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Subject: Kelley Galica Peck - Connecticut Adopts Omnibus Trust Code

"*On June 5, 2019, the Connecticut legislature enacted Public Ac t 19-137, an Act Concerning the Connecticut Uniform Trust Code. This massive bill, over 90 pages in length, adopts four major categories of revisions to Connecticut trust law that will greatly enhance the administration of trusts and planning opportunities available to practitioners and their clients in Connecticut, including allowing Domestic Asset Protection Trusts, Directed Trustees and an expansion of the Rule Against Perpetuities. The bill is expected to become law when the Governor signs it or, absent action from the Governor, fifteen days after it is presented to him for signature. It is not expected that the Governor would veto the bill. The bill, assuming it becomes law, will be effective as of January 1, 2020.*"

We close the week with important commentary by **Kelley Galica Peck** that reviews the enactment of the Connecticut Uniform Trust Code. As she notes in her commentary, this massive bill contains not only Connecticut's variation of the Uniform Trust Code, but also encompasses the Uniform Directed Trust Act, the Qualified Dispositions in Trust Act that makes Connecticut the 20th state to adopt domestic asset protection trust legislation, and also includes a modification to the Uniform Rule Against Perpetuities Act that will allow (prospectively) for trust durations of 800 years.

Kelley Galica Peck is a principal at **Cummings & Lockwood LLC** in West Hartford, Connecticut representing individuals in estate and trust planning as well as individual and professional fiduciaries and beneficiaries in contested and uncontested probate matters. She is a Fellow of ACTEC and the author of a number of books and articles on various topics relating to trusts. Attorney Peck is the Chair of the Legislative Committee of the Estates & Probate Section of the Connecticut Bar Association. She and the other members of the Legislative Committee, Molly Ackerly, Suzanne Brown Walsh, John Ivimey and Deborah Tedford, served as the drafting

committee for the Connecticut Uniform Trust Code The Committee also received substantial assistance from dedicated members of the Office of Probate Administration, the Connecticut Bankers Association, the Office of the Attorney General and other impacted state agencies.

Here is her commentary:

EXECUTIVE SUMMARY:

On June 5, 2019, the Connecticut legislature enacted Public Act 19-137, an Act Concerning the Connecticut Uniform Trust Code. This massive bill, over 90 pages in length, adopts four major categories of revisions to Connecticut trust law that will greatly enhance the administration of trusts and planning opportunities available to practitioners and their clients in Connecticut, including allowing Domestic Asset Protection Trusts, Directed Trustees and an expansion of the Rule Against Perpetuities. The bill is expected to become law when the Governor signs it or, absent action from the Governor, fifteen days after it is presented to him for signature. It is not expected that the Governor would veto the bill. The bill, assuming it becomes law, will be effective as of January 1, 2020.

COMMENT:

Calling P.A. 19-137 the “Connecticut Uniform Trust Code” may well earn a snort of derision from purists familiar with that uniform act. First and foremost, it should be noted that CUTC contains not only Connecticut’s variation of UTC, but also encompasses the Uniform Directed Trust Act, the Qualified Dispositions in Trust Act and a modification to the Uniform Rule Against Perpetuities Act to allow prospectively for trust duration of 800 years in gross. But even setting aside those additions to the Act, purists will wonder at the many variations within the UTC portion of the Act. Most of Connecticut’s variations from UTC can be traced to one overarching factor - Connecticut has a bifurcated court system where the probate courts are courts of limited jurisdiction without powers of general equity, but with firm control of virtually all aspects of testamentary trusts.

Neither practitioners nor professional trustees were willing to grant the same control over inter vivos trusts to the probate court, and the probate courts were not willing to relinquish control over testamentary trusts. To

address these competing interests, CUTC adopts a bifurcation in many aspects of the treatment of testamentary and inter vivos trusts. While there is no compelling legal distinction between inter vivos and testamentary trusts to justify the disparate treatment, those who practice in Connecticut will recognize that CUTC merely perpetuates the longstanding history of the role of the probate courts in testamentary trusts. For many years, practitioners have avoided the use of testamentary trusts for this reason and, unfortunately, CUTC does not alleviate that need. Indeed, it is likely to make the use of testamentary trusts even less favored.

