2016 Estate Planning and Probate Seminar (NCLE) (March 2016) (Written with Christi Ball)

DON'T ASK; DON'T TELL? THE NEBRASKA TRUSTEE'S DUTY TO INFORM AND REPORT

> "The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what was the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we could have any better answer to give than this, namely, the development from century to century of the trust idea."[1]
>
> -- Professor F. W. Maitland (1850-1906)

I. Introduction

> "He trusted neither of them as far as he could spit, and he was a poor spitter, lacking both distance and control."
>
> -- P. G. Wodehouse, *Money in the Bank* (1940)

So, just imagine this. It's Friday at 4:30 and your receptionist announces that Hans von Crabby & his wife Heidi, have "stopped in", and wondered if you were busy. You've been trying to get Hans' estate planning ever since you moved to Hog Waller and joined the LastStableinBethlehem Lutheran Church.

The owner of 12 farms (last time you counted), and notoriously controlling, Hans enters your office, trailed by Heidi. You say you'll stay 'til Monday, if needed.

The discussion turns to their 8 children, all of whom left home at age 17--never to return. But Hans says he holds no grudges. He just doesn't want them to get their legacy until they reach 78 years. If he has to use a trust, as you suggest, they aren't to ever see what the trust says, because one of them is to only get $1,000, and nothing else.

A dark beer awaits. What's your solution?

II. A (Short, Terse & Not-Very-Insightful) History of the Beginning of Trusts

A. Generally

While it's generally assumed that trusts were the result of English law, and, in some instances, attempts by landowners to avoid paying a royal tax, the concept of a trust goes back much further.

For example, under ancient Roman law, you could use a "mancipatio familiae", meaning your property was "mancipated' to a *familiae emptor.* This might mean he took the property, subject to your instructions (perhaps not binding), or he might hold it like a trustee. This was probably oral, "made only at the point of death, open, irrevocable, and perhaps taking effect at once."[2]

In addition, early German law had a trust "concept" under "Salmen" or "Treuhand law",[3] while Islamic law recognized a "waqf", where an "inalienable" religious endowment would be created by giving property for Muslim religious or charitable purposes, usually real estate.[4]

But it's England that gets the credit for the true origin of the "trust". It probably started with English Franciscan Friars in the 13th Century. Under their Order, they weren't permitted to own property, but they could be the beneficiaries of a "use".[5] The English "use" was a medieval devise for holding land,[6] and was expanded to enable a "passive use"--allowing a family to circumvent outdated laws of land ownership, such as primogeniture--the feudal rule that real estate passed to the oldest son.[7]

The essential people were:

1. The "feoffor"--the owner of the property;

2. The "feoffee to uses"--the person who got legal title to the property from the "feoffor"; and

3. The "cestui que use"[8]--the person who got the benefit of the property.

It appears they were used extensively to avoid paying the "lord of the land" his right to "relief", or money payment, when the land descended to the oldest male heir or other similar charges. The duty to pay these sums fell on the person who held the legal title. However, by "enfeoffing" another with the legal title, and reserving only the "use", the "feoffor" escaped the burdens.[9]

In addition, if you committed a crime (and you were of the male variety), you might have to forfeit your real estate; or you wanted to prevent your prospective bride from attaching your real estate with "dower" upon marriage;[10] or you wanted to give real estate to a religious organization; or you wanted to control your real estate after you died--the "use" was your tool:

> "To be able to control land after death was no doubt a great incentive to the creation of uses."[11]

So what if the "feoffee"--trustee--decided he would just keep the land, and therefore refused to do what he was supposed to do? The "use" might not be protected in an English court of common law because there was no "writ" that exactly fit. The common law gave no remedy due to its principles: the "feofee" was the absolute owner of the ground.[12]

Because of the problems with the common law, you would be forced to present a petition to the King, which ultimately developed into an equity court--the "court of chancery", around the time of Edward I (1272-1307):

> "The chancellor became the court of conscience where equity and fairness, rather than technicality, were supposed to rule."[13]

> "If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law."[14]

While equity gave some relief to "uses" as early as Henry V's reign (1413-1422), the first actual decree in favor of a *cestui que use* (beneficiary) appears to be in 1446, in the case of *Myrfyne v. Fallan*, 2 Cal. Ch. XXI:

> "The chancellors of those days were churchmen, and their consciences were naturally shocked by the unfairness of allowing a feofee to uses to repudiate his obligation. . . . The process by which the chancellor acted was known as a *subpoena*. It commanded the defendant to do or refrain from doing a certain act. The relief was personal and specific, not merely money damages. Hence historians say the cestui que use had a remedy only by subpoena."[15]

The trust would not have developed but for equity's willingness to impose duties on the defendant:

> "The judgment in an action at law declared the plaintiff's rights; a decree in equity imposed duties upon the defendant. . . . The result is something unique: a form of double ownership. The trustee holds legal title, but the beneficiary has equitable ownership."[16]

B. Statute of Uses

As mentioned above, "uses" were seen as early as Henry V, and equity recognized them through five more kings.[17] As also mentioned, the "use" was a way to give Catholic religious orders real estate--a gift not otherwise

possible because of the order's vow of poverty or the Statutes of Mortmain.[18] So, when Henry VIII took over, and was accumulating wives, the Pope excommunicated him (1533), and Henry had Parliament pass the famous Statute of Uses.

Any discussion of the Statute of Uses is beyond our subject--and probably our knowledge, but "uses" had begun to be abused--fraud and avoidance of taxation. In addition, Henry VIII wanted to destroy the monasteries and confiscate their property:

> "He thought he could best accomplish this by abolishing the method by which they held land, namely, the use."[19]

The object of the Statute was to abolish "uses", by wiping out the estate of the "feofee to uses" (the trustee), and giving the "legal estate" to the "cestui que use" (beneficiary). But, ultimately, the Statute was interpreted so as to partially destroy its effectiveness--it only applied to real estate; a "use upon a use" was exempt;[20] and it didn't apply to "active uses" (where the trustee had duties of administration, for example).[21]

Several state courts have held the Statute of Uses is a part of their common law,[22] but Nebraska isn't one of them:

> "[T]he statute of uses, in its direct action and execution of a use and absolute establishment of the results of conveyances, is not the law of our system of conveyancing as a statute or law. It has not been and is not recognized."[23]

However, the "active" versus "passive" trust concept is definitely with us:

> "Still another fundamental proposition to be remembered is that if the trust is passive, that is, if the trust imposes no affirmative or substantial duties upon the trustee of

> real estate but seeks to convey to him the bare naked title, the legal title as well as the beneficial use passes to the cestui que trust."[24]

On this question, compare Nebraska's § 30-3828(a)(4), saying "A trust is created only if: . . . (4) the trustee has duties to perform." Our § 30-3828 is the Uniform Trust Code's § 402, and the Comment to that section also discusses this:

> "Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. . . . Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiary's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses."

