



LOUISIANA STATE LAW INSTITUTE

PAUL M. HEBERT LAW CENTER, ROOM W127

UNIVERSITY STATION

BATON ROUGE, LA 70803-1016

OFFICE OF
THE DIRECTOR
(225) 578-0200

FAX: (225) 578-0211

EMAIL: LAWINSTITUTE@LSLI.ORG

December 22, 2014

Representative Charles "Chuck" Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, LA 70804

RE: HCR 168 of 2013

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2013 House Concurrent Resolution No. 168, relative to trusts survey.

Sincerely,


William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Neil C. Abramson

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
TRUST CODE COMMITTEE**

**REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO HCR NO. 168
OF THE 2013 REGULAR SESSION
(TRUSTS SURVEY)**

**December 22, 2014
Baton Rouge, Louisiana**

**Ronald J. Scalise Jr., Reporter
Thomas B. Lemann, Secretary
Claire Popovich, Staff Attorney**

Trust Code Committee

Hirschel T. Abbott, Jr.	New Orleans
Marguerite “Peggy” Adams	New Orleans
John C. Blackman, IV	Baton Rouge
Sidney M. Blitzler, Jr.	Baton Rouge
Miriam Wogan Henry	New Orleans
F. A. Little, Jr.	Alexandria
Edward F. Martin	New Orleans
Joel A. Mendler	New Orleans
Joseph W. Mengis	Baton Rouge
J. Edgerton Pierson	Shreveport
Charlotte K. Ray	Baton Rouge
H. Brenner Sadler	Alexandria
Cynthia A. Samuel	New Orleans
Kenneth A. Weiss	New Orleans

Ronald J. Scalise Jr., Reporter
Thomas B. Lemann, Secretary
Claire Popovich, Staff Attorney

Regular Session, 2013

HOUSE CONCURRENT RESOLUTION NO. 168

BY REPRESENTATIVE ABRAMSON

A CONCURRENT RESOLUTION

To authorize and direct the Louisiana State Law Institute to study and make recommendations relative to the Trust Code and current trust industry practices and the needs of Louisiana citizens and to report its findings and recommendations to the Louisiana Legislature no later than January 1, 2015.

WHEREAS, Louisiana's Trust Code governs the requirements for trusts in Louisiana;

and

WHEREAS, Louisiana citizens continue to become more mobile and commerce continues to increasingly cross state lines; and

WHEREAS, in recent years other states have enacted trust laws that provide features and functions that address the increasingly complex needs of those who use trusts, and Louisiana citizens may be going to other states to establish trusts to avail themselves of other states' trust laws thereby causing a loss of trust business and potential loss of assets in Louisiana; and

WHEREAS, there is a need to examine Louisiana's Trust Code to study and consider whether new provisions adopted in other states should be adopted in Louisiana so that Louisiana's trust laws address current trust industry practices and the needs of Louisiana citizens.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby authorize and direct the Louisiana State Law Institute to study and review the Louisiana Trust Code and to make a determination as to whether it should be amended to provide for asset protection trusts, silent trusts, directed trusts, and any other types of trusts that have been adopted

in other states that could be helpful to Louisiana citizens.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall report its findings and recommendations to the Louisiana Legislature on or before January 1, 2015.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

REPORT TO THE LOUISIANA LEGISLATURE IN RESPONSE TO HCR NO. 168 OF THE 2013 REGULAR SESSION (TRUST SURVEY)

House Concurrent Resolution 168 (2013) expresses the view that “there is need to examine Louisiana’s Trust Code to study and consider whether new provisions in other states [should] be adopted in Louisiana so that Louisiana’s trust laws [can] address current industry practices and the needs of Louisiana citizens.” Specifically, the Resolution asks the Law Institute to “make a determination as to whether [the Louisiana Trust Code] should be amended to provide for asset protection trusts, silent trusts, directed trusts, and any other types of trusts that have been adopted in other states that could be helpful to Louisiana’s citizens.” This report considers each of these topics.

In brief, the Louisiana State Law Institute recommends against amending Louisiana law to accommodate either asset protection trusts or silent trusts. Several features of directed trusts, however, may benefit Louisiana residents, and the Law Institute recommends a limited modification of Louisiana law to accommodate some of the beneficial features of the directed trust through the concept of independent trustees. The Law Institute also makes a series of other recommendations for the modification of Louisiana law that “could be helpful to Louisiana’s citizens,” namely expansion of the concept of the class trusts, broadening of the settlor’s ability to delegate the right to modify, facilitation of a trustee’s ability to terminate certain uneconomic trusts, allowance of certain income-only trusts to operate as unitrusts, clarification of the trustee’s ability to delegate certain duties, and acceptance of so-called animal trusts.

I. Asset Protection Trusts

The term “asset protection trusts” (APTs) refers to a variety of trust arrangements by which a settlor’s assets are insulated from creditors. Although many—perhaps all—American states allow for “spendthrift” provisions by which a beneficiary can be precluded from voluntarily or involuntarily alienating his interest in a trust,¹ far fewer states allow for settlors to set up such trusts and name themselves as beneficiaries. Such trusts, sometimes referred to as self-settled asset protection trusts (SSAPTs), were originally limited to the world of exotic and offshore island jurisdictions,² many of which legalized SSAPTs in the 1980s.³ While some foreign jurisdictions, such as the Cayman

¹ Although allowable in the United States, spendthrift trusts are generally not allowable in the United Kingdom, see, e.g., HELENE S. SHAPO, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT, *BOGERT’S TRUSTS AND TRUSTEES* § 221 (2014). Somewhat similar effects, however, can be achieved through the use of a protective trust, which is allowable by statute. *See id.*

² Foreign jurisdictions allowing SSAPTs include: Anguilla, Antigua, the Bahamas, Barbados, Belize, Bermuda, the Cayman Islands, the Cook Islands, Cyprus, Gibraltar, Labuan, the Marshall Islands, Mauritius, Nevis, Niue, St. Vincent and the Grenadines, Seychelles, and the Turks and Caicos Islands.

