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Just Say No: Reasons States Have Not Adopted the UTC

Robert Barton*

I. INTRODUCTION

With the Uniform Trust Code's passage by 34 states and the District of Columbia, the UTC hold-outs are increasingly few.¹ In some states, the UTC's proposed adoption was met with significant initial opposition from the public and members of the bar, only to pass shortly thereafter.²

But, jurisdictions like California, New York, Nevada, Texas, Delaware and South Dakota remain notable states which continue to resist the adoption of the UTC. So, is this the end of the line for UTC adoption? Or, will the hold-outs eventually become converts?

This brief article examines those jurisdictions which have not adopted the UTC and the reasons why they have not. These obstacles include jurisdictions with pre-existing robust trust codes, specific philosophical differences with the UTC, or a deliberate decision to compete with the UTC on the basis of perceived "advantageous" trust laws.

II. DON'T FIX WHAT ISN'T BROKEN

One key justification for UTC adoption is the "UTC's comprehensive defaults rules [that] apply when a trust does not address a particular subject, which will fill many gaps in trust instruments and help to prevent unnecessary litigation."³ However, many non-adopting states already have comprehensive trust statutes predating the UTC. The most

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¹ *Trust Code*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> (last visited Nov. 6, 2019).

² See, e.g., Constance Tromble Eyster & Carl G. Stevens, *The Colorado Uniform Trust Code*, COLO. LAW., Mar. 2019, at 37; Daniel P. Feliz, *New Illinois Law Guarantees Your Trust a Flat Tire*, LINKEDIN (Oct. 18, 2017), <https://www.linkedin.com/pulse/new-illinois-law-guarantees-your-trust-flat-tire-daniel-p-feliz/>.

³ *Why Your State Should Adopt the Uniform Trust Code*, UNIF. LAW. COMM'N, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e6482835-92b1-3c71-dc70-5cb0c2f4dcfe&forceDialog=0> (last visited Nov. 6, 2019).

notable is California, with an existing trust code so comprehensive it was used as the initial model of the UTC.⁴

Others such as Georgia and Indiana similarly have their own comprehensive trust codes.⁵ With detailed statutes already in place, a primary justification for UTC adoption is lacking and thus far, these states have opted not to enact a complete legislative overhaul through the UTC.

Washington, Texas and Iowa did adopt certain aspects of the UTC but felt wholesale adoption was unnecessary given the comprehensiveness of the existing statute.⁶ New York had similar reasoning for not adopting the UTC.⁷ However, having adopted certain portions of the UTC, it remains to be seen whether the UTC continues its creep forward in these states.

III. GOOD FOR EVERYONE ELSE, BUT NOT FOR US

UTC criticism has ranged from the abstract, such as the influence the National Conference of Commissioners on Uniform State Laws and the trust banking industry had on the UTC's development, to more specific objections.⁸ States that have considered, but failed to adopt, the UTC have articulated a number of areas of concern preventing its adoption.

For instance, Oklahoma attempted to adopt the UTC in 2004.⁹ The bill was ultimately defeated following concerns that the UTC would 1) decrease asset protection in third party special needs trusts and estate planning trusts; 2) eliminate charities as possible remainder beneficiaries; 3) could not easily be corrected by amendment; 4) be applied

⁴ UNIF. TRUST CODE Prefatory Note (UNIF. LAW COMM'N 2010); David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 145 (2002).

⁵ UNIF. TRUST CODE Prefatory Note.

⁶ See, e.g., Karen E. Boxx & Katie S. Groblewski, *Washington Trust Laws' Extreme Makeover: Blending with the Uniform Trust Code and Taking Reform Further with Innovations in Notice, Situs and Representation*, 88 WASH. L. REV. 813, 816 (2013); Mark Worthington, *Impact of the Uniform Trust Code on Third-Party SNTs*, NAELA ADVANCED INST. 2006, Nov. 4, 2006, at 1; Gerry W. Beyer, *Texas and the Uniform Trust Code*, WILLS, TRS. & ESTATES PROF BLOG, (Sept. 29, 2006), https://lawprofessors.typepad.com/trusts_estates_prof/2006/09/texas_and_the_u.html.

⁷ ALM Media, *Proposed New York Trust Code*, YAHOO! FIN. (July 6, 2017), <https://finance.yahoo.com/news/proposed-york-trust-code-020300679.html>.

⁸ Christina Bogdanski, *The Uniform Trust Code and the Common Law: An Analysis of Three Sections of the Code that Deviate from the Common Law and Why the Drafters Changed the Law*, 37 CARDOZO L. REV. 1907, 1909 (2016).

