

Estate Planning Update: **THE ALABAMA UNIFORM TRUST CODE**

On January 1, 2007, the new Alabama Uniform Trust Code (UTC) came into effect. The UTC applies to all trusts created before, on or after January 1, 2007. Although most of the provisions represent an attempt to unify existing Alabama law governing trusts, there are several major changes in the law that individual trustees and beneficiaries should be aware of.

1. Trust Beneficiaries Have Greater Access to Information. Disclosure is the name of the game under the UTC. For trusts created prior to 2007, a Trustee must now send an annual report or accounting to current income and principal beneficiaries. While a beneficiary can waive his or her right to receive such an accounting, that waiver is revocable by the beneficiary at any time. Trustees also are required to give a copy of the trust instrument to any beneficiary upon request, and must disclose trust administration information upon request to a certain class of beneficiaries called "Qualified Beneficiaries." A Qualified Beneficiary under the UTC is a beneficiary who receives (or can receive) current income or principal of the trust, or who would receive principal or income if the current distributees' interests were terminated. Qualified Beneficiaries also include those who would receive trust assets if the trust suddenly terminated.

For trusts created after 2007, Trustees have the following duties in addition to the duties described above: (1) to notify Qualified Beneficiaries of a change in trusteeship, (2) to notify Qualified Beneficiaries of the existence of an irrevocable trust and their right to receive a

copy of the trust instrument, and (3) to notify current income and principal distributees of a change in the Trustee's compensation. While trust instruments drafted after 2007 can specifically waive the rights described above (as well as the annual statement requirement and right to receive a copy of the trust instrument), Trustees always will have a duty to give Qualified Beneficiaries information relating to trust administration upon request. This duty cannot be waived.

2. Exceptions to the Spendthrift Rule. While many trusts contain language preventing a beneficiary's creditors from reaching his or her interest, commonly known as a "spendthrift provision," the UTC makes several notable exceptions to this rule, and allows certain creditors to ignore spendthrift restrictions and attach a beneficiary's interest in a trust. There are three categories of creditors who have this special status, namely: (a) creditors for unpaid child or spousal support for a beneficiary's child, spouse, or ex-spouse; (b) judgment creditors who have provided services protecting a beneficiary's interest in the trust; and (c) claims by the state or federal government against a beneficiary. While the amount that these creditors can demand from the trust is limited to the amount that can be paid out on a beneficiary's behalf, this is

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nonetheless a significant change from prior Alabama law.

3. Co-Trustees Can Now Act by Majority Vote.

Previously, Co-Trustees had to reach unanimous agreement on trust decisions. However, the UTC reverses this rule. Unless the trust provides otherwise, Co-Trustees may act by majority, thereby making trust administration easier and less susceptible to gridlock.

4. Filling a Vacancy in Trusteeship. Under the UTC, if there is no trustee serving and the trust document does not appoint a successor, adult Qualified Beneficiaries can appoint a new trustee by unanimous agreement. This is a change from prior law which generally required a court to appoint a new trustee if there was no successor named.

5. Modifying or Terminating Irrevocable Trusts.

Traditionally, irrevocable trusts are, by their very nature, not able to be modified or terminated except by a court in very limited circumstances. However, the UTC expands the situations in which an irrevocable trust can be modified or terminated. If the grantor of a trust and all beneficiaries agree, an

irrevocable trust can be modified or terminated by a court even if doing so would be contrary to the terms of the trust. Beneficiaries, by agreement among themselves, may also ask a court to modify or terminate an irrevocable trust. A trust may also be modified or terminated with court approval because of unanticipated circumstances, if the trust administration is uneconomical, to correct mistakes, and to more clearly achieve the grantor's tax objectives.

6. Other Areas of Change. The UTC makes many other changes in Alabama trust law. Anyone thinking about creating a new trust or making changes to their current estate plan should be aware that the new UTC rules can make it more difficult in some cases to protect assets from creditors and occasionally require undesirable disclosures. For trust beneficiaries, the UTC affords greater access to trust information. If you have any questions about how the UTC may affect your existing trusts, or how UTC considerations factor into creating a new trust, contact your legal advisor. We have inserted a *Notice to Trustees* to better explain some of the new changes.

Catherine L. Wilson

ESTATE TAX REFORM EFFORTS IN 2007



As many of you know, the future of the estate tax has been in limbo for a number of years. There have been several attempts over the past couple of years to repeal the tax permanently and/or increase the current estate tax exemption amount and lower the current maximum rate. No attempts have been successful. Most recently, during the 2008 budget resolution process, several Senate budget amendments were introduced related to the estate tax. Senator Max Baucus introduced Senate Amendment 492 to extend the 2009 estate tax rates and exemption amount — 45% maximum rate and \$3.5 million per spouse exemption — through 2012. The Amendment passed the Senate by a vote of 97 to 1. Other amendments were introduced to attempt to increase the estate tax exemption amount to \$5 million with a maximum rate of approximately 35%.