³ Robert H. Sitkoff and Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *YALE L.J.* 356 (2005).

Islands, offer low tax rates and secrecy for potential settlers, others, such as the Cook Islands, generally disregard foreign court judgments and thus offer settlers almost unparalleled insulation from judgment creditors.⁴ For a variety of reasons, foreign SSAPTs have become an attractive option for certain wealthy settlers.

Unquestionably, the primary purpose of an APT is to “shelter assets from the claims of the settlor’s future creditors.”⁵ Proponents of APTs claim that an APT is a method by which an individual, often a professional such as a doctor, lawyer, or businessman, can protect his hard-earned assets from the unpredictable vicissitudes of the American litigation system. Opponents, however, argue that an APT shelters assets from lawful creditors, is an abuse of the trust device, and has historically been considered as violative of public policy, if not outright illegal.

A. *Domestic Asset Protection Trusts (DAPTs)*

After observing the popularity of foreign APTs, Alaska in 1997 became the first state to pioneer the territory of domestic asset protection trusts (DAPTs)—a spendthrift trust set up in the United States under which the settlor is a beneficiary. Far from being marketable only to Alaska residents, the Alaskan DAPT has become very popular for out-of-state residents and can be established by anyone, provided the trust is irrevocable, has an Alaskan trustee, is governed by Alaskan law, and the trust assets (such as financial accounts) are located within Alaska.⁶ Once the Alaskan self-settled DAPT is established, the settlor is allowed to benefit from the trust, but the trust assets are exempt from the claims of his creditors, except for certain claims arising from tort, divorce, or child support. Alaskan law does, however, preclude a settlor from transferring assets with the intent to defraud existing creditors and requires a settlor to execute an affidavit of solvency before a transfer to the trust.

Since 1997, fourteen other states have followed Alaska: Delaware, Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, and Wyoming.⁷ In the ensuing years, a fierce competition among these states for trust funds has occurred, with many states attempting to attract trust funds from states that do not recognize DAPTs. Although anecdotal evidence may suggest that trust funds migrate from jurisdictions that do not allow DAPTs to those that do, little statistical evidence exists to support this belief.⁸ One such extreme

⁴ Leslie Wayne, *Cook Islands, A Paradise of Untouchable Assets*, NY Times (Dec. 14, 2013).

⁵ Kenneth L. Jordan, *Domestic Asset Protection Trusts 2* (Morgan Stanley 2012).

⁶ ALASKA STAT. ANN. § 34.40.110 & 13.36.035.

⁷ DEL. CODE ANN. tit. 12, §§ 3570-3576; HAWAII REV. STAT. ANN. § 554-G8; MISS. CODE ANN. §§ 91-9-701—91-9-723; MO. REV. STAT. §§ 456.5-505; NEV. REV. STAT. §§ 166.010-166.170; N.H. REV. STAT. ANN. § 564-D:1-18; OHIO REV. CODE ANN. § 5816.01-5816.14; OKLA. STAT. tit. 31 § 11, et seq.; R.I. GEN. LAWS §§ 18-9.2-1 - 18-9.2-7; S.D. COD. LAWS §§ 55-16-1 - 55-16-17; TENN. CODE ANN. § 35-16-101; UTAH CODE ANN. § 25-6-14; VA. CODE §§ 64.2-745.1 & 64.2-745.2; WYO. STAT. §§ 4-10-504 & 4-10-506(c).

⁸ Robert H. Sitkoff and Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis*

example is Tennessee, which enacted the Tennessee Investment Services Act in 2007, partly in an attempt to attract trust funds from outside the state. Among other things, the Tennessee act allows for the creation of self-settled DAPTs, provided the trust is governed by Tennessee law, is irrevocable, contains a spendthrift clause, and appoints a “qualified trustee.”⁹ Moreover, the settlor must execute an affidavit of solvency.¹⁰ Surprisingly, the settlor is allowed to obtain the protection of the Tennessee self-settled DAPT law, while at the same time retaining a very large amount of control over important decisions of the trust. For example, a settlor may (1) veto trust distributions; (2) have a power of appointment; (3) direct investment of trust assets; (4) receive income or principal from a charitable remainder trust; (5) receive up to 5% of the trust each year; (6) receive trust principal under an ascertainable standard in the trustee’s discretion for health, education, support, or maintenance; and (7) remove a trustee or advisor.¹¹

Moreover, the Tennessee DAPT contains one of the strongest protections from creditors of the DAPT jurisdictions. In Tennessee, the DAPT is immune from tort creditors and until recently was immune from claims of child support and those relating to divorce.¹² In the event that a judgment from another state declines to give effect to Tennessee’s DAPT statute, the statute provides that “the trustee of the trust shall immediately upon the court’s action and without the further order of any court, cease in all respects to be trustee of the trust and ... the trustee shall have no power or authority other than to convey the trust property to the successor trustee named in the trust in accordance with this section.”¹³ This forced resignation process for trustees would presumably continue for all successor trustees and thus frustrate any attempt to enforce a judgment against the DAPT.

Most recently, Mississippi has adopted (effective July 1, 2014) provisions allowing for DAPTs.¹⁴ The Mississippi statute is modeled on the Tennessee statute,

of Perpetuities and Taxes, 115 YALE L.J. 356, 411-412 (2005) (not finding consistent movement of trust funds to states that have adopted domestic asset protection trusts). On the other hand, strong empirical evidence does suggest that trust funds migrate not necessarily because of the existence of DAPT legislation but because some states allow for dynasty trusts that are essentially exempt from fiduciary taxes. *Id.* (finding movements of trust funds to states that both abolished the rule against perpetuities and levied no state income tax on trust funds). In fact, a study conducted in 2003 suggests that abolishing both the income tax and the rule against perpetuities tended to attract \$6 billion to a state. *Id.*

⁹ TENN. CODE ANN. § 35-16-102(7).