⁹ Mark Merric, *Why the Uniform Trust Code Failed in Various States*, LAW FIRM OF MARK MERRIC, LLC, 2-3, <http://www.internationalcounselor.com/Merric%20Law%20-%20Documents/UTC/utc19.pdf> (last visited Nov. 6, 2019).

indiscriminately to all trusts, old and new, requiring amendments to countless trusts; 5) cause uncertainty as to whether the creation, modification, or termination of an irrevocable trust triggered estate tax under the new law; 6) treat marital trusts and non-exempt dynasty trusts using a general power of appointment as the equivalent of ownership; 7) reduce spendthrift protection; 8) escalate claims against trusts in the domestic relations context; and 9) give judges broad powers to rewrite trusts.¹⁰ Another commentator identified asset protection reductions, charity concerns, and tax issues as the main reasons for the failure of UTC adoption in Oklahoma.¹¹

Also worth noting is the UTC's reliance on the Third Restatement of Trusts for guidance on interpretation.¹² Some UTC opponents have labelled the UTC a "skeleton statute" given the UTC's over 100 specific references to the Third Restatement.¹³ Those critics also contend the Third Restatement makes undesirable policy judgments and allows the voiding or rewriting of a trust under a public policy exception.¹⁴ For those jurisdictions which have deliberately departed from the Third Restatement either by statute or common law, this reliance is an obvious ongoing obstacle to adoption.

However, many policy objections to the UTC initially voiced by non-adopting jurisdiction have faded over time. For instance, Arizona adopted the UTC in 2003.¹⁵ The adoption was then entirely repealed a year later due to criticism about diminished creditor's rights pre-existing under Arizona common law, as well as the interference with the settlor's ability to keep information about their trusts confidential by requiring trustees to disclose trust information to beneficiaries.¹⁶ However, Arizona ultimately readopted the UTC, with the new statute addressing most of the earlier criticism.¹⁷

¹⁰ *Id.* These concerns have been noted by other commentators elsewhere. *See, e.g.,* Worthington, *supra* note 6, at 1-2.

¹¹ Courtney L. Kelley, *Gavel to Gavel: Unsuccessful Efforts to Adopt the Uniform Trust Code*, J. REC. (May 2, 2019), <https://journalrecord.com/2019/05/01/gavel-to-gavel-unsuccessful-efforts-to-adopt-uniform-trust-code/>.

¹² UNIF. TRUST CODE Prefatory Note. (UNIF. LAW COMM'N 2010).

¹³ Mark Merric et al., *The Uniform Trust Code, What does it Really Do?*, LAW FIRM OF MARK MERRIC, LLC 89 (2003-2004), <http://www.internationalcounselor.com/Merric%20Law%20-%20Documents/UTC/utc16.pdf>.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 11.

¹⁶ Kristen Franen & Bradley Myers, *Improving the Law Through Codification: Adoption of the Uniform Trust Code in North Dakota*, 86 N.D. L. REV. 321, 328 (2010).

¹⁷ David Case, *The New Arizona Trust Code*, TIFFANY & BOSCO P.A. (Mar. 16, 2017), <https://www.tblaw.com/new-arizona-trust-code/>.

In 2005, Colorado tried to adopt the UTC.¹⁸ Although the Colorado Bar Association's Trusts and Estates Section drafted a proposed bill adopting the UTC, efforts failed due to disagreements regarding the UTC's creditor's claims provisions.¹⁹ However, in 2018, Colorado ultimately enacted the Colorado Uniform Trust Code, based on the UTC, but not including the UTC's creditor's claims provisions.²⁰

The experience of Arizona, Colorado and other states suggest that as views on the UTC continue to evolve, along with the development of clarifying common law, those jurisdictions which have chosen not to adopt the UTC on policy grounds may find themselves eventually pursuing a path of at least partial adoption, if not outright acceptance.

IV. "THE [DELAWARE, SOUTH DAKOTA, NEVADA *ET AL.*] ADVANTAGE"

Competition among various states (and increasingly now, off-shore jurisdictions) for out-of-state trust business based on "advantages" in the law existed prior to the UTC.²¹ Much of the mania can be attributed to favorable tax treatment outside the purview of the UTC. However, many of these states have also found built-in marketing available through the ability to offer key differentiators from the "standard" provisions found in the UTC. In combination with other favorable treatment, the result has been an explosion in trust business in certain non-UTC jurisdictions such as Alaska, Delaware, Nevada, and South Dakota.

