

**DIAMOND in the ROUGH:  
The Idaho Uniform Custodial Trust Act**

Part One: INTRODUCTION

1.01 Idaho adopted the Uniform Custodial Trust Act (the UCTA *or* the Act) in 1989. The objective of the legislation was to provide “a simple trust that is uncomplicated in its creation”. The UCTA was approved and recommended to all of the states by the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission *or* the ULC) in August 1987. Rhode Island was the first state to adopt the Act – in 1988 and Idaho followed as the second state to adopt the Act – in 1989. The Act appears in Title 68, Chapter 13 of the Idaho Code.

1.02 The ULC wrote in a Prefatory Note in the Act that:

1.1 The Custodial Trust Act is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attorneys engaged in general rather than specialized estate practice.

1.2 The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity.

1.3 The statute will also be available for accomplishing distribution of funds by judgment debtors and others to incapacitated persons for whom a conservator has not been appointed.

1.4 The Act allows any person, competent to transfer property, to create custodial trusts for the benefit of themselves or others, with the beneficial interest in custodial trust property in the beneficiary and not in the custodial trustee. Its potential for use is extensive.

1.5 Although the most frequent use probably will be (a) by elderly persons, it is also available for (b) a parent to establish a custodial trust for an adult child who may be incapacitated; (c) for adult persons in the military, or (d) those leaving the country temporarily, to place their property with another for management without relinquishing beneficial ownership of their property; or (e) for young people who have received property under the Uniform Transfers to Minors Act to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

1.6 The Act . . . allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodial trustee for the benefit of a beneficiary. The *most typical transaction envisioned* would involve a person who would transfer intangible property, such as securities or bank accounts, to a custodial trustee but with retention by the transferor of direction over the property. Later, this direction could be relinquished, or it could be lost upon incapacity. *The objective of the statute is to provide a simple trust that is uncomplicated in its creation, administration, and termination.*

## Part Two: SCENARIOS

2.01 *The Frail Elderly.* An elder person, recognizing limitations and wanting the security of sound management of financial resources without the fear of conservatorship or

competition and strife among descendants could transfer most of her assets to a custodial trustee for management. The process is simple. The statutory protection is great.

2.02 *Young person taking by beneficiary designation.* An account owner can designate a custodial trustee to hold a future account distribution for a designated beneficiary, thus avoiding the need for a conservatorship and allowing custody beyond age 21 set in the Uniform Transfers to Minors Act.

2.03 *Avoiding Ancillary Probate.* An individual (transferor) owning real estate interests outside of Idaho (e.g., fee interests, mortgage-secured escrows, mineral interests, and timeshares) can transfer title to another as custodial trustee for the transferor-as-beneficiary and further direct distribution to a designated remainder beneficiary at the beneficiary's death.

2.04 *Obligor discharge of debt to an incapacitated person.* A person who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds twenty thousand dollars (\$20,000), the transfer is not effective unless authorized by the court. I.C. 68-1305.

2.05 *Flexible, non-probate distribution directives.* An individual (transferor) owning property of any character can transfer title to another as custodial trustee for the transferor-as-beneficiary and (a) either designate specific remainder beneficiaries to take at the beneficiary's death *or* (b) reserve the right to designate death distributees "as last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary." I.C. 68-1317(c)(i).

Part Three: INVOKING TRUST

3.01 The Act sets the criteria for effectively creating a custodial trust. I.C. 68-1302.

There are two methods: (a) a *transfer in trust*, I.C. 68-1302(1) and (b) a *declaration of trust*, I.C. 68-1302(2).

3.02 *Transfer in trust*. The Act provides that a person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary, an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the Idaho uniform custodial trust act.

An example of *transfer in trust* scripting would be as follows:

TRANSFER IN TRUST UNDER THE IDAHO  
UNIFORM CUSTODIAL TRUST ACT

I, *Oliver Owner*, transfer to *Tommy Trustee*, as custodial trustee for *Oliver Owner* as beneficiary and *Dusty Distributee* as distributee on termination of the trust in absence of direction by the beneficiary under the Idaho Uniform Custodial Trust Act, the following:

- (a) real property legally described as follows XXXXXXXX;
- (b) 1958 Ford Edsel, VIN XYZ1234567
- (c) Edward Jones brokerage account no. XMB135Z83;
- (d) Planters Bank account nos. 32890 and 89603.

Dated: .....

(Signature) \_\_\_\_\_ [Oliver Owner will then need to sign a deed for the real estate, a DMV title certificate transfer for the Edsel, an account registration change at the brokerage, and account transfer document at the bank.]

3.03 *Declaration of Trust.* The Act alternatively provides that a person may create a custodial trust of property by *a written declaration*, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and *naming as beneficiary an individual other than the declarant*, in which the declarant as titleholder is designated, in substance, as custodial trustee under the Idaho uniform custodial trust act. A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under this chapter.

An example of *Declaration of Trust* scripting would be as follows:

DECLARATION OF TRUST UNDER THE IDAHO  
UNIFORM CUSTODIAL TRUST ACT

I, *Oliver Owner*, declare that henceforth I hold as custodial trustee for *Bonnie Beneficiary* as beneficiary and *Dusty Distributee* as distributee on termination of the trust in absence of direction by the beneficiary under the Idaho Custodial Trust Act, the following:

- (a) real property legally described as follows XXXXXXXX;
- (b) 1958 Ford Edsel, VIN XYZ1234567
- (c) Edward Jones brokerage account no. XMB135Z83;
- (d) Planters Bank account nos. 32890 and 89603.