These amendments failed. There was also a Senate Amendment attempt to repeal the estate tax permanently, which also failed. Because Senate Amendment 492 was passed by the Senate, it will remain a part of the budget resolution process when the House and Senate try to reconcile differences in their proposed budget resolutions. If that occurs and Senate Amendment 492 remains intact through various conferences, the Senate Finance Committee would then have to decide whether to include the estate tax provision in its tax bill that would go to both chambers of Congress for consideration.

Craig M. Stephens

PENSION PROTECTION ACT OFFERS NEW RETIREMENT PLAN BENEFICIARY OPTIONS

President Bush signed the Pension Protection Act of 2006 into law on August 27, 2006. Among other things, the Act includes provisions related to charitable contributions of IRA assets, administrative retirement plan funding rules, and new charitable contribution substantiation rules. The new Act also implemented new rollover provisions for certain beneficiaries of traditional qualified retirement plans such as 401(k) retirement plans; 403(b) plans, and public 457(b) plans. The new Act now allows non-spouse beneficiaries to rollover inherited qualified plan assets to an IRA.

Under prior law, the beneficiary of a qualified retirement plan would be subject to the somewhat restrictive payout terms of the plan. This is because most plans require the non-spouse beneficiary to withdraw the assets within a relatively short period of time--often as a lump sum or within 5 years (or less) of the account owner's death. Because of the relatively short time in which the assets have to be withdrawn from the plan, the income tax liability due on the account assets is often compressed into a shorter time period than would otherwise be required under a traditional IRA.

Prior to the new Act, only a spouse had the option to rollover assets from a qualified plan to an IRA. In most cases, this rollover feature allows the surviving spouse to use her own life expectancy for purposes of the minimum required distribution rules and to

continue to defer income taxes on the plan assets to the maximum extent possible. Until now, non-spouse beneficiaries did not have the rollover option. However, the new Act now gives the rollover option to non-spouse beneficiaries. This portion of the new Act allows for more flexible planning for retirement benefits for non-spouse beneficiaries, including children, grandchildren, and even domestic partners.

The new rollover rules went into effect on January 1, 2007. The rules are applicable for retirement benefits payable from 403(b) plans, traditional qualified retirement plans, or public 457(b) accounts. There are some rules that must be followed carefully. First, the rollover must be a "trustee to trustee" rollover--the beneficiary of the plan cannot receive the funds directly from the plan. Second, if the account owner dies before his or her required beginning date, and if the plan would have required a payout in 5 years, there are important transfer timing deadlines that must be met to allow the beneficiary to take withdrawals over his or her life expectancy (in lieu of the 5 years required by the plan).

Overall, the new Act provides more flexibility to non-spouse beneficiaries of qualified plans. Additional income tax deferral can often be achieved by taking advantage of the rollover option. However, because the rules can be complex, and in order to determine if the rollover option is best for your particular situation, be sure to evaluate all of your options with your tax advisor.

Craig M. Stephens

SPOTLIGHT



KATHERINE N. BARR has been named a fellow of the American College of Trust and Estate Counsel, a peer-selected group of lawyers who have contributed to the practice of estate and trust law. She is one of only 28 Alabama attorneys to receive the honor, five others of whom are also members of our firm. A former chair of the Real Property, Probate and Trust Section of the American Bar Association's (RPPT) Committee on Long-Term Care, Medicaid and Special Needs Trusts, Katherine presently serves as Group Chair of RPPT's Elder and Disability Law Group, overseeing its Committees on Special Needs Trusts, Surrogate Decision Making and Bioethics. She is the Alabama member and a co-chair of the Education Committee of Special Needs Alliance, a national organization of lawyers dedicated to disability and public benefits law, a charter member of the Elder Law Section of the Alabama State Bar, a member of the Birmingham Estate Planning Council and a member of NAELA (National Academy of Elder Law Attorneys).

As part of her estate planning practice, she routinely helps families create estate plans with special needs trusts, and assists trial lawyers in establishing court-created special needs trusts, designing structured settlements and implementing other strategies to receive an injured party's settlement funds while maintaining eligibility for government assistance benefits.

Katherine presently serves on the Advisory Board of Camp ASCCA (Alabama's Special Camp for Children and Adults, a March of Dimes Organization), the Advisory Board of the Alabama Family Trust (Alabama's pooled trust for persons with disabilities) and is active with the Alabama Head Injury Foundation, the Autism Society of Alabama and the local chapter of United Cerebral Palsy. She is also a member of the Advisory Board of Lakeshore Foundation and the Planned Giving Advisory Board of Camp Smile-a-Mile. She rarely misses an opportunity to speak to a group of parents, lawyers or other advisors to share information about the importance and methods of protecting assets and government benefits for persons with disabilities.

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