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Trust Administration Takes a Village?
The New Uniform Directed Trust Act Paves the Way for Creative and Thoughtful Divided Trusteeship[*]

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I. Introduction

Directed trusts have remade the field of trust administration. Across the centuries, the law of trusts evolved on the assumption that the power to administer a trust would belong to a trustee. The investment, distribution, and management of a trust's property were all the responsibility of a trustee. A directed trust departs from this tradition by granting a power over a trust to a person who is not a trustee.[1] Unlike a trustee, a so-called "trust director," who may also be known as a "trust protector" or "trust adviser," does not hold title to a trust's property.[2] But the trust director may nevertheless be granted any power over the trust that might otherwise belong to a trustee. A trustee in such a trust is often known as a "directed trustee" or "administrative trustee."[3]

The fundamental policy question arising from the emergence of directed trusts is how the law of trusteeship should be divided among a directed trustee and trust director.[4] When the power to administer a trust belongs exclusively to a trustee, there seems little question that the fiduciary duties and subsidiary rules of trusteeship should apply exclusively to the trustee. But when the terms of a trust divide power between a trustee and a trust director, applying the law of trusteeship becomes much harder. For example, should a trust director be subject to the fiduciary duties of trusteeship? Should a directed trustee be subject to reduced fiduciary duties—or no fiduciary duties at all? The common law is uncertain and existing statutes, including the Uniform Trust Code, are in disarray.[5]

Fortunately, the Uniform Law Commission (ULC) has just finished work on the Uniform Directed Trust Act (UDTA), a new uniform law that "promotes settlor autonomy in accordance with the principle of freedom of disposition" while offering clear solutions to the many legal uncertainties surrounding directed trusts.[6] The UDTA was approved by the ULC in 2017 after several years of drafting in consultation with a committee of nationally recognized trust experts from practice and academia. The UDTA provides clear, practical, and comprehensive solutions to all of the major legal difficulties in a directed trust. At the same time, the UDTA offers a host of technical innovations that dramatically improve on existing directed trust statutes. Although many states have already adopted statutes of their own, the UDTA's legal engineering is more sophisticated than any statute that has come before.

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[1] The Uniform Directed Trust Act (UDTA) defines a "directed trust" in § 2(2). [cx power of appointment]

[2] The UDTA defines a "trust director" in § 2(9).

[3] The UDTA defines a "directed trustee" in § 2(3).

[4] *See* John D. Morley & Robert H. Sitkoff, The Law and Economics of Directed Trusts: Separating Title from Power and Duty [work-in-progress].

[5] [pref note or cx]

[6] UDTA pref. note.

Specifically, the UDTA offers four areas of improvement. The first concerns the fiduciary duties of a trust director and a directed trustee. The basic approach of the UDTA is to take the law of trusteeship and attach it to whichever person holds the powers of trusteeship, even if that person is not a trustee. [7] Thus, the fiduciary responsibility for a power of direction attaches primarily to the trust director who holds the power, rather than the directed trustee who merely facilitates the director's exercise of the power. A directed trustee is thus relieved from the full panoply of fiduciary duties of a unitary trusteeship, and faces only a diminished duty to avoid "willful misconduct" in deciding whether to comply with a director's directions.[8]

This simple and intuitive approach to dividing duties has already proven successful and workable in Delaware.[9] The UDTA improves on the Delaware model, however, by providing greater clarity in specifying the duties of a trust director.[10] In prescribing the duties of a trust director, the UDTA says that a director bears the same fiduciary duties as a trustee "in a like position and under similar circumstances."[11] The comparison to a trustee in a like position and under similar circumstances adds specificity while also inviting flexibility and sensitivity to context in addressing the immense variation among the powers given to trust directors.[12]

A second innovation is to address non-fiduciary matters in the subsidiary law of trust administration. Although many directed trust statutes address fiduciary duties, no existing statute comprehensively addresses subsidiary matters such as acceptance, compensation, vacancy, and limitations periods. Unlike existing statutes, the UDTA anticipates these subsidiary issues and adopts the same basic solution that it applies to fiduciary duties—the UDTA takes the law of trusteeship and applies it to trust directors.[13] Thus, for example, the law of succession for a trust director is the same as the law of succession for a trustee in a like position and under similar circumstances.[14] In addition to absorbing the law of trusteeship for trust directors in this way, the UDTA also deals with new and distinctive subsidiary problems such as the sharing of information between a trustee and a trust director, integrating solutions to these new and distinctive problems with the allocation of fiduciary responsibility in a directed trust.[15]