Practitioners will note one of the most significant deviations from UTC in the jurisdictional and venue provisions. UTC Section 203, concerning subject matter jurisdiction, is barely four lines long. By contrast, the corresponding provision in CUTC, Section 15, is fully four pages long. Practitioners outside Connecticut may find the epic jurisdiction and venue provisions mind-numbing and wonder what in the water is causing such madness. For Connecticut practitioners, the lengthy provision relating to jurisdiction in the probate court versus the superior court over testamentary and inter vivos trusts may garner little more than an eye roll over the complexities engendered by the unique role of the probate courts in the affairs of testamentary trusts.

To deal with the anomaly, Section 15 outlines in exacting detail the jurisdiction of the probate court and the superior court relative to virtually every statute under Connecticut's existing and new trust law. It starts by addressing the exclusive jurisdiction of the probate courts relative to testamentary trusts in subsection (a). It then outlines the concurrent jurisdiction of the probate and Superior Courts over testamentary trusts in subsection (b). Notably, however, the exclusivity of jurisdiction set forth in (a) is markedly cut back, and potentially rendered entirely moot, by the provisions of subsection (c), in which the Superior Court is given original jurisdiction over any testamentary trust matter, including those purportedly subject to the exclusive jurisdiction of the probate courts under subsection (a), if the matter is related to another Superior Court action or if the probate courts lack the power to provide an adequate remedy. This effectively means that the Superior Court will have jurisdiction over any contested matter since the probate courts lack the power to provide the full scope of equitable remedies. Section 15(c) adopts the case law analysis that has consistently been interpreted to reach this result.[i]

Section 15(d) and Section 16, regarding venue, will be a welcome change for practitioners in Connecticut. These sections substantially expand access to the probate courts for inter vivos trusts. Connecticut probate courts can be quicker and more efficient than the Superior Court, less expensive and more knowledgeable in dealing with trust matters, particularly those where no controversy exists. Practitioners have long jumped through hoops to gain access to the probate courts for simple inter vivos trust matters such as a change of trustee or construction. Doing so often required the necessity of bringing an accounting action in order to gain access. Now, parties can gain access to the probate courts without the need of an accounting in virtually all circumstances related to inter vivos trusts. Venue will be in the probate court where an accounting action could be brought, though one will no longer be required.

Section 15(e) grants all courts the power to hear and decide a trustee's request for instructions or any party's request to compel or prohibit an action by a trustee. While this declaratory judgment power is presumed to exist in the Superior Court, the lack of any statutory grant of the power in probate court left some doubt as to the force and effect of such probate decrees. Granting this enhanced power in the probate courts by statute should be another welcome tool to allow parties to gain preapproval (or denial) of a proposed action with the binding effect of a court order, at least relative to trusts.

Another notable difference is the decision to exclude portions of Article X of UTC relating to remedies and damages for breach of trust in CUTC. As noted, the limited powers of the Connecticut probate courts render them without most equitable powers and certainly without the power to empanel juries and award damages.[ii] The provisions of Article X in UTC are broad equitable powers which already exist in Connecticut Superior Courts. The probate courts were unwilling to concede that some of the remedies available under Article X should remain limited only to Superior Court matters and practitioners and professional trustees were unwilling to upend 300 years of case law limiting the equitable power of probate courts. To avoid a controversy that could have prevented passage, the drafting committee excluded portions of Article X altogether with the hope that a future committee may thread that delicate needle of articulating which remedies are available in the probate courts. The question of remedies for breaches and the award of damages, is left, for now, to be ascertained under traditional common law principals in each court.

CUTC also adopts another great aspect of UTC, the opportunity for non-judicial settlements in Section 11. Sadly, it applies only to inter vivos trusts and not to testamentary trusts. Parties to testamentary trusts will continue to be subject to the more cumbersome obligations, and expense, of submitting to probate court supervision all non-controversial matters such as accountings, change of trustee, compensation, construction matters and the decision to act or not act in a particular manner. Further, Section 11(e) expressly provides that a non-judicial settlements may not be used to terminate or modify any trust (testamentary or inter vivos). That can be done only under Sections 31 to 37. While it has been fairly common practice to use release agreements in Connecticut for inter vivos trust matters, the express statutory authority will provide greater comfort to the parties, especially fiduciaries.