¹⁰ *Id.* § 35-16-103.

¹¹ *Id.* § 35-16-111.

¹² *Id.* § 35-16-104, *as amended*, by 2008 Tenn. Laws Pub. Ch. 1010 (H.B. 2888). Nevada remains the only state with no exception for spousal and child support creditors. *See, e.g.*, NEV. REV. STAT. § 166.120 (stating that the whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from any and all obligations of the beneficiary whatsoever and of all responsibility therefor). For a useful discussion of the policy implications of asset protection trusts in the context of child support claims, see Trent Maxwell, *Domestic Asset Protection Trusts: A Threat to Child Support?*, 2014 BYUL. REV. 477 (2014).

¹³ TENN. CODE ANN. § 35-16-104.

¹⁴ MISS. CODE § 91-9-701.

although it includes several features that are likely to make it unattractive to settlors from either inside or outside of Mississippi. Specifically, the Mississippi statute requires that the settlor obtain a general or professional liability policy in the amount of \$1 million, and Mississippi law retains both a state income tax, which would be applicable to trust income, as well as a traditional common law rule against perpetuities.

With a number of states now allowing for the creation of DAPTs, potential settlors have a number of variations and options from which to choose. Although no one state statute can be viewed as typical, many states have adopted DAPT statutes very similar to Alaska's statute. In addition, many states have eliminated other legal barriers that might have otherwise discouraged the migration of trust funds. The following are common modifications in state law often done in conjunction with the enactment of a DAPT statute:

- eliminating the state income tax applicable to trust funds, at least with respect to non-residents;
- eliminating the rule against perpetuities for funds in trust, or functionally doing so by providing a vesting period of 360 or 1000 years;
- significantly reducing the applicable statute of limitations period for pre-existing creditors to attack transfers made to the trust (usually to some period between six months and four years);
- significantly reducing the applicable statute of limitations period for future creditors to attack transfers made to the trust (usually to some period between 1.5 months and four years); and
- providing for little to no access to the trust funds by creditors of the settlor, except in cases of child support and divorce and, in rare instances, certain tort claims.

B. Uncertainties Surrounding DAPTs

Despite the increasing popularity of self-settled DAPTs, a number of legal uncertainties surrounding them exist concerning the effectiveness of a DAPT in face of a judgment by a federal court or a state court in a jurisdiction not recognizing the DAPT.¹⁵ Because only a minority of jurisdictions recognize DAPTs, a settlor who creates such a trust runs the risk that he might be subject to a court judgment, e.g., a tort judgment, in a state that does not recognize DAPTs and which is hostile to the settlor's DAPT. Such a judgment would be enforceable even in the state where the settlor's DAPT was created, given the dictates of Article V of the U.S. Constitution, which states that "[f]ull faith and

¹⁵ Although little to no reported litigation exists on DAPTs, some reported cases do exist on foreign SSAPTs. *See, e.g.,* FTC v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999) (affirming a district court's order holding the settlors of a SSAPT in the Cook Islands, who had been involved in a Ponzi scheme, to be in contempt of court for refusing to repatriate the trust property.)

credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”¹⁶ Although a judgment rendered against a settlor is not usually enforceable against a trustee, a court in one state may conclude that the trust entity should be pierced or disregarded, given the controversial and unconventional nature of the DAPT device. Moreover, a judgment creditor would most likely pursue both the settlor and trustee by alleging that the settlor fraudulently transferred assets to the trust, thus allowing for a state court judgment potentially to be enforced even against the trustee.

In situations involving federal jurisdiction, such as bankruptcy, the Supremacy clause to the U.S. Constitution may create a further stumbling block to DAPTs, as a federal court order to access funds of a DAPT would have to be enforced even in the state under which a DAPT was created. Moreover, federal bankruptcy law allows a trustee in bankruptcy to avoid transfers to self-settled trusts that were fraudulently made and made within ten years of the filing for bankruptcy.¹⁷ Thus, DAPTs are even more likely to be disregarded in the face of a conflicting federal law or federal court judgment than in face of conflicting state law or judgment.

C. DAPTs under Louisiana Law?

Whatever uncertainties exist with respect to self-settled DAPTs, Louisiana law unquestionably prohibits them. Section 2002 of the Louisiana Trust Code allows for the existence of spendthrift trusts precluding the voluntary or involuntary alienation of trust assets, but Section 2004 allows a creditor to seize an interest in a spendthrift trust “to the extent that the beneficiary has donated property to the trust, directly or indirectly.”¹⁸ If DAPTs were allowed in Louisiana, the above provisions, at a minimum, would have to be amended.

Given the uncertainty of the legality of DAPTs and the questionable public policies furthered by them, the benefits to be derived from adopting a DAPT in Louisiana are unclear. Nevertheless, there appear to be two predominant reasons often suggested for adopting DAPT legislation. The first is to make the self-settled DAPTs attractive to out-of-state trust funds. The second is to benefit Louisiana settlors and to keep Louisiana trust funds from flowing out-of-state to jurisdictions allowing for DAPTs.

To attract out-of-state funds, however, it is clear that Louisiana would have to do much more than merely adopt a DAPT statute. Because Louisiana has never had a rule against perpetuities, as other states have, Louisiana adopted certain rules for the

¹⁶ U.S. CONST. ART. V. § 1.