A third innovation is to reconcile the law of cotrusteeship with the broad settlor autonomy recognized with respect to a directed trust.[16] Under the UDTA, the terms of a trust may allocate fiduciary responsibility among cotrustees in a way that mirrors the allocation among a trust director and a directed trustee.[17] Thus, under the UDTA, a cotrustee who is subject to direction by another cotrustee can be relieved of fiduciary responsibility in the same way that the UDTA relieves the fiduciary responsibility of a directed trustee who is directed by a trust director. The UDTA does not apply this treatment by default; rather it gives a settlor the freedom to do so by choice.

A fourth and final innovation is a carefully thought-out system of exclusions that preserves existing law and settlor autonomy with respect to a host of issues that are collateral to the emergence of directed trusts.[18] Among other things, the UDTA preserves tax planning in existing trusts by excluding from the act any power that must be held in a nonfiduciary capacity to achieve a settlor's federal tax objectives.[19] The UDTA also preserves existing plans by preventing the settlor of a revocable trust or the donee of a power of appointment from being unintentionally characterized as a trust director by virtue of having a power over the trust.[20] This exclusion is important, because it corrects an unacknowledged drafting error in many existing directed trust statutes, including the Delaware statute. A literal reading of the Delaware and many other existing

[7] [cx]

[8] UDTA §§ 8-9. The UDTA also requires a trustee to "take reasonable action" to comply with a director's exercise or nonexercise of its powers. UDTA § 9(a). However, as the comments to § 9 make clear, the duty to take reasonable action is merely a duty to act reasonably in carrying out the acts necessary to comply with a director's action, not a duty to ensure that the substance of the direction is reasonable. [cx]

[9] *See* Del. Code tit. 12, § 3313.

[10] [Placeholder—waiver of duty.]

[11] UDTA § 8(a).

[12] [cx]

[13] *See* [cx].

[14] *See* UDTA § 16(4)-(6).

[15] [cx to later].

[16] [cx]

[17] UDTA § 12.

[18] [cx].

[19] *See* UDTA § 5(b)(5).

[20] *See* UDTA § 5(b)(1), (3).

statutes could make the settlor of a revocable trust and the donee of a power of appointment into trustee-like fiduciaries by virtue of their powers over the trust.[21] The UDTA anticipates and corrects this error.

These and other technical improvements in the UDTA are so significant that the UDTA is appropriate for adoption by every state. Although some states may wish to change the "willful misconduct" standard for the fiduciary responsibility of a directed trustee to a standard of no liability (several states already have statutes along these lines[22]), no other provision of the UDTA should be the subject of serious controversy. A state that wishes to adopt the UDTA with no liability for a directed trustee could easily do so while leaving the rest of the UDTA intact and gaining its benefits. The UDTA is so much simpler, more comprehensive, and more technically adept than the existing statutes that, with this one small modification in states that prefer a directed trustee to have no duty, the UDTA would improve the law of every state while remaining consistent with every state's policy preferences.

Let us now turn to the details. Part I examines the scope of the UDTA and its careful system of exclusions to preserve existing law and settlor autonomy with respect to collateral matters. Part II examines the UDTA's answer to the core question of allocating fiduciary responsibility among a trust director and a directed trustee and the deeply intertwined questions of information sharing and cross-monitoring among trust directors and directed trustees. Part III examines the UDTA's coverage of the various non-fiduciary matters in the subsidiary law of trust administration that might be overlooked in the drafting of a directed trust and that for the most part are not addressed by the existing statutes. Part IV examines the UDTA's reconciliation of the law of cotrusteeship with the broad settlor autonomy permitted with respect to a directed trust. A short conclusion follows.

II. Scope and Exclusions

A. A Capacious Scope

We begin our tour through the UDTA by considering the statute's scope. In accordance with the principle of freedom of disposition, the purpose of the UDTA is to promote settlor autonomy by validating directed trusts.[23] To that end, the UDTA recognizes a "power of direction" granted to a "trust director" in a "directed trust."[24] Accordingly, the scope of the statute depends largely on which powers qualify as a "powers of direction." If the terms of a trust are found to include a power of direction, then the machinery of the statute switches on,[25] and the statute applies to the power.