So, why should we care about this history tripe? About somebody 600 years ago who couldn't get relief for his "use"? As Henry Ford said,

> "History is more or less bunk."[25]

The point is to emphasize the equitable nature of a trust, and its function, as well as to emphasize the need to protect the beneficiary of the trust. When the English equity court stepped in to force the trustee to live up to his bargain--to hold the real estate for the beneficiary, and not claim it as the trustee's own, the chancellor needed to protect the beneficiary.

> "A trustee, like an executor, a guardian, an agent, and similar parties, owes a duty to act solely in the interest of the beneficiary . . . ."[26]

In this vein, there's discussion below about what the settlor (grantor; "feoffor") wants, and whether we need to make sure the settlor's "intentions" are carried out. Does trust history say we need to enforce equity in this

situation, and protect the beneficiary?

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties."

--Justice Cardozo[27]

III. Nebraska Trust History

> Our concern for the future too quickly casts a shadow over the things of the past. People, generally, do not care so much for the things of the past, its achievements and failures, as they do about the opportunities and allurements of the future. However anxiously we may be rushing on for the things of the future, let us understand that we cannot detach ourselves from the past. Every one filleth a niche in the bulwarks of time, and each generation buildeth a stepping-stone between the two eternities.
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> -- Rev. C. H. Frady of Billings Montana
> History of Antelope County Nebraska 1868-
> 1883, A. J. Leach, 1909.

In 1867, Nebraska became the 37th state admitted to the Union, at which time the territorial capital was moved from Omaha to Lancaster (which was later renamed Lincoln, following the assassination of President Abraham Lincoln). Even prior to Nebraska becoming a state, the territory was convening legislature and courts:

> On Monday, March 12, 1855, the first court of record ever held in the territory, the district court of the first judicial district, with jurisdiction practically like our present district court, was opened at the mission house, Bellevue, by Fenner Ferguson, chief justice; Eli R. Doyle, marshal." The Palladium of March 21, 1855, informs us that "The Court was organized by the choice of Silas A. Strickland of Bellevue, Clerk. Several foreign born residents made their declaration of intention to become citizens. No other business of importance

coming up, the Court adjourned to April 12."[28]

The first published opinion of the Nebraska Supreme Court was on December 1, 1871,[29] and the high court almost immediately began addressing cases involving trusts, trustees, trust property, and beneficiaries:

> In Tierney v. Cornell,[30] the Supreme Court upheld the deeds executed in 1859 by the probate judge serving as trustee, which disposed of town sites under statute. The property at issue was transferred by deed to James K. Paul and his grantees (for approximately $1.25 per acre). The Court found that the required statutory notice had been complied with by the trustee, such that he was deeding legal and equitable title in the parcels to James K. Paul rather than merely attempting to delegate the role of trustee.
>
> > There is not the least intimation in the opinion of the court, that with proper rules and regulations, allowing the trustee to decide who were entitled to a conveyance of any portion of the land held in trust, that if he erroneously conveyed to a party not entitled thereto, that the deed would be void, and would pass no title.... But the ... probate judge entered the land and forthwith gave public notice, as required by law, of the fact of entry, and proceeded to execute said trust in pursuance of law and the statutes of Nebraska, and made, executed, and delivered, to each and every one of the occupants of said town site, a deed in fee-simple for such part or parts, lot or lots, of said land in said town site as each of said occupants were lawfully entitled to.[31]
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> In 1879, in First National Bank of Omaha v. Bartlett,[32] the Nebraska Supreme Court stated that where it is clearly shown that a husband has his wife's money, holding it in trust for her, and the proof is clear that it is a bona fide transaction, she may become his creditor. And a wife may appoint her husband her agent to manage her separate property, and will be bound by his acts when within the scope of his authority. If a trustee purchases lands

> with trust funds, taking the conveyance in his own name, in equity the land is held as a resulting trust for the benefit of the person beneficially interested. The rule is, that the acts done by the trustee are presumed to be not for the benefit of the trustee, but for that of the cestui que trust. When such trust fund has been converted into another species of property, and its identity can be traced, it will be held in its new form liable to the rights of the cestui que trust, and these general doctrines are not limited to trustees, technically so called, but extend to all other persons in a fiduciary relation to the party, whatever that relation may be. [33]

> In Jones v. Shrigley, the Nebraska Supreme Court held that if a trust is "passive" in that the trust imposes no affirmative or substantial duties upon the trustee of real estate, but seeks to convey to him the bare naked title, the legal title as well as the beneficial use passes to the cestui que trust (beneficiary).[34]

> In Ebke v. Board of Educational Lands and Funds, the Nebraska Supreme Court held that the trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the cestui que trust and no one else.[35]

It has long been the rule in this state that the trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his own interests where necessary.[36]

> A trustee is held to an often quoted standard written by Justice Cardoza in 1902:
>
> > A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the

> "disintegrating erosion" of particular exceptions.[37]

Once Nebraska adopted in the Uniform Probate Code ("UPC") in 1974,[38] the courts began construing the duties of the trustee under the applicable sections of the UPC for written trust documents, but also continued to rely on and interpret the duties under common law.

> In St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp, the Nebraska Supreme Court wrote that a "trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his own interests where necessary." In essence, the trustee is responsible to the beneficiary and only holds the assets in the trust for that purpose.[39]

> In Karpf v. Karpf, the Nebraska Supreme Court held that the trustee breached its duty under 30-2814 to keep beneficiaries reasonably informed when the trustee's son, son's wife, and son's children were limited beneficiaries, but only trustee's son was informed of the existence of the trust.[40]

Again, after Nebraska adopted the Uniform Trust Code ("UTC") in 2003,[41] the courts began construing the duties of the trustee under applicable sections of the UTC, and continued to analyze trustee duties under common law.