¹⁷ 2005 Bankruptcy Abuse Prevention and Consumer Protection Act § 548(e); *see also* *Battley v. Mortensen*, Adv. D.Alaska, No. A09-90036-DMD, May 26, 2011 (holding that an Alaskan DAPT did not shield the assets of an insolvent settlor when assets were transferred at least ten years prior to the date of the trust and when the settlor’s purpose in transferring his assets to the trust was to protect the trust assets from creditors of the settlor).

¹⁸ R.S. 9: 2002 & 2004.

maximum duration of both ordinary trusts and class trusts. These rules are unknown outside of Louisiana and would need to be radically rewritten, as current class trust law allows for a trust with a maximum duration of only three generations of the settlor's family. In some jurisdictions that allow for DAPTs, the duration may be perpetual or in other states, essentially perpetual, e.g., 1000 years.¹⁹ Moreover, to successfully attract trust funds, studies suggest that Louisiana would likely have to repeal its fiduciary income tax law as well.²⁰ Louisiana would undoubtedly also have to address and revise its prohibition on deferred vesting as well as its laws on fraudulent transfers (known as the revocatory and oblique actions in Louisiana) and prescriptive periods for creditors.²¹ Given the above, adoption of a DAPT statute in Louisiana solely for the purpose of attracting out-of-state trust funds would likely be an unsuccessful endeavor.

The second reason often suggested for adopting a DAPT law is to retain trust funds within the state and to prevent them from migrating to an out-of-state DAPT jurisdiction simply to achieve the benefits not otherwise available in-state. Although the desire to retain Louisiana trust funds within Louisiana is a laudable one, it is doubtful that mere adoption of a Louisiana DAPT statute would do so. In the experience of the members of the Trust Code Committee, there are not presently large numbers of Louisiana clients demanding or desiring the use of DAPTs. Even if large numbers of Louisiana clients did desire the use of a DAPT to help insulate them from liability, authorizing DAPTs in Louisiana would not be sufficient to stem the flow of trust funds from Louisiana to more favorable jurisdictions. For many of the reasons stated above regarding taxes, trust duration, and prescription, other states (such as Tennessee, Nevada, and Delaware) clearly have more established and more advantageous laws, and Louisiana settlors would be ill-advised simply to establish trusts under Louisiana law rather than in a state with more favorable laws. In fact, popular sites and publications annually rank states with DAPT laws to indicate which states' laws are most favorable to settlors.²² These rankings employ a multi-factor weighted approach, taking into account tax liability, degree of insulation of trust funds from creditors, ability of a trustee to decant to another state, and many other factors.²³ Moreover, given the uncertainty with regard to the enforceability of DAPTs, a Louisiana settlor wanting to set up an APT may be better served by moving the trust property outside of the United States altogether and pursuing a foreign SSAPT, which is better insulated from the jurisdiction of courts in the United States.

In conclusion, the Law Institute recommends no change to the Louisiana Trust Law on the issue of Asset Protection Trusts. The policies underlying APT legislation are

¹⁹ See, e.g., Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. ____ (2014) (forthcoming) (questioning the constitutionality of perpetual trusts under various state laws).

²⁰ R.S. 47:181 et seq. See also Sitkoff and Schanzenbach, *supra* note 9, at 410 (finding that states that abolished the rule against perpetuities but maintained a fiduciary tax experienced no attraction of out-of-state funds).

²¹ C.C. arts. 2036-2043.

²² http://www.oshins.com/images/DAPT_Rankings.pdf.

²³ *Id.*

controversial at best, and the effectiveness of DAPT legislation is largely untested. Adoption of DAPT legislation in Louisiana would also likely be ineffective in either retaining existing trust funds in Louisiana or attracting out-of-state trust funds, as states that have successfully done so have enacted DAPT laws as one small piece of a large legislative reform to a variety of areas of the law that the Trust Code Committee believes would be inadvisable to alter.

II. Directed Trusts

Directed trusts can be defined as trusts in which the settlor grants a third person the power to direct certain actions of the trustee, such as distribution and investment. Sometimes this third person is known as a “trust advisor;” if broad powers have been granted, however, these individuals are often known as “trust protectors.” The Uniform Trust Code explains, “‘Advisers’ have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. ‘Trust protector,’ a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust.”²⁴

Although the Louisiana Trust Code currently allows the trustee to delegate certain limited investment and ministerial functions to a third party, it is silent on the ability of the settlor to provide for such functions in someone other than the trustee. Moreover, the Louisiana Trust Code is clear that when a trustee delegates certain investment decisions, the trustee is still under the obligation to use prudence in selecting an investment advisor, establishing the scope and the terms of the delegation, and in monitoring the advisor’s actions.²⁵

Apart for the authority of a trustee to *delegate* certain trust functions, both the Restatement (Second) of Trusts and the Uniform Trust Code allow for the trust instrument to designate a person to *direct* the trustee in certain circumstances. Specifically, section 185 of the Restatement (Second) of Trusts and Section 808(b) of the Uniform Trust Code, to different extents, allow for the trust instrument to create the office of trust advisor in a person who is not the trustee.²⁶ It has been suggested that “directed trusts” might be a useful tool for settlors who fund trusts with closely-held companies and want to restrain a trustee’s ability to diversify or interfere with the closely-held business.²⁷ Other settlors may “have a special relationship with an investment manager other than the corporate fiduciary” and may want to preserve that role without imposing upon the investment manager all the obligations of a general

²⁴ UTC § 808 cmt.

²⁵ See, e.g., R.S. 9:2087.

²⁶ RESTATEMENT (SECOND) OF TRUSTS § 185; UTC § 808(b).