In addition to the unique difficulties presented by testamentary trusts, the drafting committee faced other state agency concerns about the risk of change in some aspects of long-settled common law of trusts in Connecticut. The Office of the Attorney General, in its role representing the interest of charitable trusts and the department of social services relative to the impact of trusts on Medicaid eligibility and recovery, actively expressed concerns regarding the potential impact of adopting pure UTC provisions. The drafting committee had to take account of those concerns. For example, Section 2, related to the scope of the Act, expressly provides that the Act does not apply to charitable trusts and many provisions throughout the Act expressly exclude application to charitable trusts. Section 2 also declares that the Act cannot be applied in any way that is inconsistent with or in contravention of federal Medicaid law.

Another major exclusion from CUTC is Article V of the UTC governing creditor's claims, spendthrift and discretionary trusts. Some stakeholders wanted to adopt very explicit rules for making claims against revocable trusts similar to the rules for claims against estates. This approach might appear to treat revocable trusts as no more than will substitutes. Further, recent case law in Connecticut renders the liability of a revocable trust for the debts of a decedent in some doubt, at least in the absence of express provisions in the trust instrument.[iii]

A second and equally compelling reason to exclude Article V stemmed from concerns expressed by the state agency in charge of Medicaid and

other benefits that codifying the UTC law of spendthrift trusts might have an unanticipated consequence of changing certain well-established common law rules in Connecticut related to Medicaid eligibility and recovery. For the same reason, a number of provisions were expressly added at the request of the agency to clarify that modification and termination of trusts could not be used to prejudice the rights of the state to collect under first party special needs trusts.

CUTC, at Section 40, does incorporate and expand on some of the concepts from Article V regarding creditor's claims. It provides that a creditor of a beneficiary has no right to compel a distribution from a trust merely because the beneficiary is also a trustee and distributions are limited by an ascertainable standard or because the beneficiary has a discretionary 5 by 5 power or a "Crummey" withdrawal right. That section also clarifies that the lapse, release or waiver of a power of appointment does not render the beneficiary a settlor of the trust relative to that portion of the trust. While that provision would not necessarily impact the tax treatment of trust for purposes of the grantor trust rules, it does serve to preclude a claim of a creditor to the trust by asserting that the beneficiary became a settlor and is subject to a different set of rules. In a similar fashion, Section 58 of CUTC provides that the mere grant of a discretionary power to the trustee to reimburse the grantor for the payment of taxes incurred by an irrevocable grantor trust, or even the direct payment of the tax liability, does not grant a beneficial interest in the trust to the settlor and does not subject the trust to claims of the settlor's creditors.

Exclusion of Section 601 of UTC regarding capacity required to execute a revocable trust is another deviation in CUTC. Under UTC, the capacity is the same as that required to execute a will. The very low standards of capacity required for a will can be problematic for many reasons and there was no enthusiasm to compound the problem by adopting the same low standard for trusts. The existing common law capacity for execution of trusts in Connecticut is akin to that required to execute a deed. It is higher than that necessary for a will, but lower than that required in the case of a contract.[iv] The drafting committee considered it important to recognize that revocable trusts, while often used, in part, to dispose of assets at death, have a far broader use and purpose than as mere testamentary substitutes. To treat them as such diminishes their value as independent tools.

Provisions for modification and termination of trusts may err on the side of greater restrictions, but are substantially broader than existing Connecticut law. In Section 31(a) a trust may be modified or terminated even if it defeats a material purpose of the trust if the settlor is living and consents. Consistent with recent suggestions by the uniform laws commission, the Act made this provision effective only to trusts established after the effective date of the act and only with court approval to avoid the risk of estate tax inclusion of irrevocable trusts due to a "retained" power to modify or terminate the trust by the settlor. Other modifications and terminations are permitted under Section 31(b) without the consent of the settlor so long as the change does not violate a material purpose of the trust, but court approval is still necessary.[v]

The power to terminate "small trusts" was greatly simplified and less burdensome under Section 35.[vi] The trustee may terminate under Section 35(a) without court approval by giving 30 days' notice to the qualified beneficiaries if the value of the trust is less than $200,000. This amount is an increase from existing law setting a threshold amount of $150,000. In addition, under Section 35(b), termination, with court approval, is now possible for any trust that is uneconomic to maintain. The language of Section 35(b) does not associate any specific dollar amount with the determination of what constituted an uneconomic trust and leaves flexibility to argue economics with larger trusts.