> In Brennemann v. Brennemann, the Nebraska Supreme Court concluded that the trustee's conduct fell below acceptable standards, in that annual schedule K-1 tax reports were insufficient to reasonably inform beneficiaries of the trust and its administration, but affirmed the Court of Appeals finding that the trustee's breach of its duty to inform was "essentially harmless." The Supreme Court reversed and remanded the issue of award of attorney fees stating "the trustees clearly breached their duty to inform and report, and did so for decades. They were unable to properly account to [the beneficiary] because they failed to properly maintain trust records. In such a situation, [the beneficiary] had little choice but to resort to litigation to resolve any doubts about the trust's administration. Even though the trustee's conduct ultimately

> did not harm [the beneficiary] or the trust, that became clear only after litigation - litigation made necessary by the trustees breach of their duties."[42]

IV. The Nebraska Trustee's Duty to Inform.

> "There is an expression--(1) unanswered questions (2) become doubts; (3) which become suspicions; (4) which become convictions. Nothing good will happen once the other party has reached step 4 and is convinced that the question was not answered because the answer would have been harmful."

--Internet Quote (Author Unknown)

A. Who's a Beneficiary?

An obvious question arises when we talk about trust accountability. To whom is the trustee accountable? Most trusts would require accountability to the settlor, during the settlor's lifetime. But who's a beneficiary of the trust?

1. Traditional Definitions. If you can remember law school, chances are you remember certain distinctions in beneficiaries:

> "The settlor has great freedom in the selection of the beneficiaries and their interests. The interests he creates in them must always be equitable, but otherwise they need possess no particular characteristics. Such a beneficial interest may be a *present interest*, entitling its holder to immediate enjoyment of income of the trust property. Or it may be a *future interest*, giving the beneficiary rights to receive trust assets or benefits at a later time. The interest of the beneficiary may be *absolute and vested*, so that the happening of no future event will destroy or

diminish it, or it may be subject to a *condition precedent or contingent* . . . ."[43]

And the list goes on and on, such as a beneficiary's interest that's "determinable or with a condition subsequent attached."[44]

Several law review articles have dissected the beneficiary definitions in an excellent manner, attempting to de-mystify this lugubrious minefield.[45] One commentator[46] points out there are three common "types" of beneficiaries--"current", "vested remainder" and "contingent":

a. **Current**. A current beneficiary is one who is entitled to a current benefit from the trust.

Example 1: Using the introductory set of facts (Hans & Heidi):

At Hans' death, an irrevocable trust is created for the benefit of his wife, Heidi. All income goes to Heidi for her lifetime. Upon her death, the remaining principal is distributed to their child, Ludwig.

In this example, Heidi is the current beneficiary. Hans is not a current beneficiary because he's dead, and he and his estate have given up all interest in the trust property. Ludwig is not a current beneficiary because he is not currently entitled to any distributions from the trust--either income or principal. Ludwig gets nothing from the trust until his mother, Heidi, is dead.

b. **Vested Remainder**. A vested remainder beneficiary is one who may or may not be receiving current trust benefits, but has a "vested property interest" that can't be taken away.

Example 2: Slightly change the facts:

Hans has created an irrevocable trust and he's dead, with the trust giving income to Wife Heidi, except Son Ludwig has the right to request principal distributions for his education, payable in the trustee's sole discretion. As in the prior example, the trust remainder is payable to Son Ludwig, upon Wife Heidi's death.

Wife Heidi is still a current beneficiary, but now Son Ludwig is also a current beneficiary. Ludwig is not "entitled" to the principal distributions (because of the trustee's discretion), but he does have an immediate interest in the trust principal. In addition, Ludwig is a "vested remainder beneficiary", because he gets the principal when Heidi dies.

Example 3. Hans dies, again, with an irrevocable trust that:

1) Pays the income to Heidi;
2) Upon Heidi's death, pays the income to Ludwig; and
3) Upon Ludwig's death, the principal goes to Ludwig's children.

Heidi is a "current" beneficiary, but Ludwig isn't because he doesn't get any current trust distribution. However, Ludwig is a "vested remainder beneficiary", because he's going to get the income when Heidi dies.

c. **Contingent or Contingent Remainder**. The contingent or contingent remainder beneficiary is one who is not receiving current trust benefits, and whose status as a beneficiary may be changed, or otherwise taken away.

Example 4: Hans dies, with an irrevocable trust that pays the income to Wife Heidi, but at Heidi's death, she can appoint, in her will, the trust principal to whomever she chooses. If she fails to exercise this power of appointment, Ludwig gets the principal.

Heidi is the current beneficiary, but Ludwig is no longer vested. Ludwig's status is contingent on Heidi's actions with the power of appointment. Ludwig is a "contingent remainder beneficiary". In addition, Ludwig is "ascertainable"--his identity can be determined.[47]

In examining these "beneficiary" definitions, it helps to determine how "remote" each category is:

> "Noteworthy here, and important to the analysis of a beneficiary's right to receive information about a trust, is the level of remoteness associated with the three different types of

beneficiaries. A current beneficiary is the least remote--enjoying a current benefit from the trust. A vested remainder beneficiary is more remote than a current beneficiary; though a vested remainder beneficiary will likely enjoy a benefit sometime in the future, no current benefit flows to this beneficiary. Contingent remainder beneficiaries, in these examples, are the most remote; in some cases they may even be impossible to identify. These beneficiaries may or may not ever receive a benefit from the trust, though the possibility of them receiving a benefit does exist."[48]

2. **Nebraska's UTC Definitions**. Under Nebraska's version of the Uniform Trust Code, there is a somewhat more complicated maze to decipher the meaning of a "beneficiary":

1. **A "Simple" Beneficiary**. Section 30-3803(3) of the Nebraska Trust Code (UTC § 103), defines a "beneficiary" to be a person that:

"(A) has a present or future beneficial interest in a trust, vested or contingent; or

(B) in a capacity other than that of trustee, holds a power of appointment over trust property." (Emphasis added).

The UTC Comments point out this definition includes "living and ascertained individuals", as well as beneficiaries who "may be unborn or unascertained".

As to a charitable "beneficiary":

"The definition of a 'beneficiary' includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 405(a) [Nebraska § 30-3831]), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code."[49]

However, a charity could have the rights of a "qualified beneficiary" under § 30-3810 (UTC 110).

In all three of the above examples, Wife Heidi and Son Ludwig are "beneficiaries" under 30-3803(3).

2. **A "More Complicated" Beneficiary**. Subsection "13" of § 30-3803 creates the "concept" of a "qualified beneficiary". The Comments to the UTC's § 103 tell us why:

> "Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of 'qualified beneficiary' (paragraph (13)) to limit the class of beneficiaries to whom certain notices must be given or consents received."