1. Defining a "Power of Direction"

Section 2(5) defines a "power of direction" as "a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee."[26] The heart of this definition is the broadly worded phrase "power over a trust." Though a mere four words, this phrase was the subject of intense care and discussion in the drafting process, and it counts as one of the UDTA's many technical innovations.

The phrase is innovative, because of its great breadth—it is capacious enough to cover all of the conventional powers of trusteeship, such as a power to invest or distribute the trust property, as well as other powers that may not conventionally belong to a trustee, such as a power to amend or terminate the trust. The phrase is also broad enough to cover every form that such a power might take. The term power of direction includes both a power to direct a trustee to act (such as when a director tells a trustee to invest in particular assets) as well as a power in a director to act on his or her own (such when the terms of a trust permit a director to sign an investment subscription agreement without the trustee's participation). The broad definition also covers powers to veto or consent in advance to a trustee's actions or a power to release a trustee from liability for prior conduct. The only types or kinds of powers over a trust that do not qualify as powers of direction are those covered by the categorical exclusions from the statute prescribed by Section 5, to which we turn below.[27]

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[21] [CX]

[22] [cx]

[23] UDTA pref. note ("By validating terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust Act promotes settlor autonomy in accordance with the principle of freedom of disposition.").

[24] The UDTA defines these terms in § 2(5), (9), and (2) respectively.

[25] The definition of "terms of a trust" in § 2(8) accounts for the possibility of changes to those terms owing to court order, nonjudicial settlement agreement, and court order.

[26] UDTA § 2(5).

[27] [cx]

The drafting committee took two further steps for the avoidance of doubt about the capaciousness of the definition of a power of direction, and therefore the breadth of the UDTA's scope. First, within the blackletter of the definition of "power of direction," the drafting committee included the further statement that "[t]he term includes a power over the investment, management, or distribution of trust property or other matters of trust administration." The accompanying comment explains that this further statement

> confirms that a power of direction may include a power over "matters of trust administration" as well as a power over "investment, management, or distribution of trust property." These examples are meant to illustrate the potential scope of a power of direction rather than to limit it. In using the term "administration," the drafting committee intended a meaning at least as broad as that found in the context of determining a trust's "principal place of administration," such as under Section 3(b). The drafting committee also intended the terms "investment, management, or distribution" to have a meaning at least as broad as that found in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee's default powers.

As a second measure for the avoidance of doubt about the UDTA's scope, the drafting committee elsewhere in the comments provided a non-exclusive but highly detailed list of the kinds of specific powers that the committee contemplated would fall within the definition of a power of direction:

- direct investments, including a power to:
  - acquire, dispose of, exchange, or retain an investment;
  - make or take loans;
  - vote proxies for securities held in trust;
  - adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
  - adjust between principal and income or convert to a unitrust;
  - manage a business held in the trust; or
  - select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee's or another director's delegation of the trustee's or other director's powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.[28]

The drafting committee based this list on a comprehensive review of every existing state directed trust statute and on a sampling of directed trust provisions provided by a variety of trust lawyer and banker observers and advisers to the drafting committee.[29] The list therefore covers every power that is specifically enumerated as a power of direction in an existing directed trust statute as well as every example that the drafting committee and its numerous observers and advisers could conjure up. The capacious wording in the blackletter definition of a power of direction plus the broad inclusiveness of the examples in the comments make the UDTA the most comprehensive directed trust statute yet written.

2. Excluding a Serving Trustee

Having equated a "power of direction" with any "power over a trust," the drafting committee took care to ensure that the definition would not swallow the law of trusteeship by transforming the powers over a trust that belong to a trustee into powers of direction. The definition of a "power of direction" in § 2(5) excludes a power held by a person while the person is serving as trustee. Thus, a "power over a trust" is a "power of direction" only "to the extent the power is exercisable

[28] UDTA § 6 cmt. The comment indicates that this list was meant to be illustrative not "limiting" of "the definition of a 'power of direction.'" Id.