Dated: .....

(Signature) \_\_\_\_\_ [Oliver Owner will then need to sign a deed for the real

estate, a DMV title certificate transfer for the Edsel, an account registration change at the brokerage, and funds transfer directive at the bank.] NOTE: In the Declaration of Trust the owner self-declares a trust and also holds title as trustee for another. The Custodial Trust cannot be revoked by a transferor – so this trust is irrevocable by the trust declarant and asset transferor.

## Part Four: KEY, UNIQUE, Non-OBVIOUS FEATURES

4.01 The methodology of *incorporation by reference* gives sweeping power and energy to the Uniform Custodial Trust Act. Principal features incorporated into the creation of a custodial trust are (a) definitions; (b) scripting text that invoke the Act's provisions; (c) rules for treatment of trusts containing multiple beneficiaries; (d) a statement of general duties of the custodial trustee; (e) a statement of general powers of the custodial trustee; (e) a comprehensive framework for determining incapacity and affording safeguards for the beneficiary; (f) protection for third parties dealing with custodial trustees; (g) procedures for trustee declination, resignation, incapacity, death, removal, and succession; (h) provisions for trustee expenses, compensation, and bond; (i) rules for trustee reporting, accounting, and determination of liability; (j) limitations of action provisions regarding trustee-rendered accountings; and (k) express provisions on methods and forms for creating custodial trusts.

4.02 A unique, general rule governing most custodial trusts is that *trust distributions are beneficiary-directed and not subject to trustee discretion*. An important exception to the beneficiary-directed, trust-distribution modality arises when the beneficiary is incapacitated – a defined term and status under the Act. In that event, the distributions are discretionary with the trustee.

4.03 Although the beneficiary may direct distributions, absent direction from a beneficiary the trustee is obliged to “observe the standard of care that would be observed by a prudent person dealing with the property of another.” I.C. 68-1307(2).

4.04 While the Idaho Uniform Power of Attorney Act permits an agent who has been given express authority to create, amend, revoke or *terminate* an inter vivos trust, I.C. 15-201(1)(a), the Uniform Custodial Trust Act expressly prohibits such an agent to terminate a custodial trust created under the Act. The UCTA provides that “exercise of a durable power of attorney for an incapacitated beneficiary *is not effective to terminate or direct* the administration or distribution of a custodial trust.” I.C. 68-1307(6). So while an agent authorized to create inter vivos trust can create a custodial trust, the agent cannot terminate it. Only a beneficiary with capacity or a conservator for an incapacitated beneficiary of a custodial trust may terminate. I.C. 68-1302(5).

4.05 CUSTODIAL TRUSTEE FOR FUTURE PAYMENT OR TRANSFER. A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event (a *springing custodial trust*) by designating in writing the recipient, followed in substance by: "as custodial trustee for (name of beneficiary) under the Idaho uniform custodial trust act." Such a designation may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right. I.C. 68-1303.

4.06 MULTIPLE BENEFICIARIES — SEPARATE CUSTODIAL TRUSTS — SURVIVORSHIP. Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary. Except in a transfer or declaration for use and benefit of husband and wife, for whom survivorship is

presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship or survivorship is required as to community or marital property. A custodial trustee of custodial trust property held for more than one (1) beneficiary shall separately account to each beneficiary pursuant to sections 68-1307 and 68-1315, Idaho Code, for the administration of the custodial trust. I.C. 68-1306.

4.07 *Averting the Beneficiary's Power to Direct Distributions.* The UCTA beneficiary's ordinary right to direct trust distributions can be blocked and the trust administered as a discretionary trust *even in the absence of a determination of beneficiary incapacity* if the transferor has directed in the instrument creating the custodial trust that the custodial trustee shall administer the custodial trust *as for an incapacitated beneficiary*. I.C. 68-1310(1)(ii).

4.08 DISTRIBUTION ON TERMINATION. (1) *Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:*

- (a) To the beneficiary, if not incapacitated or deceased;
- (b) To the conservator or other recipient designated by the court for an incapacitated beneficiary; or
- (c) **Upon the beneficiary's death, in the following order:**
  - (i) **As last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;**
  - (ii) To the survivor of multiple beneficiaries if survivorship is provided for pursuant to section 68-1306, Idaho Code;
  - (iii) **As designated in the instrument creating the custodial trust;** or
  - (iv) To the estate of the deceased beneficiary.
- (2) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.



(3) *Death of the beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.*

4.09 The following jurisdictions have enacted the Uniform Custodial Trust Act: Rhode Island, Idaho, Hawaii, Virginia, Minnesota, Arkansas, Wisconsin, New Mexico, Alaska, Massachusetts, North Carolina, Louisiana, Nebraska, Colorado, Arizona, District of Columbia, Indiana, Nevada, U.S. Virgin Islands, and Iowa.

## Part Five: CONCLUSION

5.01 The Idaho Uniform Custodial Trust Act will never become the bread-and-butter of an Idaho estate planner's practice. It was never intended to be. Nonetheless, we should not allow our workaday patterns of assessing and addressing client needs to blind us from understanding and – where applicable – incorporating custodial trusts to further client goals.

5.02 Each of us have to a greater or lesser extent - a pride of authorship - in our “standard documents”, but we should not forget that we are not “selling documents”, we are providing professional solutions that meet client needs. We should not underestimate client appreciation for ease, simplicity, and economy where the circumstances permit. The UCTA provides discrete tools that should be part of our repertoire.