Nebraska's version of this definition matches the UTC's, and essentially creates three types of beneficiaries:

a. **Type 1**. We'll call this person a "Type 1 beneficiary" (again using Philip Ruce's diagnosis), and is created under § 30-3803(13)(A):

> "(13) 'Qualified beneficiary' means a beneficiary who, on the date the beneficiary's qualification is determined:
>
> (A) is a distributee or permissible distributee of trust income or principal."

Type 1 is a "current beneficiary", outlined above. The beneficiary gets an immediate trust benefit.

In **Example 1** above, Wife Heidi is the only Type 1 beneficiary, because she's the only person who gets income. Nobody gets principal until Heidi dies. Son Ludwig isn't a "distributee or permissible distributee of trust income or principal"--until Heidi dies.

In **Example 2** above, both Heidi and Ludwig are Type 1 beneficiaries, because Heidi gets current trust income distributions, and Ludwig can request trust principal distributions for education, in the trustee’s discretion.

In **Example 3** above, Heidi is the only Type 1 beneficiary, because she’s the only one to receive the income while she’s alive, and no principal is distributed until she dies.

In **Example 4** above, Heidi is still a Type 1 beneficiary, but, in our opinion, Ludwig is not, because Heidi can cut him out with her power of appointment, and he receives nothing while Heidi is alive.

b. **<u>Type 2</u>**. Under what we’ll call a "Type 2 beneficiary", § 30-3803(13)(B) says they are included if they "would be a distributee or permissible distributee" of income or principal, if the Type 1 beneficiary’s interests terminated on that date, without causing the trust to terminate:

> "(13) ‘Qualified beneficiary’ means a beneficiary who, on the date the beneficiary’s qualification is determined: . . . .
>
> (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subdivision (A) of this subdivision terminated on that date without causing the trust to terminate."

In **Example 3** above, Heidi gets the income, and when she dies Ludwig then gets the income, <u>but the trust doesn’t terminate</u>. Therefore, Ludwig is a Type 2 qualified beneficiary. Ludwig would a "distributee . . . of trust income" if the interest of Heidi (the Type 1 qualified beneficiary), were to terminate "without causing the trust to terminate."

c. **<u>Type 3</u>**. The last definition under § 30-3803(13)(c), is very broad ("Type 3") and covers any beneficiary who is entitled to any distribution on the date of the trust’s termination:

> "(13) 'Qualified beneficiary' means a beneficiary who, on the date the beneficiary's qualification is determined: . . . .
>
> (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date."

In **Example 1** above, Heidi gets the income until she dies, at which point Ludwig gets the trust principal. Therefore, Ludwig is a Type 3 qualified beneficiary.

In **Example 2** above, Ludwig is both a Type 1 and Type 3 qualified beneficiary (he can receive principal while Heidi is alive, and he gets the principal when the trust ends).

In **Example 3** above, Ludwig's children are the Type 3 qualified beneficiaries (they get the principal when Heidi and Ludwig are dead).

In **Example 4**, where Heidi can appoint the trust principal under her will, we can't name the Type 3 qualified beneficiaries at this time, because Heidi hasn't died. In addition, the appointees under the will of a living person can't be qualified beneficiaries, per the Comment to UTC § 103 (our § 30-3803):

> "Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person."

However, in this Example 4, Ludwig is a "taker in default"-if Heidi doesn't cut him out by her power of appointment at death, he gets the principal. Therefore, is he still a "qualified beneficiary", per the Comments to § 103:

> "The qualified beneficiaries who take upon termination of the beneficiary's interest or

of the trust can include *takers in default of the exercise of a power of appointment*." (Emphasis added);

or did § 30-3855(c) eliminate that:

"While the trust is irrevocable and during the period the interest of any beneficiary not having a present interest may be terminated by the exercise of a power of appointment or other power, the duties of the trustee are owed exclusively to the holder of the power to the extent of the property subject to the power."

These definitions are expanded in 30-3810 (UTC § 110), to include the following as "qualified beneficiaries":

1. A "beneficiary" who sends the trustee a "request for notice";

2. A "charitable trust" beneficiary under defined conditions;

3. A "person appointed to enforce a trust" created for the care of an animal or an unascertainable beneficiary under §§ 30-3834 and 30-3835; and

4. The Attorney General for a charitable trust having its principal place of administration in Nebraska.

The "qualified beneficiary" designation plays an important part in several other sections of Nebraska's Trust Code. For example:

1. Under § 30-3805(8) (UTC § 105(8)), the trust can't waive § 30-3878(a)'s duty to keep "qualified beneficiaries reasonably informed", etc.;

2. Section 30-3808(d) (UTC § 108(d)) requires notice before transferring a trust's principal place of administration;

2. Section 30-3843 (UTC § 417), defines the class that receives notice before a trust is combined or divided;

3. Section 30-3860 (UTC § 704) defines the class that can be used to unanimously appoint a successor trustee;

4. Section 30-3861 (UTC § 705) defines the class that receives notice of a trustee's resignation; and

5. Section 30-3878 (UTC § 813) defines the notice requirements that are the focus of this paper.

Regardless, Section 30-3855(a) of the Nebraska Uniform Trust Code (UTC § 603) says that, while a trust is revocable, "rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."[50]

B. Nebraska Trust Notice Law.

Prior to the adoption of the Uniform Trust Code by the Nebraska legislature in 2003, Section 30-2814 governed the trustees duty to inform and report and provided as follow:

> Duty to inform and account to beneficiaries. The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration, and, unless otherwise provided in the trust instrument, in addition:
> (a) Within thirty days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under section 30-2222 may represent beneficiaries with future interests, of the court, if any, in which the trust is registered and of his name and address.
> (b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.
> (c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

In the 2003 Nebraska legislative session, LB130 was passed, which repealed former provisions under the Uniform Probate Code ("UPC") regarding trust administration, and replaced them with Uniform Trust Code ("UTC") provisions.

The 2005 legislature then passed LB533 which altered the trustee duties and effective date as follows:

30-3805 (UTC 105) was revised from

...(b) The terms of a trust prevail over any provision of the code except:

> ...(8) the duty under section 30-3878 to notify qualified beneficiaries of an irrevocable trust who have attained the age of twenty five years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;

to:

> ...(8) the duty under subsection (a) of section 30-3878 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;

and

30-3878 (UTC 813) was revised from

> (f) The requirements of subdivisions (b)(2) and (3) of this section apply only to trustees who accept a trusteeship on or after January 1, 2005, and to trusts which become irrevocable on or after January 1, 2005.

to delay the effective date to January 1, 2006:

> (f) The requirements of subdivisions (b)(2) and (3) of this section do not apply to a trustee who accepts a trusteeship before January 1, 2006, to an irrevocable trust created before January 1, 2006, or to a revocable trust that becomes irrevocable before January 1, 2006.