[29] [cite to memo appendix via ULC]

while the person" who holds the power "is not serving as a trustee."[30] The comment explains that "[t]he purpose of this limitation is to exclude a person serving as trustee from the definition of a trust director, even though as trustee the person will inevitably have a 'power over a trust.'"[31] The purpose of the UDTA is "to address the complications created by giving a person other than a trustee—that is, a trust director—a power over a trust. A power over a trust held by a trustee is governed by existing trust fiduciary law."[32]

3. Defining a "Directed Trust," "Directed Trustee, and "Trust Director"

Having defined a power of direction capaciously, the UDTA defines its other key terms in relation to a power of direction. A "directed trust" is "a trust for which the terms of the trust grant a power of direction."[33] A "trust director" is "a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee."[34] And a "directed trustee" is "a trustee that is subject to a trust director's power of direction."[35]

Crucially, these definitions are functional, rather than formal, and they apply without regard to the terminology within the terms of a trust. The definition of a "trust director," for example, expressly says that a person who satisfies the functional definition of a trust director "is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust."[36] The effect is that so long as the functional criteria prescribed by the UDTA's definitions are satisfied, a power labeled as a "power of protection" is treated as a power of direction, a person labeled as a "trust adviser" or "trust protector" is treated as a trust director, and a trustee labeled as an "administrative trustee" is treated a directed trustee. The UDTA applies to a "power of direction," a "trust director," and a "directed trustee" in a "directed trust" in accordance with function not form, and even if the terms of a trust disclaim this vocabulary.[37]

B. An Enabling Statute

Having given the term "power of direction" a capacious meaning, and having tied the definitions of a "directed trust," "trust director," and "directed trustee" to the meaning of a power of direction, the UDTA expressly confirms the validity of a trust with a power of direction, and therefore the validity of a directed trust with a trust director and a directed trustee. Section 6(a) provides that "the terms of a trust may grant a power of direction to a trust director."[38] Thus, although a trust with a power of direction would almost certainly be valid under the common law,[39] the UDTA resolves any doubt with statutory certainty.

1. Enabling versus Off-the-Rack

Validating a power of direction, and therefore a directed trust with a trust director and a directed trustee, raises the further question about what exactly such a power entails. As we have just seen, the term "power of direction" is defined capaciously to include *any* power over a trust.[40] But this definition, and the corollary definition of a "trust director" as "a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee,"[41] does not answer the question of *what* powers over a particular trust are granted to a particular trust

[30] UDTA § 2(5).

[31] Id. cmt.

[32] Id.

[33] Id. § 2(2).

[34] Id. § 2(9).

[35] Id. § 2(3).

[36] Id. § 2(9).

[37] The clarity in the UDTA's definitions represents a dramatic technical improvement on the confusing and clumsy definitions in many existing state statutes. In South Dakota, for example, the definition of a "trust protector" is circular: a trust protector is "any person whose appointment as a protector is provided for in the instrument." SD Codified Laws § 55-1b-1(2). In other words, a trust protector is a trust protector. Elsewhere, the South Dakota statute provides examples of powers that might be granted to a protector. Id. § 55-1b-6. But the statutes does not say whether granting one of these powers necessarily makes a person into a protector and it never says what else might make a person into a protector either.

[38] UDTA § 6(a).

[39] *See, e.g.*, [case and Restatement]

[40] [cx]

[41] Id. § 2(9).

director. The definition identifies the concept of a power of direction generally, but does supply the content of a particular power of direction specifically. The existing directed trust statutes can be divided roughly into two categories in how they answer this question: "enabling" and "off-the-rack."

The *enabling statutes*, typified by the Delaware statute,[42] authorize creation of a directed trust by validating terms of a trust that grant to a trust director a power of direction, but they do not prescribe any specific powers by default. The settlor, and so the settlor's lawyer, have the freedom to grant a power of direction, but must specify which powers, if any, they will grant to a particular director. For example, the Delaware statute provides that a person other than a trustee may be "given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary."[43]

Under these enabling statutes the scope of a trust director's power of direction—that is, the allocation of powers between a trust director and a directed trustee—is determined by the terms of the trust. In a state with this enabling form of statute, all directed trusts are bespoke—or at least they are created by drawing into the terms of the trust the language of a formbook rather a statute.