CUTC adopts broad notice and reporting requirements for trustees. Under the mandatory inclusion provisions of Section 5, notice to beneficiaries over the age of 25 cannot be avoided by the terms of the trust. However, under Section 17 - 20, the virtual representation provisions formerly found in Conn. Gen. Stat. § 45a-487a to 487f were incorporated back into the UTC framework. Further, in recognition of the genuine concern some settlors have regarding the fitness of an individual beneficiary to receive notice and control beneficiary decisions, CUTC adds Section 21, which enables the settlor to appoint a third party designated representative to receive notice on behalf of a beneficiary and to bind the beneficiary. For existing trusts, it is to be hoped that courts will grant requests for modification to add designated representatives in circumstances where the settlor or the trust instrument reflect an intent to restrict information to certain beneficiaries.

The robust notice and reporting provisions of the Act are set forth primarily in section 63. They require notice of the trust to all qualified beneficiaries

(i.e., those currently eligible to receive distributions and the presumptive remainder beneficiaries) of an irrevocable trust within 60 days and to any other beneficiary who requests notice. Annual reports (which are less burdensome than full accountings) are required for all current beneficiaries and any other qualified beneficiary that requests the report. The report and notice may, however, be provided instead to a designated representative and the virtual representation rules do apply.

As an adjunct to the substantial notice and reporting requirements, CUTC now applies a strict statute of limitations on the right to raise breach of duty claims. Under Section 70, a beneficiary has one year to raise a claim regarding any matter disclosed in the report. In the absence of a report, the beneficiary has three years from (i) the termination of the trust or the beneficiary's interest in the trust, or (ii) the death, removal or resignation of the trustee in which to file a claim for breach of duty. Unfortunately, like so many of the other great aspects of CUTC, the statute of limitations provision in Section 70 apply only to inter vivos trusts and not to testamentary trusts. Rather, those parties are left with the cumbersome and expensive process of mandatory probate court accountings and no statute of limitations without an accounting.

Within P.A. 19-137, Connecticut also adopted the Uniform Directed Trust Act, which was published in 2017. As such, Connecticut is one of the first ten states to adopt this uniform act. The Connecticut UDTA closely parallels the uniform act with few deviations.

CUDTA sets forth standards for the appointment and services of a trust director. It approves the bifurcation of the traditional role of the trustee into various facets to allow a director to assume limited responsibility for discrete acts ordinarily required of the trustee. The role tends to be most valuable in trusts with difficult assets, such as real property, a closely-held business or a concentration of assets. Many professional trustees will not assume responsibility for such unique assets and might force sale rather than retain the assets. The trust director can provide the requisite expertize to manage such assets effectively and, more important from the perspective of the trustee, absorb the liability if the investment or retention decision ultimately proves imprudent.

Under CUDTA, trust directors have the same fiduciary duties and liabilities of a trustee, though the settlor can limit or expand liability in the trust

instrument. In addition, Section 91 permits the bifurcation of duties among co-trustees in the same fashion as between a trustee and trust director with the same effect.

As if the foregoing was not enough to take on in one legislative session, P.A. 19-137 also incorporates the Connecticut Qualified Dispositions in Trust Act. Passage of CQDTA makes Connecticut the 19th state to adopt domestic asset protection trust legislation. In the interest of remaining consistent with neighboring states of Rhode Island and New Hampshire, the CQDTA is modeled after the key provisions of the acts in those states.[vii] Like virtually all DAPT acts, CQDTA requires that the trust be irrevocable, spendthrift, governed by Connecticut law and have a Connecticut trustee, either a resident individual or a bank or trust company licensed to operate in Connecticut and having custody of assets and substantial administrative functions in Connecticut.