So that Neb. Rev. Stat. Section 30-3878 (replacing 30-2814) now provides:

30-3878. (UTC 813) Duty to inform and report.

> (a) A trustee shall 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.

Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(b) A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in subsection (c) of this section; and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect

to future reports and other information, may withdraw a waiver previously given.

(e) The duties of a trustee specified in this section are subject to the provisions of section 30-3855.

(f) Subdivisions (b)(2) and (3) of this section do not apply to a trustee who accepts a trusteeship before January 1, 2006, to an irrevocable trust created before January 1, 2006, or to a revocable trust that becomes irrevocable before January 1, 2006.

The 2013 legislature then passed LB38 which changed provisions relating to powers of appointments as follows:

30-3823 (UTC 302) was revised as follows:

~~To the extent there is no conflict of interest between the holder of a general testamentary~~ The holder of a power of appointment ~~and the persons represented with respect to the particular question or dispute, the holder~~ or other power to terminate an interest may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

and

30-3855 (UTC 603) was revised as follows:

(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

(b) ~~During~~ While the trust is irrevocable and during the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section and the duties of the trustee are owed exclusively to the holder of the power to the extent of the property subject to the power.

(c) While the trust is irrevocable and during the period the interest of any beneficiary not having a present interest may be terminated by the exercise of a power of appointment or other power, the duties of the trustee are owed exclusively to the holder of the power to the extent

of the property subject to the power.

In addition to the notice to beneficiaries provided in 30-3882, the 2015 legislature passed LB72 which amended Neb. Rev. Stat. Sections 30-3880 through 30-3882 and related sections, to restrict transfers and distributions by trustee and require notice to the Department of Health and Human Services.

30-3880 (UTC 815) was revised to add the following language:

...

> (c) After the death of the trustor occurring after August 30, 2015, a trustee of a revocable trust which has become irrevocable by reason of the death of the trustor shall not transfer trust property to a beneficiary described in section 77-2004 or 77-2005 in relation to the trustor prior to satisfaction of all claims for medicaid reimbursement pursuant to section 68-919 to the extent necessary to discharge any such claim remaining unpaid after application of the assets of the trustor's probate estate. The Department of Health and Human Services may, upon application of a trustee, waive the restriction on transfers established by this subsection in cases in which the department determines that either there is no medicaid reimbursement due or after the proposed transfer is made there will be sufficient assets remaining in the trust or trustor's probate estate to satisfy all such claims for medicaid reimbursement. If there is no medicaid reimbursement due, the department shall waive the restriction within sixty days after receipt of the trustee's request for waiver and the deceased trustor's name and social security number and, if available upon reasonable investigation, the name and social security number of the trustor's spouse if such spouse is deceased. A trustee who is a financial institution as defined in section 77-3801, a trust company chartered pursuant to the Nebraska Trust Company Act, or an attorney licensed to practice in this state may distribute assets from the trust prior to the receipt of the waiver from the department if the trustee signs a recital under oath and mailed by certified mail to the department that states the decedent's name and social security number and, if available upon reasonable investigation, the name and social security number of the decedent's spouse if such spouse is deceased, and

that the trustor was not a recipient of medical assistance and no claims for medical assistance exist under section 68-919. A trustee who makes such a recital knowing the recital is false becomes personally liable for medical assistance reimbursement pursuant to section 68-919 to the extent of the assets distributed from the trust necessary to discharge any such claim remaining unpaid after application of the assets of the transferor's probate estate.

V. Conclusion. Some Thoughts:

A. Notice--Advantages and Disadvantages.

1. Quiet Trusts. A trust that doesn't require notice to a beneficiary is sometimes referred to as a "quiet trust"[51], and doesn't mean the Settlor is nuts, or a control freak. A beneficiary may have real mental health, substance abuse or other problems, and knowledge of the trust might cause an unstable beneficiary to bring frivolous lawsuits, or remove any incentive for the beneficiary to become self-supporting:

> "That the parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would, seems to me capable of proof which cannot be gainsaid."[52]

Placed in a trust setting:

> "The settlor may believe that knowledge of the trust may have a harmful effect on the beneficiaries and that full disclosure of the trust will cause the beneficiaries to grow up feeling dependent, conflicted, or listless."[53]

An excellent discussion of what may be called the "competing policy considerations" on eliminating notices in trusts can be found in an article by Anne J. O'Brien, called "The Trustee's Duty to Provide Information to Beneficiaries: When Can the Settlor Say 'Don't

Ask, Won't Tell'."[54] This topic is obviously beyond the paper's theme, but suggested ways to avoid notice include:

a. Jurisdiction & "Public Policy". You could create a trust in a state that doesn't require notice to the beneficiaries. Several states are selling themselves in this regard, the closest being South Dakota.[55]

If such a "quiet trust" is used, the argument is usually that you would have a "protector", "surrogate notice", "surrogate beneficiary" or other similar "agent"[56] used as a representative to receive the disclosure--on behalf of beneficiaries, or

> "a trust document could call for a periodic review by a third party such as a peer review by an independent professional trustee every five years or an accounting review or both."[57]

Query: If you create a South Dakota "quiet trust" for a Nebraska resident, holding Nebraska assets (real estate or otherwise)--even if you use a South Dakota trustee, and the trust is to avoid notice directly to beneficiaries, does that trust violate Nebraska's "public policy"? Section 30-3807 (UTC 107) of the Nebraska Uniform Trust Code says the "meaning and effect" of the trust's terms are determined by "the law of the jurisdiction designated" in the trust, unless

> "the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue . . . ."

In addition, § 30-3807(b) gives Nebraska real estate a special trust category, not in the original UTC § 107:

> "(b) The meaning and effect of the terms of a trust that pertain to title to Nebraska real estate are determined by the law of Nebraska."

