the Uniform Prudent Investor Act which was enacted by the Mississippi Legislature in 2006¹ and is codified in Sections 91-9-601 through 91-9-627 of the Mississippi Code. Article 5 of the UTC addresses creditors' rights and is not proposed for adoption at this time. The Task Force also recommends creating a new article of the Mississippi Uniform Trust Code to address directed trustees.

Article 1 – Article 1 of the Mississippi Uniform Trust Code contains general provisions and definitions. The Uniform Trust Code is intended to be supplemental to the common law of trusts and principles of equity; therefore, it does not contain language on every trust issue. The trust code provides default law and rules for trusts.

Article 2 – Article 2 provides guidance on judicial proceedings, and clarifies that courts in the trust's principal place of administration have jurisdiction over both the trustee and beneficiaries regarding matters related to the trust. The code does not attempt to address most issues surrounding jurisdiction or procedure.

Article 3 – Article 3 governs representation, both by a fiduciary (personal representatives, guardians, conservators) and through virtual representation. This Article also confirms the court's authority to appoint representatives to represent and approve settlements for minors, incapacitated, unborn, or individuals whose identity or location is not reasonably ascertainable.

Article 4 – Article 4 provides statutory framework for creating, modifying and terminating trusts. The requirements do not generally depart from traditional doctrine. The trust code does utilize a three-part classification of trusts: charitable, non-charitable, and honorary. The most common trust is the non-charitable trusts. Non-charitable trusts require a valid purpose and ascertainable beneficiary (or beneficiaries). Charitable trusts have the opposite purpose which is to benefit the public as a whole. The honorary trust was unenforceable at common law but is recognized under the trust code. An honorary trust lacks an ascertainable beneficiary. The most common example is a trust to care for an animal.

¹ See House Bill 1112 (2006).

In addition to the terms on creation and validity, Article 4 provides terms on modification and termination of a trust. The modification provisions are intended to help preserve the intent of the settlor, but provide flexibility in the instance that a provision of the trust no longer serves a material purpose. The Code also provides for termination of trusts, if properly approved, when the size of the trust is insufficient to justify continued administration.

Article 5 – Reserved. Article 5 of the UTC addresses creditors’ rights. The Task Force proposes to omit Article 5 from the proposed Mississippi Uniform Trust Code and instead rely on the current creditors’ rights laws existing in Mississippi.

Article 6 – Article 6 addresses revocable trusts. Generally, revocable trusts are treated as the equivalent of a will under the trust code. Trusts are presumed revocable unless the terms provide otherwise. The article also provides the procedure to amend or revoke the trust.

Article 7 – Article 7 covers the Office of the Trustee. All of the default rules found in Article 7 may be modified by the trust terms. The rules address acceptance of the office, the role of co-trustees, changes in trusteeship, resignation, removal, appointing successor trustees, and compensation.

Article 8 – Article 8 governs the duties and powers of trustees.

Article 9 – The Uniform Prudent Investor Act is already enacted in Mississippi and codified in Sections 91-9-601 through 91-9-627. The Task Force recommends reincorporating these provisions into the Mississippi Uniform Trust Code.

Article 10 – Article 10 provides for the liability of trustees and rights of those dealing with trustees.

Article 11 – Article 11 is the miscellaneous provisions section of the act. Article 11 provides for the effective date and further provides that the code applies to all trusts created before or after the effective date.

Article 12 – Article 12 address trust advisors and trust protectors.

Repeals – To avoid conflicting and overlapping provisions, the Task Force recommends repealing Articles 1 (General Provisions), Article 3 (Uniform Trustees’ Powers), Article 5 (Resignation and Succession of Trustees), and Article 7 (Removal of Trustees) of Title 91, Chapter 9 of the Mississippi Code.

Directed Trustees (Trust Advisors and Trust Protectors)

The Uniform Trust Code already contained some language addressing directed trustees. The Directed Trustee Task Force recommended drafting an additional article to the Mississippi Uniform Trust Code. This new Article 12 covers Trust Advisors and Trust Protectors and lays out the responsibilities and roles of these individuals, as well as their relationships among each other and with trustees.

Article 12 proposes:

- A non-exhaustive list of powers which may be given to trust advisors and protectors;
- Places fiduciary responsibilities on trust advisors and protectors, to the extent the individual is granted power in the trust instrument;
- States a trustee, trust advisor, or trust protector is considered an excluded fiduciary with respect to each power granted or reserved exclusively to another individual;
- Trust advisors and trust protectors consent to personal jurisdiction in Mississippi by accepting their roles in the trust;
- Provides that if an individual is an excluded fiduciary, he is under no duty to review actions by the other individual or recommend, report, communicate with beneficiaries, or take any other action;
- Administrative activities or record keeping required by an individual's role with a trust will not give rise to any duty when the power is exclusively held by another;
- An excluded fiduciary is not liable for the actions of other individuals. Only the individuals who hold the power may be liable for the failure to exercise or results of exercising that power;
- A claim against a trust advisor or trust protector must be brought within one (1) year of the date the individual received a report indicating the existence of a potential claim, or if no such report was provided, within three (3) years of the removal or resignation of the individual, the termination of the beneficiary's interest or the termination of the trust.