By contrast, the *off-the-rack statutes*, typified by the South Dakota statute, provide for one or more statutory forms of directed trust, with particular sets of powers given to a type or kind of trust director by default.[44] The South Dakota statute, for example, provides for the appointment of an "investment trust advisor" and a "distribution trust advisor," each with different default powers.[45] Under the statute, an investment trust advisor by default may direct the trustee with respect to investment and vote proxies for securities held in trust without even without specific authorization in the terms of the trust.[46] Thus, under an off-the-rack form of statute, a settlor can create a directed trust by invoking one or more off-the-rack forms subject to further tailoring by the terms of the trust. Yet the South Dakota statute also has an enabling feature, doubtless because a pure off-the-rack design cannot possibly capture the variety of directed trust forms that a settlor might want to create. Thus the South Dakota statute authorizes a "trust protector" with the "powers … as provided in the governing instrument."[47]

2. The UDTA is an Enabling Statute

After carefully considering both models, the UDTA drafting committee opted for an enabling structure. Section 6(a) provides that the terms of a trust may grant a power of direction to a trust director, but with one exception to which we will turn below,[48] the UDTA does not prescribe any powers for a trust director by default. There are no distinct categories of trust directors or powers under the UDTA, and no set of default powers that may be invoked by referencing a type of director, as under the South Dakota statute. Instead, any power over a trust that is granted to a person other than a serving trustee is a power of direction, with the scope of that power prescribed by the terms of the trust, as under the Delaware statute. As the comment to § 6 explains, the UDTA "does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust."[49]

The drafting committee favored the enabling model for several reasons. First, an enabling statute is simpler than an off-the-rack statute. Second, an enabling statute will not require periodic amendments to update its default forms of directed trusts to reflect changes in practice. Third, although in theory an off-the-rack statute could minimize transaction costs, in practice a directed trust under one of those statutes will commonly require tailoring by the terms of the trust, adapting the statutory form to the particulars of the situation. Furthermore, as the directed trust concept becomes more familiar, formbook boilerplate will become readily available, further reducing the costs of drafting. Finally, an enabling statute is less disruptive for already existing trusts, because it does not attach default powers to a trust director that the settlor might not have intended or even contemplated.

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[42] *See* Del. Code tit. 12, § 3313; *see also* [others].

[43] Id. § 3313(a).

[44] *See* [citation]; *see also* [citations].

[45] S.D. Codified Laws § 55-1B-9, 55-1B-10, 55-1B-11.

[46] See, e.g., SD Stat. §§ 55-1B-10(1), (2).

[47] S.D. Codified Laws § 55-1B-6.

[48] [cx]

[49] UDTA § 6 cmt.

To see the advantages of the enabling approach more concretely, consider the myriad problems created by the off-the-rack approach in South Dakota. Start with the effect on trusts that were already in existence at the time the South Dakota statute was passed. Like the UDTA, the South Dakota statute applies to all trusts regardless of when they were created, including trusts that predate enactment of the statute.[50] In consequence, the off-the-rack nature of the South Dakota statute could upset the settlor's intended allocation of powers in an existing trust.

Suppose, for example, a trust settled prior to enactment of the statute gives a committee of the settlor's family the power to vote the trust's interest in a family business. Under the South Dakota statute, this power would make the family members into a committee of "investment trust advisors." As such, unless the terms of the trust provided otherwise, the family members would have all of the default powers of investment trust advisors, even if the terms of the trust did not provide those powers.[51] Thus, in addition to having the power to *vote* the family shares as provided by the terms of the trust, the family members would also have the power to *sell* those shares even though such a power was not granted by the terms of the trust.[52] Though some settlors may appreciate the provision of powers not granted by the terms of the trust, many others may not. By not supplying powers by default, the UDTA avoids this problem.

A closely related problem is the empirical uncertainty about which powers a typical settlor would want by default. Any system of categories in an off-the-rack structure would inevitably fit badly with many trusts. The categories in the South Dakota statute, for example, tie powers into awkward bundles that may not make sense together. In South Dakota, an accountant who is granted a power to direct the trustee "as to the value of nonpublicly traded trust investments" would by reason of that express power also by default have the power to direct the trustee "with respect to the retention, purchase, sale," or "exchange" of those assets.[53] In other words, anyone granted a power to value assets would also by default have the power to buy or sell them. Though a settlor could avoid this awkward result by opting out of the default bundle, the drafters of the UDTA decided to avoid the risk by providing that a trust director has only those powers granted by the terms of the trust.