²⁷ David A. Diamond & Todd A. Flubacher, *The Trustee’s Role in Directed Trusts*, 149 TRUSTS & ESTATES 24 (2010).

trustee.²⁸ For a variety of reasons, then, it may be beneficial to segregate certain trustee functions in one person and other functions in another. After further study, however, the Law Institute decided that many of the functions of a trust advisor could be incorporated into Louisiana law by explicitly segregating the rights and responsibilities of multiple trustees, without creating the new office of trust “advisor” or “director.” This approach is pursued below and in accompanying legislation.

A. *Directed Trusts in Other States*

Most states that allow for trust directors are faced with two fundamental questions: whether the trust director has fiduciary responsibilities similar to a trustee and what duties and responsibilities trustees have in cases where trust directors have been appointed. After review of all of the relevant directed trust statutes, the Committee ascertained that the common approach for states with directed trust statutes is to re-create fiduciary duties similar to a trustee for the trust director. There is no consensus, however, as to what liability a trustee may have when a trust director has been appointed.

Both the Restatement (Second) of Trusts and the Uniform Trust Code create fiduciary duties for trust directors. Comment (c) to Section 185 of the Restatement (Second) of Trusts states that “[i]f the power is for the benefit of someone other than the holder of the power, the holder of the power is subject to a fiduciary duty in the exercise of the power. In such a case the trustee is under a duty similar to his duty with respect to the action of a co-trustee.”²⁹ Similarly, the Uniform Trust Code provides that “[a] person other than a beneficiary who holds a power to direct is rebuttably presumed to be a fiduciary and is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.”³⁰

Recently, Illinois enacted a new statute, effective January 1, 2013, which allows for the creation of “directing parties” with respect to certain investment and distribution decisions. As with the Restatement and the Uniform Trust Code, Illinois law provides that “directing parties” are deemed, themselves, to be fiduciaries of the trust.³¹ Similarly, Tennessee law provides that a “person who holds a power to [direct]...other than a beneficiary...is a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.”³²

With respect to the responsibilities of trustees after the appointment of a trust director, both the Restatement and the Uniform Trust Code continue to impose some

²⁸ *Id.* at 25.

²⁹ RESTATEMENT (SECOND) OF TRUSTS § 185 CMT (C).

³⁰ UTC 808(D).

³¹ ILLINOIS PUBLIC ACT 097-0921.

³² TENN. CODE §35-15-808(d).

obligations upon the trustee in monitoring the actions of the trust advisor. For example, the Restatement provides as follows:

If under the terms of the trust a person has the power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.³³

Only two states—Iowa and Indiana—have adopted statutes based upon the Restatement.³⁴

Similar to the Restatement, section 808(b) of the Uniform Trust Code maintains some obligations upon the trustee but fewer than those provided in the Restatement:

If the terms of the trust confer upon a person other than the settlors of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.³⁵

About eighteen states have adopted statutes similar to the Restatement and require the trustee to comply with the instructions of the trust director “unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty.”³⁶

A third approach, pioneered by Delaware, exonerates the trustee from any responsibility due to following the instructions of a trust director, unless the trustee commits actions of “willful misconduct.”³⁷ In relevant part, the Delaware statute provides as follows:

If a governing instrument provides that a fiduciary is to follow the direction of an advisor, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.³⁸

³³ RESTATEMENT (SECOND) OF TRUSTS § 185. *See also* RESTATEMENT (THIRD) OF TRUSTS § 75.

³⁴ IND. CODE § 30-4-3-9; IOWA CODE § 633A.4207. *See also* Richard W. Nenno, *Directed Trusts: Making Them Work*, ESTATES, GIFTS, AND TRUST JOURNAL (2013).

³⁵ UTC § 808(b).

³⁶ Nenno, *supra* note 34, at 3.

³⁷ 12 Del. C. § 3313.

³⁸ *Id.*

Approximately four states have statutes modeled on the Delaware approach.³⁹

Finally, a survey by the Reporter indicates that about ten states allow for directed trusts in which the trustee has no oversight responsibility or liability for the actions of the trust advisor or director.⁴⁰ For example, Mississippi enacted a new trust statute, effective July 1, 2014, that allows for the existence of directed trusts through the offices of trust advisors or trust protectors.⁴¹ As with other states, Mississippi law relieves the trustee of liability for reviewing the actions of the advisor or protector, communicating with or warning beneficiaries, and following the instructions of the advisor or protector.⁴²

B. Adoption of the Concept of Independent Trustees in Louisiana to Achieve Some of the Benefits of Directed Trusts

Rather than create a new office of a trust director and then impose upon the director the fiduciary obligations of the trustee, the Law Institute recommends legislation enacting a new provision of the Trust Code, proposed R.S. 9:2114.1, that allows for a settlor to establish two independent trustees:

A trust instrument may confer different powers upon different trustees in which case each trustee acts independently with respect to those powers conferred upon him. As to powers not conferred upon him, he shall have no duties or liabilities as to the actions or inactions of the other trustees.

In recommending the above provision, many of the benefits of a directed trust are achieved without adding additional layers of complexity to Louisiana trust law. For example, under proposed R.S. 9:2114.1, one trustee could be designated as the trustee for investment decisions and another for distributions and general administration. It is notable that proposed R.S. 9:2114.1 follows the permissive approach of states that impose no liability upon a trustee for following the instructions of a trust director. Similarly, proposed R.S. 9:2114.1 imposes no liability upon a trustee who has been granted powers by a settlor that are separate and different from other trustees. If a settlor desires multiple trustees to have responsibilities for the conduct of each other, then the

³⁹ See, e.g., COLO. REV. STAT. ANN. § 15-16-807(1); 760 ILL. COMP. STAT. § 5/16.3; N.C. GEN. STAT. § 36C-8A-4(a) (requiring “intentional misconduct”); S.C. CODE § 62-7-1005A(B) (requiring “willful misconduct or gross negligence”).