The law will not permit settlors to evade known creditors. Exemption from the claims of existing creditors applies only four years after transfer to the DAPT, or one year after it was reasonable to discover the transfer, whichever is later. For claims that arise after a transfer to a DAPT, exemption applies four years from transfer. Certain exception creditors are not exempt from making claims. A spouse or former spouse who was married to the transferor at or before the time of transfer is an exception creditor, but only as to agreements or support and property orders in place prior to the transfer to the DAPT. Children having support orders in place prior to the transfer to the DAPT also are exception creditors. Finally, preexisting tort creditors (based on the date of the tort without regard to the date of judgment) are also exception creditors.

Under CQDTA, the trustee of the DAPT is exempt from liability and entitled to priority of reimbursement for the cost of defending against claims of a creditor absent bad faith. The creditor must prove bad faith by clear and convincing evidence. The Act also prevents claims against practitioners who advise or assist in the creation or funding of a DAPT. The Act does not require the transferor to provide an affidavit of solvency at the creation of the DAPT, but any transfer that renders the transferor insolvent could be deemed a fraudulent transfer under existing law.

Last, though certainly not least, P.A. 19-137 (at Section 119) adopts near repeal of the rule against perpetuities by establishing an 800 years in gross

standard under the Connecticut Uniform Rule Against Perpetuities Act.[viii] The option to employ this longer perpetuities provision applies prospectively only to trusts established on or after January 1, 2020.[ix]

Adoption of the Connecticut Uniform Trust Code, which encompassed the Connecticut Uniform Directed Trust Act, the Connecticut Qualified Dispositions in Trust Act and a nearly unlimited perpetuities period of 800 years, was an ambitious undertaking. Any one Act alone would be a major stride forward, but the adoption of all four, in a state with such complex impediments to reasonable and comprehensive modern trust reform, has thrust Connecticut trust law firmly forward into the 21st century.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Kelley Galica Peck

CITATIONS:

[i] See *Geremia v. Geremia*, 159 Conn. App. 751, 125 A.3d 549 (2015).

[ii] Connecticut probate courts do have the power to surcharge a fiduciary, but have never had the power to award damages. In 1997, the legislature adopting ambiguous legislation granting to the probate courts "all the powers available to a judge of the Superior Court at law and in equity" pertaining to accounting matters. Conn. Gen. Stat. § 45a-175(h). However, at least two appellate level courts have concluded even after the

enactment that probate courts still lack the power to award damages and to provide many other equitable remedies available in the Superior Courts. See *Geremia v. Geremia*, 159 Conn. App. 751, 125 A.3d 549 (2015) and *Gaynor v. Payne*, 261 Conn. 585, 599, 804 A.2d 170 (2002).

[iii] See *Lefevre v. Lefevre*, 54 Conn, L. Rprtr. 339; 2012 WL 3264051 (Conn**.** Super**.** Ct. 2012). While the case is only a Superior Court opinion, the drafting committee was not comfortable making a substantial change in Connecticut law without further opportunity for review.

[iv] See *Whittemore v. Neff*, 2001 WL 753802 (Conn**.** Super**.** Ct. 2001)).

[v] While Connecticut does not yet have a decanting statute, the common law does recognize the viability of decanting. See *Ferri v. Powell-Ferri*, 317 Conn. 226, 116 A.3d 297 (2015). Modification and termination rules may provide some respite for problematic trusts, especially those adversely impacted by the sweeping new rules, until more formal decanting options are adopted.

[vi] Conn. Gen. Stat. § 45a-484, with its lower threshold and cumbersome notice and court approval requirements for terminating a small trust, is repealed.

[vii] Presently, New Hampshire and Rhode Island are the only other states in the Northeast with DAPT laws.

[viii] Conn. Gen. Stat. § 45a-491, *et. seq*.

[ix] A technical error has been identified in Section 119. The 90 years in gross currently reflected in § 45a-491, *et seq*, was amended to 800 years in section §§ 45a-492 to 495, but the reference to the change in § 45a-491 was inadvertently excluded. A technical correction next year will be necessary.