The absence of default powers bundled together under the rubric of "investment" director or "distribution" director allows for a simpler statute. The UDTA provides for only a single class of trust director with only a single set of rules to govern it. A single category avoids the complexities that arise from having multiple categories, such as the awkward tendency of many statutes to conflate directors with the powers they hold. The categories in many "off-the-rack" statutes unthinkingly operate by classifying *directors* rather than *powers*. South Dakota, for example, has a category for "trust investment advisers" rather than a category for "trust investment powers." The contents of the category are people, rather than powers. The awkward consequence of fixating on people rather than powers is that a single person can occupy several categories simultaneously—he can be a "trust investment adviser," a "distribution trust advisor," and a "trust protector" all at once, with correspondingly inconsistent and confusing results. The basic insight that drives the UDTA is thus to separate the law of trusts from people and instead attach it to the powers that a person holds.[54]

Moreover, if the default powers of a director depend on which category the director occupies, then the parties may find themselves in costly litigation about categorization. Under the South Dakota statute, for example, beneficiaries, directors, and trustees may end up fighting with each other about whether a particular director is a trust distribution adviser, with the default powers of that category, or is instead merely a trust protector with only the powers granted by the terms of the trust. A benefit of the simple enabling structure of the UDTA is that it eliminates the risk of litigation about categorization; under the UDTA, there is only one category of trust director, and the only powers of a director are those granted by the terms of the trust.

C. Further Powers

Although the UDTA does not generally supply powers by default, the act does contain one important exception. Section 6(b)(1) provides that, "[u]nless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director" by the terms of a trust.[55] In other words, if the terms of a trust supply an express power, then by default the UDTA supplies further powers as "appropriate" to the exercise or nonexericse of that expressly granted power.

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[50] *See* SD Codified Laws. § 55-1B-1(1); UDTA § 3(a). We discuss UDTA § 3(a) below at [cx].

[51] *See* SD Codified Laws. §§ S 55-1B-1(6), 55-1B-10.

[52] *See* SD Codified Laws. § 55-1B-10.

[53] Id.

[54] *See* Morley & Sitkoff, supra note __.

[55] UDTA § 6(b)(1).

Colloquially speaking, § 6(b)(1) operates as a kind of "necessary and proper" clause, granting additional powers as appropriate to carry out a settlor's intent. Following the Uniform Trust Code, the provision uses the term "appropriate" to avoid the narrowing implication sometimes associated with the term "necessary and proper."[56] The comment explains the meaning of appropriateness thus: "Appropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director."[57] The comment elaborates by way of examples:

> [F]urther powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director's powers. [58]

Suppose, for example, that the terms of a trust grant a trust director a power to direct investments. If the trustee refuses to comply with the director's exercise of this power, but the terms of the trust do not expressly grant the director the power to bring an action against the trustee, § 6(b)(1) would supply the director with a further power to bring an action to redress the trustee's noncompliance.[59] Manifestly, such an action would be "appropriate" to the director's exercise of the expressly granted power to direct investments. "It would normally be 'appropriate,' for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction."[60]

The further powers supplied by section 6(b)(1) count as a major technical innovation that improves on the existing enabling statutes, such as in Delaware, which tend not to include such a provision.[61] It also offers yet another motivation for the UDTA's enabling approach, because the further powers in the UDTA accomplish many of the same objectives as the default powers in off-the-rack statutes, but with greater precision. The UDTA's further powers are at once less over-inclusive and less under-inclusive than the default powers in off-the-rack statutes. The UDTA is less over-inclusive, because they include only those powers "appropriate" to the director's express powers. Thus, unlike the South Dakota statute, the UDTA would not tie a power to sell investments to a power to value investments unless tying the two powers together would be appropriate to a particular settlor's intent.

The UDTA's further powers are also less under-inclusive than the off-the-rack powers in many statutes, because the UDTA's further powers include every power appropriate to a particular appropriate to a particular trust, and not just the handful of powers bundled in the off-the-rack provision. The South Dakota statute, for example, grants an investment trust advisor the power to sell investments by default, but not the power to sue a trustee who refuses to comply with a direction to sell investments.[62]

D. The Exclusions

Because the term "power of direction" is so broad, it might swallow some matters collateral to the emergence of directed trusts, inadvertently disrupting normal and customary estate planning practices by subjecting them to the fiduciary and other rules of the UDTA. As we have already seen, every power of trusteeship is literally a "power over a trust,"[63] so the UDTA drafting committee took care to exclude powers in a serving trustee from the scope of the act. In addition to this

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[56] *See* UDTA § 6(b)(1) cmt. ("The term 'appropriate' is drawn from Uniform Trust Code § 815(a)(2)(B) (2000).").

[57] Id.

[58] Id.

[59] Id.