⁴⁰ See, e.g., GA. CODE § 53-12-194(b),(c) (providing that a trustee is “liable, if at all, only as a ministerial agent and shall not be liable as a trustee or cotrustee for any loss resulting from the making or retention of any investment pursuant to authorized direction”); IDAHO CODE § 15-7-501; MISS. CODE § 91-8-1204; NEV. REV. STAT. § 163.5549; N.H. REV. STAT. §§ 564-B:12-1204 & 564-B:12-1207; OHIO REV. CODE § 5815.25; OKLA. STAT. tit. 60, § 175.19 (holding a trustee liable only for “negligen[ce] in carrying out the execution of the directed investment or other directed action”); S.D. CODIFIED LAWS § 55-1B-2 & §55-1B-5; TENN. CODE §§ 35-3-122 & -123 & 35-15-1205.

⁴¹ MISS. STAT. § 91-8-1201.

⁴² MISS. STAT. §§ 91-8-1204.

settlor can either provide so in the trust instrument or designate them as co-trustees and allocate the same powers to both, in which case both would be required to use “reasonable care to prevent a co-trustee from committing a breach of trust and shall compel him to redress a breach of trust.”⁴³

In conclusion, the Law Institute believes that the concept of directed trusts has benefits that could be accommodated and incorporated into Louisiana law. The proposal of independent trustees, it is believed, achieves many of those benefits, while at the same time providing the least invasive revision to existing Louisiana law. Nonetheless, the Reporter and the Trust Code Committee will continue to monitor national developments, specifically those concerning directed trusts, to see if the concept should be reconsidered at a later time.

III. Silent Trusts

A silent or quiet trust is an irrevocable trust that precludes the trustee from notifying the beneficiaries of the existence of the trust or to provide any information regarding the trust, usually until the beneficiaries reach a certain age. The purpose of a silent or quiet trust is to allow a settlor to receive the benefits of creating the trust but to prevent the risk that might exist from a beneficiary who is not mature or old enough to appropriately appreciate his status. A beneficiary who is too young or profligate may treat his status as a beneficiary as a reason not to work or pursue an education. (Obviously, a trustee would be required to accumulate income and not make distributions to certain beneficiaries during the silent period of the trust.) The interest in and existence of silent or quiet trusts is on the rise, even though they are a clear deviation from the traditional view of the trust arrangement and the trustees responsibilities.⁴⁴

The rise of silent trusts can be traced to the promulgation of the Uniform Trust Code in 2000, which allowed trustees not to inform certain beneficiaries. Specifically, Section 813 of the UTC requires only “qualified beneficiaries,” who are defined as “current recipients of trust income or principal,” to be informed of the trust and its performance. However, section 105(b) allows the settlor to waive the duty to provide certain information even to qualified beneficiaries until they “have attained 25 years of age.”⁴⁵

A. *The Existence or Allowance of Silent Trusts in the Various States*

⁴³ R.S. 9:2096.

⁴⁴ See, e.g., J.P. Morgan, *Drafting a Silent Trust: Ten Ideas for Avoiding Complications that May Arise from Limiting a Trustee’s Duty to Inform* (2012); Kelley Greene, *Can You Trust Your Kid With \$5.25 Million?* WALL STREET JOURNAL (Jan. 18, 2013).

⁴⁵ UTC § 105(b).

Although silent trusts are becoming increasingly popular, their existence and use has met with some challenges. First, many states implicitly allow for the existence of silent trusts simply because their trust law does not obviously preclude them. That is, under many state statutes, settlors have broad and generic authority to restrict or limit a trustee's duty to inform beneficiaries.⁴⁶ For example, Virginia law provides that "[t]he terms of a trust prevail over any provision of this chapter."⁴⁷ Although Virginia law does provide a very limited list of mandatory duties that cannot be varied, the trustee's obligation to inform and account to beneficiaries is not among the duties on that list.⁴⁸ Similarly, Tennessee law provides, as a default rule, that a trustee "shall keep the beneficiaries of the trust who are current, mandatory or permissible distributees of trust income or principal, or both, reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." In a subsequent provision, however, the law allows for the trust instrument to waive the obligation to inform beneficiaries: "Subsections (a) and (b) shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust, or a trust protector or trust advisor ... holds the power to so direct, directs otherwise in a writing delivered to the trustee."

A number of states, however, expressly allow for the existence of silent trusts by virtue of a statute.⁴⁹ South Dakota, for example, provides that "[t]he settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee ... eliminate ... the rights of beneficiaries to information relating to a trust."⁵⁰ Delaware law provides similarly in allowing the trust instrument to "eliminate ... any laws of general application to fiduciaries, ... including, but not limited to, [the beneficiary's] right to be informed of the beneficiary's interest for a period of time."⁵¹

Some statutes are drafted more narrowly and allow a settlor to restrict a trustee's duty to inform only for a finite period of time, most usually until the beneficiary reaches 25 years of age. Maine allows a settlor to restrict information provided by a trustee to a beneficiary until the beneficiary reaches the age of 21: "The terms of the trust prevail, ... except ... the duty of a trustee of an irrevocable trust to notify each permissible distributee who has attained the age of twenty-one years of the existence of the trust and

⁴⁶ ARK. CODE ANN. § 28-73-105; FL. STAT. ANN. § 736.0306; KAN. STAT. ANN. 58A-813(B); MI. CONS. LAW ANN. § 700.7105(I); MISS. CODE § 91-8-81(C); NEB. REV. STAT. § 30-3805(B)(8); NEV. REV. STAT. 165.135; N. H. REV. STAT. § 564-B:1-105; N.C. GEN. STAT. ANN. § 36C-8-105; N.D. CENT. CODE § 59-09-05; 60 OKL. ST. ANN. § 175.21; S.C. CODE 1976 §§ 62-7-813(A), (B), (C); TENN. CODE ANN. § 35-15-105; 14A VT. STAT. ANN. § 105; VIRG. CODE ANN. § 64.2-703; WYO. STAT. 1997 § 4-10-813.