Qualified Disposition Trust

Qualified Disposition Trusts are becoming popular around the United States. These trusts allow settlors to receive limited protection as a beneficiary of a self-settled trust. The Qualified Disposition Trust Task Force based its proposal largely on language used in Tennessee.

To take advantage of the Mississippi Qualified Dispositions Act, a settlor must first sign a qualified affidavit. The affidavit states the settlor is solvent, has title and authority to transfer the subject assets, is not taking any action to defraud a creditor, is not aware of any pending or threatened court action, is not involved in any administrative proceeding, does not plan to file bankruptcy, and the assets being transferred were not derived from any unlawful activity.

Unless otherwise provided in the Mississippi Qualified Dispositions Act, an action on the trust assets must be brought under the Uniform Fraudulent Transfer Act. If the creditor existed at the time of the qualified disposition, the action must commence within two (2) years of the qualified disposition or within six (6) months after the person discovers, or reasonably should have discovered, the qualified disposition. For a creditor coming into existence after the qualified disposition was made, an action must be brought within two (2) years after the qualified disposition was made.

Trust Decanting

The Mississippi Trust Decanting Act authorizes a trustee, with absolute discretion, to distribute the principal of a trust, with or without court approval, in favor of a trustee of a second trust for the benefit of one or more of the beneficiaries of the first trust, and one or more of the successor beneficiaries of the first trust. The Act does not allow a future interest in the first trust to be accelerated to a present interest in the second trust.

A trustee without absolute discretion is given similar authority to distribute the principal of a trust to a second trust, but all the beneficiaries of the second trust must be the same as the beneficiaries under the first trust. This requirement applies to both current and successor beneficiaries. Further, if the trustee does not have absolute discretion and the first trust grants a power of appointment to a beneficiary, the second trust shall grant such power and the class of permissible appointees shall be the same as in the first trust.

Other proposals in the Mississippi Trust Decanting Act include:

- A trustee is authorized to distribute part or all of the principal of a disabled beneficiary's interest to the trustee of a supplemental needs trust, if the trustee determines it is in the best interest of the disabled beneficiary.
- A trustee may distribute the principal of the first trust to the trustee of a second trust without the approval of the settlor or beneficiaries, but notice of such distribution must be given not less than sixty (60) days prior to the planned effective date of the distribution.
- Court approval is not required under the proposal, but provisions are included to provide for actions to approve or disapprove to be brought by the settler, trustee, co-trustee, trust protector, trust advisor, beneficiary, or legal representative of a beneficiary.
- The term of a trust may not be extended by decanting unless the first trust expressly permits such extension or lengthening of the perpetuities period.
- The Act is not intended to limit the power of a trustee to distribute trust assets, does not require a trustee to show a need to distribute before making a distribution to a second trust, and does not create a duty that the trustee distribute assets as allowed under the Act.
- The Act does not require a trustee to inform beneficiaries about the availability of the act or to determine whether any action should be taken.

- A distribution is not allowed if it would reduce, limit or modify a current right to a mandatory distribution.
- A trustee is not allowed to make distributions to decrease or indemnify against liability for failure to exercise reasonable care, diligence or prudence.
- A trustee may not attempt to eliminate a provision which grants another person the right to remove or replace the trustee or to change provisions regarding the compensation of the trustee.
- An exercise of the power to distribute under the Mississippi Trust Decanting Act must be in writing, signed and acknowledged by the trustee.
- The Mississippi Trust Decanting Act will apply to all trusts whether created before, on or after the effective date of the Act.

Extended Term Trusts

The Extended Term Trust Proposal allows settlors the option to extend the life of a trust beyond the common law rule against perpetuities. The common law rule against perpetuities creates uncertainty for anyone creating an estate plan. The bill proposes to eliminate uncertainties by allowing the settlor to opt out of the common law rule in favor of having the trust last no longer than 360 years. The bill also provides default rules for distribution of assets upon termination of the trust.

Conclusion

After lengthy review and discussion, the Trust Law Study Group and individual Task Forces developed the attached proposals. These proposals take the best aspects of uniform and non-uniform provisions used in other states. The Study Group recommends the Legislature adopt the Mississippi Uniform Trust Code, Qualified Disposition Trusts, Trust Decanting, and Extended Term Trusts proposals in the 2014 session.

Adoption of the Mississippi Uniform Trust Code will make administration of trusts much easier in Mississippi, not only for trustees, but also for beneficiaries. For example, the Code provides for non-judicial settlements (agreements entered into by the beneficiaries and trustees, generally used to recognize that the trustee is allowed to take action the beneficiaries want), and virtual representation which allows those agreements to apply to other individuals (such as minors) who do not have a materially different position from the representative. It also removes the requirement for court approval to dissolve small trusts, which again recognizes the usefulness of provisions allowing for non-judicial settlements (to determine how to distribute the trust) and virtual representation. These provisions reduce the cost to the trust and its beneficiaries.

Qualified Dispositions, Decanting and Extended Term Trusts will provide Mississippi with creative laws which may attract more trust business to the state. This results in assets staying or being moved to Mississippi rather than neighboring states.

The update to Mississippi's trust law would bring Mississippi in line with more trust friendly states and provide Mississippians local options for estate planning. Because trusts are easily located in any jurisdiction, Mississippi loses investment opportunities by forcing its citizens to look to other states for estate planning.