[60] UDTA § 6(b)(1) cmt. The UDTA thus resolves the situation that arose in Schwartz v. Wellin, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The comment explains:

> The court held that a trust director, which the terms of the trust referred to as a "trust protector," lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure, because the director was neither a real party in interest nor a party that could pursue a claim if not a real party in interest.
>
> In some circumstances, subsection (b)(1) may produce a different outcome. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is "authorized by statute." Subsection (b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be "appropriate" to a director's exercise or nonexercise of a power granted by the terms of the trust under subsection (a).

[61] *See, e.g.*, Del. Code. Tit. 12, § 3313.

[62] *See* SD Codified Laws. § 55-1B-10.

[63] [cx]

carve-out for serving trustees, the UDTA includes a carefully thought-out system of other carve-outs as well. Section 5 of the act contains five categorical exclusions that preserve existing law and settlor autonomy with respect to a host of issues that are collateral to the emergence of directed trusts.[64] These exclusions count as a major technical innovation of the UDTA, for as we shall see, they correct unacknowledged drafting errors in many existing directed trust statutes, including the Delaware statute, that could disrupt a variety of typical estate planning practices.

1. Nonfiduciary Powers of Appointment

The first exclusion is for powers of appointment. Under a *power of appointment*, the person who holds the power, commonly known as a *donee*, may appoint the property to one or more persons known as the *objects* of the power, in accordance with the power's terms. Consider a typical example: *H* devises property to *X* in trust to distribute the income quarterly to *W* for life, and on *W* 's death to distribute the principal to one or more of *H* 's descendants as *W* shall appoint by will. *H* is the donor of a power of appointment, *W* is the donee, and *H* 's descendants are the objects. By this power, which *H* intends *W* to hold in a nonfiduciary capacity, *W* may decide who among *H* 's descendants will take the trust property at her death. In this way, *H* empowers *W* to deal flexibly with changing circumstances in the interim between their deaths, which may span years or even decades.[65]

Powers of appointment provide benefits beyond building *flexibility* into an estate plan. They are also commonly used for *tax planning* and *asset protection*. In the example just given, because *W* cannot appoint the trust property for her own benefit (the power is *nongeneral*, in the jargon), no estate or gift tax will be due upon *W* 's exercise of the power,[66] and no creditor of *W* will have recourse against the property.[67] It would be difficult to overstate the importance of powers of appointment in contemporary estate planning.[68]

Without an exclusion for nonfiduciary powers of appointment, the risk that the UDTA could disrupt countless estate plans is readily apparent. In the example just given, arguably *W* has "a power over a trust granted to [her] by the terms of the trust," specifically "a power over the ... distribution of trust property."[69] As such, without an exclusion for a nonfiduciary power of appointment, under the UDTA *W* would have a power of direction, making her a trust director subject to the fiduciary and other rules applicable to a trust director, and making the trustee a directed trustee, with a lower standard of fiduciary duty than a non-directed trustee. The same disruptive result would obtain under a literal reading of the Delaware and other enabling directed trust statutes. Under the Delaware statute, arguably *W* was "given authority by the terms of a governing instrument to direct … a fiduciary's … distribution decisions," with the consequence that under the statute *W* would be a trust adviser presumptively subject to fiduciary duty "when exercising such authority."[70]

The drafting committee of the UDTA anticipated this problem, providing a categorical exclusion for nonfiduciary powers of appointment in § 5(b)(1). This exclusion is consistent with the well-settled principle that a donor may grant to a person, typically but not necessarily a beneficiary, a power of appointment in a nonfiduciary capacity. That is, a donor may grant to a person a power over the distribution of trust property that does not impose on the person a fiduciary duty. This settled principle underpins countless estate plans and is central to contemporary trust practice.

The exclusion for powers of appointment in the UDTA works as follows. UDTA § 5(b)(1) provides that the act "does not apply to a … power of appointment." Section 5(a) defines a "power of appointment" as "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment

[64] [forward cx to medical professional fiduciary exception]

[65] Portions of this and the next paragraph are adapted without further citation or acknowledgment from Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 807, 812 (10th ed. 2017).

[66] *See* id. at 809-10, 813-15.

[67] *See* id. at 815-16.

[68] "The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." W. Barton Leach, Powers of Appointment, 24 A.B.A. J. 807, 807 (1938).

[69] UDTA § 2(5).