⁴⁷ VA. CODE ANN. § 64.2-703(B).

⁴⁸ *Id.* at § 64.2-703(B).

⁴⁹ ALA. STAT. § 13.36.080(B); ARIZ. REV. STAT. § 14-10105(B); D.C. STAT. § 19-1308.13; 12 DEL. C. § 3303(A); 18-B ME. REV. STAT. ANN. § 105(3); MO. STAT. §§ 456.1-105(2)(8), (9); N. MEX. STAT. 1978, § 46A-1-105B(8); OHIO. REV. CODE § 5801.04(C); OR. REV. STAT. § 130.020(3)(B); S. D. CODE §§ 55-2-13, 55-2-14; TEX. CODE ANN. § 111.0035(B)(4); UTAH CODE ANN. 1953 § 75-7-811.

⁵⁰ S. D. CODE §§ 55-2-13

⁵¹ 12 DEL. C. § 3303(A).

of that permissible distributee's rights to request trustee's reports and other information reasonably related to the administration of the trust."⁵²

About five states, however, tie the limit for the silent trust to the incapacity of the settlor or the settlor's spouse, presumably in an attempt to allow the settlor to have some involvement with the beneficiary's development and maturation while he is alive. For example, Alaska law states as follows:

The settlor of a trust may exempt a trustee from the duties under (a) of this section to provide notification or information regarding the trust to a beneficiary who is not entitled to a mandatory distribution of income or principal from the trust on an annual or more frequent basis.... The exemption may not exceed in duration the shorter of the settlor's lifetime or a judicial determination of the settlor's incapacity.⁵³

A small handful of states expressly preclude the existence of the silent trust. Nebraska law, for instance, provides that a trust instrument may not vary the trustee's obligation to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust."⁵⁴

B. The Challenges Involved in Using Silent Trusts

Despite the rise in the interest in silent trusts, many challenges exist with respect to their use. First, the very idea of the trustee keeping a trust secret from the beneficiary seems antithetical to the foundational notion of the trust, in which the trustee owes a duty of loyalty to the beneficiaries. Some states allow a representative of the beneficiary or a surrogate to receive information and accountings from the trustee so as to provide some check on the trustee's actions.⁵⁵ For example, Pennsylvania law provides that "[t]he settlor of a trust may in the trust instrument appoint one or more persons or a succession of persons to receive, on behalf of one or more named current beneficiaries of the trust, the notices required by this section."⁵⁶

Second, despite a trustee's best efforts, a beneficiary of a silent trust may learn of the existence of the trust and of his status from other beneficiaries or from parties other

⁵² ME. STAT. ANN. § 456.1-105.

⁵³ ALASKA STAT. ANN. § 13.36.080.

⁵⁴ NEB. REV. ST. § 30-3805.

⁵⁵ D.C. CODE ANN. § 19-1301.05(C)(3); ME. REV. STAT. ANN. TIT. 18-B, § 105(3)(B); MO. STAT. ANN. § 456.1-105(3); OHIO REV. CODE ANN. § 5801.04(C); OR. REV. STAT. § 130.020(3).

⁵⁶ 20 PA. CONS. STAT. ANN. § 7780.3(k).

than the trustee. In these cases, the trustee may be faced with the difficult situation of responding to an inquiry from a beneficiary as to his status and to the existence of the trust.

Third and finally, in the many states without specific termination dates on silent trusts, silent trusts run the risk of never coming out of the silent phase. If the triggering event is the beneficiary achieving a certain financial stability or state of maturity, these events may never occur. Clear triggering events apart from the trustee's discretion prevent a trustee from being faced with the difficult decision of whether and when a disclosure should be made to a beneficiary.

C. *Silent Trusts Under Louisiana Law?*

Although Louisiana law does not specifically address the idea of the silent trust, its existence is clearly precluded because of the mandatory nature of the trustee's duty to inform beneficiaries. Section 2089 requires a trustee to provide a beneficiary "upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property" and permit him to inspect the trust, its accounts, and related documents.⁵⁷ The trustee's duty to furnish information is mandatory and cannot be waived by the settlor.⁵⁸ The jurisprudence is clear that "[i]f the trust has both income and principal beneficiaries, the trustee is obligated to render accounts to all."⁵⁹

Although a trustee's duty to provide information regarding the trust is triggered by a "request" of the beneficiary under Section 2089, a trustee's duty to render an accounting to the beneficiary is not so conditioned. Section 2088 of the Trust Code provides that "[a] trustee is under a duty to the beneficiary to keep and render clear and accurate accounts of the administration of the trust."⁶⁰ Only if the trust is revocable can the trustee render that accounting to the settlor, as opposed to the beneficiaries.⁶¹ In fact, Section 2089 states that "[a] trustee shall render to a beneficiary or his legal representative at least once a year a clear and accurate account covering his administration for the preceding year."⁶² The mandatory language of Section 2089 makes clear that this duty of the trustee is essential for the beneficiary's protection of his interest in the trust.

Although the Law Institute acknowledges that silent trusts may afford some benefits to a settlor and the beneficiaries, the collateral issues that they create, in the

⁵⁷ R.S. 9:2089.

⁵⁸ *Boyd v. Boyd*, 57 So.3d 1169, 1175 (La. Ct. App. 1st Cir. 2011) ("The Louisiana Trust Code at LSA-R.S. 9:2088 imposes a mandatory duty on the trustee to render annual accounts of the administration of the trust to the beneficiary.")

⁵⁹ *Id.* at 1175.

⁶⁰ *Id.* at § 2088.