For example, one trust company touts South Dakota's exhaustive enumeration of trust protection powers on its website by stating, "in contrast to the Uniform Trust Code, which affords [Trust] Protectors three general powers, South Dakota now lists fifteen specific powers and discretions that a Protector may exercise."²² Another, Delaware trust company notes that "Delaware law is . . . very protective of a grantor's desire to restrict the disclosure of a trust's terms to beneficiaries. This Delaware Advantage is very unusual. Most states (and all states

¹⁸ Eyster & Stevens, *supra* note 2, at 37.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037-39 (2000).

²² *South Dakota's 2016 Trust Law Changes – June 2016*, TRIDENT TR., <https://tridenttrust.com/knowledge/news-events/south-dakota-s-2016-trust-law-changes-june-2016/> (last visited Nov. 6, 2019).

which have adopted the Uniform Trust Code) have created beneficiary disclosure rules which cannot be overridden by the terms of a trust.”²³

The result has been an explosion in the transfer of assets to these jurisdictions. For example, in 1996, South Dakota had fewer than five trust companies with assets of less than 1 billion dollars.²⁴ In 2001, that number ballooned to thirteen trust companies with nearly 13 billion under management.²⁵ By 2018, not including banks, nearly 100 trust companies were chartered in South Dakota and had collectively nearly 300 billion under management.²⁶ Significant growth over this time period has also been reported in other non-UTC states as well.²⁷

Of course, the adoption of the UTC would not preclude a state from adopting the statute and just continuing the further development of its trust code for marketing purposes. Indeed, Wyoming, New Hampshire and Ohio are UTC states but are frequently touted by commentators as “advantageous” trust jurisdictions.²⁸ However, so long as certain jurisdictions can offer consumers a perceived or actual competitive advantage ready-built into their trust law, it seems highly unlikely that the adoption of the UTC will become a part of a future legislative strategy.²⁹

²³ Richard P. Trumpler, *And Another Thing About Delaware*. . . , N.Y. PRIVATE TR. CO., <https://www.nyprtrust.com/white-papers/and-another-thing-about-delaware/> (last visited Nov. 6, 2019).

²⁴ Reid K. Weisbord & Patrick Goetzinger, *South Dakota Trust Law: Pulling Back the Curtain, A Soup to Nuts Tour of South Dakota Trust Law*, DENVER ESTATE PLANNING COUNCIL (Nov. 2018), <http://www.denverestateplanningcouncil.org/assets/Councils/Denver-CO/library/111518%20Powerpoint%20SD%20Trust%20Law.pptx>.

²⁵ *Id.*

²⁶ *Id.*; see also *South Dakota Welcomes \$234 Billion Trust Industry*, WEALTH ADVISOR (Mar. 9, 2018), <https://www.thewealthadvisor.com/article/south-dakota-welcomes-234-billion-trust-industry>; Reid K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93, 105 (2016).

²⁷ Sally Roberts, *Nevada trust companies growing wealth*, N. NEV. BUS. VIEW (Feb. 11, 2018), <https://www.nnbusinessview.com/news/nevada-trust-companies-growing-wealth/>.

²⁸ Jocelyn Margolin Borowsky & Richard W. Nenno, *A Comparison of Leading Trust Jurisdictions*, 37 TAX MGMT. ESTS., GIFTS, & TRS. J., 233 (2012); Scott Martin, *Nevada Trust Big Says Ohio Takes Place of Delaware as Top Trust Choice*, WEALTH ADVISOR (Apr. 28, 2013), <https://www.thewealthadvisor.com/article/nevada-trust-big-says-ohio-takes-place-delaware-top-trust-choice>.

²⁹ Weisbord, *supra* note 26, at 106 (commenting that “states that have succeeded in attracting nonresident trust business are unlikely to now reverse course and unilaterally withdraw from the interjurisdictional race to create the most settlor-friendly trust haven.”).

V. CONCLUSION

Over its twenty-year history, the UTC has continued its slow march towards national uniform adoption. In 2019, both Illinois³⁰ and Connecticut³¹ became late adopters. These states' respective adoptions signal that notwithstanding its age, the UTC continues to play a major role in the ongoing development of trust law. But, among the remaining non-adopting jurisdictions, the vast majority appear firmly entrenched. While UTC creep will likely continue, especially with those jurisdictions who have adopted some sub-set of UTC provisions, the remaining jurisdictions will be difficult to win over and UTC proponents will have to carefully consider how to convince the hold-outs that uniformity is preferable to the status quo, policy differences or a ready-built marketing campaign. Only time will tell if UTC proponents will be successful or instead, if these states will "just say no."

³⁰ *Trust Code*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> (last visited Nov. 6, 2019).

³¹ *Id.*