In discussing this "public policy" argument, one commentator suggests a "quiet trust" violates a UTC state's public policy:

> "But by banning the choice [of a quiet trust], the UTC has effectively declared the quiet trust violates public policy--an official contempt usually reserved for transfers in fraud of a settlor's creditors, or gifts tied to racial or religious overtones."[58]

In addition, in this "quiet trust", if you have a Nebraska co-trustee, or Nebraska assets, does Nebraska have jurisdiction over any dispute? In discussing the Utah "asset protection trusts", one Utah writer mentions some "cautions":

> "The [Utah] statute does not require that all trustees of a [Utah Asset Protection Trust] be Utah residents. It requires only that at least one trustee be a Utah resident or a Utah trust company. However, it may be advisable to make sure that all trustees are in fact Utah residents for the following reason. If the trust has a co-trustee who lives, for example, in Tennessee, a creditor of the settlor who is trying to reach the trust assets might bring suit in Tennessee. If he does, there is no guarantee that a Tennessee court will respect a Utah asset protection trust. If the settlor has a trusted non-Utah resident in mind that he would like to serve as trustee, he may consider appointing that person as a trust protector rather than as a trustee.
>
> "Similarly, the statute does not require that all trust assets be held in Utah. But again, it may be advisable to hold only Utah

> assets in a UAPT. If the trust holds a vacation home in, for example, North Carolina, a creditor of the settlor who is trying to reach the trust assets might bring suit in North Carolina. If he does, there is no guarantee that a North Carolina court will respect a Utah asset protection trust. If the settlor has non-Utah property that he wants to contribute to a UAPT, he might consider creating two UAPTs, one to hold the Utah property and the other to hold the non-Utah property." [59]

A somewhat different question, since it's an "asset protection trust", but interesting comments.

b. Separate Trusts. You could create separate Nebraska trusts, so that one set of beneficiaries wouldn't see what another set got. The administrative hassle and cost of such an approach would need to be weighed against the privacy desired.

For an example of a problem in this regard, the 1997 Virginia case of Fletcher v. Fletcher,[60] required the trustee to give notice to the beneficiaries, even though the trust didn't require it. The Settlor apparently intended to create three separate trusts in one document. Since the Court required notice of all three "separate trusts" to the beneficiaries of all three contained in the same trust, perhaps the lesson is to draft three separate trust documents if you want that privacy.

c. One Trust-Portability. With the portability tool,[61] you could make the argument that, in the right situation, only use one trust for a rich married couple (in excess of $5 million), thereby eliminating the need for notice upon the death of the first.

d. Power of Appointment. In those instances when your client is willing to have a power holder change the beneficial interests in the trust, then so long as the holder has such power, the trustee may provide notice to the power holder rather than to the beneficiary or

beneficiaries.

2. Advantages of Notice. But are there actual advantages to giving the notice under Nebraska's Trust Code, including:

a. Trustee Actions Permitted (if notice given). With disclosure, a trustee is able to use the following Nebraska Trust Code sections to administer the trust:

(1) Settlement Agreements. Put together nonjudicial settlement agreements under § 30-3811 (UTC § 111);

(2) Uneconomic Trust Modification or Termination. Modify or terminate an uneconomic trust under 30-3840 (UTC § 414); and

(3) Trust Combination or Division. Combine and divide trusts under § 30-3843 (UTC § 417).

b. Waiver of a Trustee's liability for a particular action. A beneficiary can consent to a trustee's breach under § 30-3898 (UTC § 1009), if the beneficiary has received the "material facts relating to the breach":

> "The relief from liability is predicated on the consent, release, or ratification not being induced by improper conduct and the beneficiary (or the beneficiary's representative) knowing the material facts relating to the breach. In obtaining consents and releases, it is most important that the trustee fully disclose all of the facts necessary for the consenting party to make an informed decision."[62]

c. Statutes of Limitations.

(1) Contesting the Trust. Section 30-3856(a) (UTC § 604) gives a trustee a method to shorten the normal statute of limitations:

> "(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at

> the settlor's death within the earlier of:
>
> (1) one year after the settlor's death; or
>
> (2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding."

Nebraska reduced the UTC section from three years to <u>one year</u>. If the trust doesn't allow the trustee to give the notice under § 30-3856(a)(2), the trustee is stuck with the one-year rule.

(2) <u>Actions for Breach of Trust</u>. With notice, a beneficiary is stuck with a one-year statute of limitations for the trustee's breach of trust under § 30-3894(a) (UTC § 1005):

> "(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding."

Section 30-3894(c) then says that, if subsection (a) doesn't apply for some reason (trustee failed to give the "report", for example), then the beneficiary has four years to sue for the breach, commencing the earlier of three events--trust termination; the trustee's death, resignation or removal; or the termination of the beneficiary's interest. Obviously getting rid of it by using the "notice" under subparagraph "(a)" would be preferable:

.

> "Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of

> the trust transactions and advised of the bar if no claim is made within the year. UTC § 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC § 1005(c)."[63]

Nebraska reduced the UTC 5-year statute to 4 years.

d. Terminating Distribution. Under § 30-3882[64] of the Nebraska Trust Code (UTC § 817), the trustee may send a "proposal for distribution", and if the beneficiary doesn't object within 30 days after the proposal was sent, the right to object terminates, "but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection". This essentially reduces to 30 days a beneficiary's right to object to distributions in partial or full termination of a trust.

e. Making the Trust Enforceable. Arguments have been made that a trust provision that eliminates notice to beneficiaries may actually make the trust unenforceable:

> "Like a trust term purporting to abrogate all fiduciary duties, or a term authorizing the trustee to act in bad faith, a term that prevents the beneficiary from obtaining the information needed to enforce the trust entails the risk of making the trust unenforceable and hence illusory. The policy of mandatory disclosure is protective. Behind the [UTC's] prohibition on complete nondisclosure of the trust and its terms is the intuition that the settlor is not likely to have understood that the true effect of such a term resembles a transfer of the beneficial interest to the trustee, because the term

> places the trustee's misuse of the trust property beyond effective remedy."[65]

The idea that the trustee is holding the property, but has no duty to advise the beneficiary of its existence is similar to the method Henry VIII tried to eliminate the "use"--the trust doesn't exist, and therefore a beneficiary would argue he's the owner, or the trustee would argue it belongs to him, outright:

> "The most significant risk posed by a waiver of all information and reporting duties is that doing so may negate the existence of a trust; if the trustee is not accountable to the beneficiary, the settlor may be deemed to have intended that the 'trustee' hold the property free of trust."[66]

As you might imagine, whether a trust exists at all has been at the center of much litigation. For example, in the 1890 Nebraska case of Carter v. Gibson,[67] Carter sued Gibson, claiming the real estate Gibson bought at an auction was really held by Gibson, as a trustee for Carter--an argument the Supreme Court bought.

f. Ensuring Trustee Honesty. In addition, it could be argued that by requiring the trustee to keep the beneficiary advised of the trust, and the trustee's actions, a crafty, corrupt or lack-brained trustee is kept at bay:

> "Trust terms that would excuse bad faith, or dispense with fiduciary obligation, or conceal the trust from its beneficiaries would make the trust obligation illusory, effectively allowing the trustee to loot the trust."[68]

g. Trustee's Practical Problems. In addition to the advantages of a shorter statute of limitations mentioned above, if notice is given, the trustee may avoid some practical problems:

> "Keeping a trust secret from the current beneficiaries also presents practical hurdles. For example, how is the trustee to make decisions about discretionary distributions without inquiring about the beneficiary's needs and financial situation? And how can the trustee make those inquiries of an adult beneficiary without disclosing the existence of the trust?[69]

h. Crummey Powers. Does the Trust have Crummey powers, or other powers of withdrawal? Obviously any restrictions on notice shouldn't conflict with the requirements to provide notice under Crummey or other withdrawal powers.[70]

i. "Good Faith". Section 30-3866 (UTC § 801) requires the trustee to administer the trust "in good faith", in accordance with "the interests of the beneficiaries" and "in accordance with the Nebraska Uniform Trust Code". It seems to us that a trustee's failure to give notice could certainly be cited as a violation of this Trust Code section.

By the same token, a trustee who has given the required notices could be said to be acting in good faith--evidence of the trustee's competency in any removal action.

1 B. Final Thoughts. Section 30-3878 of the Nebraska Uniform Trust Code is only one of roughly 116 portions of the Code, but the chances for screw-ups are immense, especially with a trust that may have a lot of beneficiaries with unknown addresses, or remote contingencies, and other language that only a perpetuities professor would appreciate.

However, it may mean perpetual employment--to help interpret and understand these complex labyrinths. Unless you represent Dorothy Henderson, who apparently understands everything:

> "Dorothy and George Henderson, operating through 'G&D Associates', sold 'packages of bogus trusts to their clients and

advised the clients on how to use the trusts to generate fraudulent tax deductions.' The clients, including doctors, dentists, consultants and others, 'would transfer their businesses, homes and other assets into the trusts.' The clients, appointed "managers" of the trusts, 'in fact continued to control those assets,' said the U.S. Attorney's office.

[E]vidence at trial showed the Hendersons earned more than $1 million in fees from clients in the course of marketing their operations from 1994 through early 1998. 'They filed no tax returns and paid no taxes during that period,' the U.S. Attorney's office said. . . .

"A lawyer who represented Dorothy Henderson at the trial says Dorothy R. Henderson, who is now in jail, argues she did nothing wrong. Earlier this year, she told a judge she wasn't the DOROTHY R. HENDERSON named in the proceedings because it was spelled in all capital letters. 'I am a sovereign individual' whose name is spelled with upper and lower-case letters, she said."

-- The Wall Street Journal,
April 3, 2001

[1]"The Unincorporated Body", 3 Maitland, Collected Papers (1911) 271, 272. Professor Maitland was a Cambridge Professor, generally regarded as the modern father of English legal history. See Runciman, David (1997), in *Pluralism and the Personality of the State*, pp.

xi(Cambridge: Cambridge University Press).

[2]W. W. Buckland, A Text-Book of Roman Law from Augustus to Justinian 283 (1921). See also Gaius, G.2.103.

[3]See the discussion at Ames, "The Origin of Uses and Trusts", 21 Harvard L. Rev. 261, 263 (1908), and "German Law Trusts: A Route to Value Realisation", International Financial L. Rev. (May 23, 2013).

[4]See, e.g., Comment, "The Influence of the Islamic Law of *WAQF* on the Development of the Trust in England: The Case of Merton College", 136 U.Pa.L.Rev. 1231. "Islamic law mandated no particular form to create a *waqf*. It simply required the *waqif* [the "founder"] to indicate clearly his intention to create the trust and to specify the charitable purpose to which the trust would be dedicated." *Id.*, at p. 1236.

[5]See discussion at Comment, *supra* note 4, at p. 1240; Brown, "The Ecclesiastical Origin of the Use", 10 Notre Dame Law. 353, 353 (1935); and Cattan, "The Law of Waqf", Law in the Middle East, at page 213.

[6]See Ames, supra at 261-68 and Fratcher, "Uses of Uses", 34 Mo. L. Rev. 39, 39 (1969)

[7]See, generally, 4 W. Holdsworth, A History of English Law 417 (3d ed. 1945) and Comment, *supra* note 4.

[8]"[T]he person for whose benefit the use was created." 1 A. Scott, The Law of Trusts § 3.2 (3d ed. 1967).

[9]Bogert, The Law of Trusts and Trustees, § 2, at 19 (2007).

[10]A widow's share for life of her husband's assets.

[11]Bogert, *supra* note 9, § 2, at 20.

[12]James Barr Ames, *supra* note 3, at 265.

[13]Bogert, *supra* note 9, § 3, at 25.

[14]Lord Denning M.R., *Re vandervell's Trusts (No. 2)*, [1974] 1 Ch. 269 at 322.

[15]Bogert, *supra* note 9, § 3, at 26. "Never take a reference from a clergyman. They always want to give someone a second chance." Lady Selborne, *The Later Cecils* (1975).

[16]1 Scott and Ascher on Trusts § 1.1, at page 5 (5th Ed. 2006). "Equity acts in personam and not in rem; equity follows the law [except when it chooses not to . . .]" Professor Ron Volkmer, "Reflections" (2015).

[17]Henry VI (1422-1461); Edward IV (1461-1483); Edward V (1483); Richard III (1483-1485) and

Henry VII (1485-1509).

[18]In 1279 and 1290, Edward I attempted to prevent the Catholic Church from possessing real estate, in order to preserve the kingdom's revenues. 1 Pollock & Maitland, History of English Law, 329 (1968). "Mortmain" literally means "the dead hand". The King got revenues when the land passed to the next generation, but the Church never died. Until Henry VIII arrived.

[19]Bogert, supra § 4, at 27.

[20]Real estate's conveyed to A, and his heirs, to the use of B and his heirs, to the use of C and his heirs. Under these facts, "the Statute [of Uses] was held to transfer the use of B into possession and give him the legal estate but not to convert the use of C into possession and destroy B's legal estate." Bogert, *supra*, at 29, citing Doe on the Demise of Lloyd v. Passingham, 6 Barn. & Cress, 305, 130 Rev. Rep. 327 (1827).

[21]See, e.g., the discussion at Restatement (Third) of Trusts § 6, comment a (2003 and Note and Comment, "The Statute of Uses and Active Trusts", 17 Mich. L. Rev. 87, 88-90 (1918).