⁶¹ *Id.*

⁶² *Id.*

opinion of the Law Institute, militate against adoption of this device. Moreover, the goal of nondisclosure of the existence of the trust to certain minor beneficiaries can already be obtained to some extent under existing law by the trustees providing accountings to the parent or tutor of the beneficiary.⁶³ Although the concept of an information surrogate under a silent trust solves one problem, it creates others.⁶⁴ For instance, if a trustee violates a fiduciary duty, is the information surrogate authorized to pursue a claim on behalf of a beneficiary? If so, can a beneficiary sue a surrogate for failing to do so? If not, how long does a beneficiary have to sue the trustee? What happens if the information surrogate declines or refuses appointment? Should the trust no longer be silent or should the court appoint another surrogate? If the beneficiary accidentally discovers the existence of the trust, does the trustee have an obligation to provide information to the beneficiary or must he refuse to disclose the existence of the trust? Moreover, in the context of a silent trust, how is a beneficiary to know of the existence or size of his interests for other legal purposes, such as estate tax purposes if he dies or preservation of income from the community if he marries. Finally, Louisiana law seems particularly ill-suited for silent trusts, given the interests of forced heirs whose legitimes can be placed in trust and who are, by definition, included within the class of young beneficiaries for whom silent trusts are often designed.

Even in states that have enacted silent trusts law, few, if any, of these questions have clear answers.⁶⁵ The above issues and the apparent lack of demand for silent trusts by Louisiana residents persuaded the Law Institute not to pursue this matter further and not to recommend any modification to Louisiana law.

IV. Other Amendments to the Trust Code that “Could be Helpful to Louisiana Citizens”

As part of the Law Institute’s obligation to make recommendations for improvements to the Louisiana Trust Code and in specific fulfillment of the request by HCR No. 168 of the 2013 regular session to consider “other types of trusts that have been adopted in other states that could be helpful to Louisiana’s citizens,” the Law Institute is, contemporaneously with this report, making a number of recommendations for reform and improvement of Louisiana trust law.

Specifically, the Law Institute believes that in the age of blended families and multiple marriages, Louisiana settlors could benefit from an expansion in the scope of the class trust. To that end, the Law Institute recommends amending R.S. 9:1891 to allow a settlor to create a class trust that includes certain defined relations of the settlor’s current,

⁶³ R.S. 9:2008.

⁶⁴ For a useful review of the challenges and approaches of various states to silent trusts and the challenges posed by silent trusts, see Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925 (2014).

⁶⁵ See *id.*

former, or predeceased spouse. This change, it is believed, will accord more with the preferences of settlors and allow for planning opportunities commonly used in other states.

In addition, the Law Institute recommends amendment of R.S. 9:2031 to allow for clarification and expansion of a settlor's ability in the trust instrument of a non-class trust to authorize a person to modify a trust to add beneficiaries not yet in being, provided the beneficiaries are in being at the time the power to add is exercised. In a class trust, the Law Institute recommends allowing use of the power to remove beneficiaries or modify their rights, but not to add beneficiaries. These amendments, it is believed, will increase the planning opportunities while at the same time limiting the rights of settlors within the bounds of public policy and not providing for the existence of perpetual trusts.

The Law Institute further recommends clarification of R.S. 9:2087, providing for the trustee's ability to delegate his duties. Although the Trust Code generally requires a trustee to personally discharge his responsibilities, the proposed revision clarifies that a trustee may delegate those duties that he "could not reasonably be required to perform personally and the performance of ministerial duties." In the latter case, it is now made clear that a trustee may by mandate authorize another person to "alienate, acquire, lease, or encumber specifically described property on specific terms."

Furthermore, the Law Institute proposes a series of amendments to the Trust Code that will enhance planning opportunities of Louisiana settlors and increase flexibility for Louisiana trusts. For example, the Law Institute recommends amendment of R.S. 9:2158 to allow an income-only trust to operate like a unitrust. This proposed change would allow trustees and beneficiaries of Louisiana trusts to achieve benefits similar to their counterparts from other states who often have the benefit of specific unitrust conversion statutes. In addition, the Law Institute recommends amendment of R.S. 9:1953, which will permit a beneficiary to exchange his interest in a charitable remainder trust for an annuity and to achieve a situation that may be mutually advantageous to the beneficiary and the charity. A modification to R.S. 9:2026 is also proposed to allow a trustee to terminate certain uneconomic trusts without having to obtain court approval, which can be a time-consuming and expensive process. Furthermore, the Law Institute is proposing a new article, R.S. 9:2047, modeled on a uniform statute and on provisions in place in other states, to provide for automatic revocation upon divorce of certain designations in inter vivos trusts of the settlor's former spouse. All of the above changes are consistent with national developments in trust law and will provide practical benefits to Louisiana residents.

Finally, the Law Institute, in response to Senate Resolution 8 of 2011 asking the Law Institute to "study revising state law to authorize creation of testamentary and inter vivos trusts to provide for the care of an animal," is recommending a modification of the Trust Code to create a new statute, R.S. 9:2263, to allow for the existence of trusts for the

care of animals. At present, there are two uniform statutes concerning “pet trusts,” section 408 of the Uniform Trust Code and section 2-907 of the Uniform Probate Code, and state statutes in 48 of the 50 states. This proposal will allow Louisiana residents to enjoy the same simple methods enjoyed by residents of almost all the other states for providing for the care of an animal after an owner’s death.

In conclusion, the Law Institute has worked on the above issues for the last two years. It is pleased to make this report and these recommendations to the Legislature. It intends to continue its on-going work to propose revisions for the improvement of Louisiana trust law and has several existing items on its agenda for upcoming meetings. In addition, the Law Institute will continue to monitor national developments on all of the above issues and make recommendations, as appropriate, to the Legislature for improvement of the law.