[22]See, e.g., Randolph v. Read, 196 S.W. 133 (Ark. 1917) and discussion at Bogert, *supra* § 208.

[23]Farmers & Merchants Ins. Co. v. Jensen, 58 Neb. 522, 530, 78 N.W. 1054, 1056 (1899).

[24]Jones v. Shrigley, 150 Neb. 137, 144, 33 N.W.2d 510, 515 (1948).

[25]*Chicago Tribune*, May 25, 1916.

[26]Bogert, *supra*, at 5.

[27]Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1 (1928).

[28]History of Nebraska, reported in The NEGenWeb Project by Pam Rietsch, Ted & Carole Miller, 2001.

[29]Mattis v. Robinson, 1 Neb. 3 (1871).

[30]Tierney v. Cornell 3 Neb. 267 (1874).

[31]Tierney v. Cornell, 3 Neb. 267, 282 (1874).

[32]First National Bank of Omaha v. Bartlett, 8 Neb. 319, 1 N.W. 199 (1879).

[33]First National Bank of Omaha, 8 Neb. 319, 327 (1879).

[34]Jones v. Shrigley, 150 Neb. 137, 138, 33 N.W.2d 510 (1948).

[35]State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 249, 47 N.W.2d 520 (1951).

[36]St. Paul Fire & Marine Ins. Co. v. Truesdell

Distributing Corp, 207 Neb. 153, 296 N.W.2d 479 (1980).

[37]Meinhard v. Salmon, 249 N.Y. 458 (1902), *and as cited in* Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N.W.2d 139 (1956).

[38]L.B. 354, 83d Leg., 2d Sess. (Neb. 1974).

[39]St. Paul Fire & Marine Ins. Co. v. Truesdell Distributing Corp, 207 Neb. 153 (1980), *cited* in Karpf v. Karpf, 240 Neb. 302, 481 N.W.2d 891 (1992).

[40]Karpf v. Karpf, 240 Neb. 302 (1992).

[41]L.B. 130, 98th Leg., 1st Sess. (Neb. 2003).

[42]Brennemann v. Brennemann, 288 Neb. 389, 404, 849 N.W.2d 458 (2014).

[43]Bogert, supra at § 181, p. 244 (emphasis added).

[44]See, e.g., Hoglan v. Moore, 219 Ala. 497, 122 So. 824 (1929) (trust for beneficiaries so long as they were employed by American Cast Iron Pipe Company).

[45]See, e.g., Ruce, "The Trustee and the Remainderman: The Trustee's Duty to Inform", 26 Real Property, Trust and Estate L. J. 173, 185 (Spring 2011); Gallanis, "The Trustee's Duty to Inform", 85 North Carolina L.Rev. 1595, 1598 (2007).

[46]Ruce, supra at 182. The following examples are based on Philip Ruce's article as well.

[47]Ludwig is arguably a "vested remainder subject to a complete defeasance". His interest is there, unless Heidi removes it by her will. See Ruce, supra, at 185.

[48]*Id.*

[49]Uniform Trust Code Comment to § 103.

[50]See Manon v. Orr, 289 Neb. 484, 856 N.W.2d 106 (2014) and In re Rolf H. Brennemann Testamentary Trust, 288 Neb. 389, 849 N.W.2d 458 (2014), for cases discussing elements of the notice during a settlor's lifetime.

[51]See, e.g., Donald D. Kozusko, "In Defense of Quiet Trusts", Trusts & Estates, at 20 (March 2004); Frances H. Foster, "Trust Privacy", 93 Cornell L. Review 555 (2008).

[52]Andrew Carnegie, *The Advantages of Poverty*, pp. 54-55 (1891).

[53]Kevin D. Millard, "The Trustee's Duty to Inform and Report Under the Uniform Trust Code", 40 Real Property, Probate and Trust Journal 373, 393 (Summer 2005).

[54]Volume 40, Univ. of Miami Law Center's Philip E. Heckerling Institute on Estate Planning, Paragraphs 500-508.

[55]For an example of the sales techniques, and the fees involved, see South Dakota Trust Company's website, www.sdtrustco.com. Other similar concepts are a "secret trust", "Domestic Asset Protection Trust (DAPT)", "Dynasty Trust", "Perpetual Trust" and "Directed Trust". Other states advocating such trusts include Alaska, Delaware and Nevada. For a website that "ranks" 15 states and their ability to create such trusts, see www.oshins.com, in which a Nevada lawyer places Nevada as the number one state in which to create such a trust. For a case that shows some of the perils in these approaches, see Dahl v. Dahl, Utah Supreme Court January 30, 2015, 2015 UT 79 # 20100683 (wife's attorney's fees of $2,186,568.00).

[56]See Florida's "designated representative" statute as an example, Fla. Stat. § 736.0306.

[57]Kozusko, *supra* at 24. See also Anne J. O'Brien's article, *supra*, at Paragraph 507. For an extensive discussion of trust surrogates, see Note, "Agents in Secrecy: The Use of Information Surrogates in Trust Administration", 64 Vand. L. Rev. 925 (2011).

[58]Kozusko, *supra* at 21.

[59]Robert S. (Rust) Tippett, as quoted in Steve Leimberg's Asset Protection Planning Email Newsletter (September 2, 2015)

[60]253 Va. 30, 480 S.E.2d 488 (1997).

[61]American Taxpayer Relief Act of 2012 (Pub. L. 112-240, H.R. 8, 126 Stat. 2313).

[62]Dana G. Fitzsimons, Jr. & James L. Kronenberg, "Navigating the Trustee's Duty to Disclose", at 88 (ABA Section of Real Property, Trust, and Estate Law, 2008 Joint Fall Meeting).

[63]Kartiganer & Young, "The UTC: Help for Beneficiaries and Their Attorneys", Probate & Property 18, 20 (March/April 2003).

[64]Amended by LB 72 passed in the 2015 Unicameral.

[65]John Langbein, "Mandatory Rules in the Law of Trusts", 98 Nw. U. L. Rev. 1105, 1126 (Spring 2004).

[66]Millard, *supra,* at 394.

[67]29 Neb. 324, 45 N.W. 634 (1890).

[68]Langbein, *supra*, at 1126.

[69]Millard, *supra*, at 395.

[70]Michael M. Gordon, "The Trustee's Duty to

Inform: What Must the Trustee Tell Which Beneficiaries and When?", American Law Institute, at 15 (June, 2015).