[70] Del. Code tit. 12, § 3313(a). Under the Delaware statute, fiduciary status is presumptive rather than mandatory. The statute says that "the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity." Id. Thus, in the case posited, *W* could argue that the terms of the trust impliedly granted the power in a nonfiduciary capacity. Putting to the side the question of whether the text of the statute allows for implied waiver of fiduciary status, the broader point is that, owing to the overbreadth of the Delaware statute, *W* is exposed to litigation risk and *H*'s plan is exposed to disruption. Under the UDTA, by contrast, *W*'s nonfiduciary power of appointment is protected by a categorical exclusion.

over trust property."[71] Accordingly, if the terms of a trust grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under the UDTA that power will be construed as a power of appointment rather than as a power of direction and will therefore not be subject to the act. The holder of the power will not be a trust director, and a trustee subject to the power will not be a directed trustee.

The exclusion prescribed by § 5(b)(1) applies only to a power of appointment held in a nonfiduciary capacity. It does not apply to a power of distribution held in a fiduciary capacity. Thus, if the terms of a trust grant a person a power to direct a distribution of trust property while the person is not serving as trustee, and the person holds the power in a fiduciary capacity, then under the UDTA the power is a power of direction and the person is a trust director.

To resolve doubt about whether a power over distribution is a nonfiduciary power of appointment or a fiduciary power of direction, UDTA § 5(c) prescribes a rule of construction under which a power over distribution in a person not serving as a trustee is presumptively a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust indicate otherwise.[72] Thus, if the terms of a trust give the spouse of a settlor a power to distribute trust property to the settlor's descendants without specifying whether the power is held in a fiduciary capacity, the rule of construction in UDTA § 5(c) will presume the power is held in a nonfiduciary capacity as a power of appointment, exempting the spouse and the power from the the act. A power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because as we have seen, a serving trustee can never be a trust director.[73]

Two other points about this exclusion merit further discussion. First, as a planning matter, the § 5(b)(1) exclusion for a nonfiduciary power of appointment ensures that a settlor may grant to a person or a committee of persons a power over distribution of the trust property in *either* a fiduciary capacity (i.e., a power of direction subject to the UDTA) *or* a nonfiduicary capacity (i.e., a nonfiduciary power of appointment excluded by UDTA § 5(b)(1)). The drafting committee reasoned that, whatever the merits of the argument that all powers over distribution should be held in a fiduciary capacity, history has settled the question decisively in favor of allowing a settlor to grant a power over distribution in a nonfiduciary capacity. Nonfiduciary powers of appointment are an entrenched feature of the background law of trusts and the UDTA does not attempt to change them.

A second important point about the § 5(b)(1) exclusion for a nonfiduciary power of appointment is that the exclusion fits tightly with the Uniform Powers of Appointment Act (UPAA), which excludes fiduciary powers over distribution and applies only to a nonfiduciary power of appointment.[74] Under the UPAA, the definition of a power of appointment includes only powers that are nonfiduciary, and a trustee or other person who has a fiduciary power over distributions holds a fiduciary power that is distinct from a power of appointment.[75] In summary, within the uniform trusts and estates acts, the UPAA governs a nonfiduciary power of appointment; the UDTA governs a fiduciary power over

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[71] This definition of "power of appointment" is based on Uniform Powers of Appointment Act (UPAA) § 102(13) (2013), and is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011) refers to as a "discretionary" power of appointment, that is, one in which "the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power."

[72] *See* UDTA § 5(c) "Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.").

[73] [cx] Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity, making it a fiduciary distributive power held in the person's capacity as trustee, or is instead a nonfiduciary power of appointment held by the person individually, is governed by background law. *See, e.g.*, Restatement (Third) of Trusts § 50 cmt. a (2003). For example, *H* might devise a fund in trust to *W*, granting *W* both fiduciary distributive powers in *W*'s capacity as trustee as well as one or more lifetime and testamentary nonfiduciary powers of appointment.

[74] *See* UPAA § 102(13) (2013). The comment explains:

> In this act, a fiduciary distributive power is not a power of appointment. Fiduciary distributive powers include a trustee's power to distribute principal to or for the benefit of an income beneficiary, or for some other individual, or to pay income or principal to a designated beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of or for the benefit of someone who is not a permissible appointee.

Id. cmt.

[75] *See* Restatement (Third) of Trusts § 50 cmt. a (2003).

distribution in a person not serving as trustee; and the Uniform Trust Code governs a fiduciary power over distribution in a person serving as trustee.

2. Power to Appoint or Remove a Trustee or Trust Direction

UDTA § 5(b)(2) excludes "a … power to appoint or remove a trustee or trust director."[76] The drafting committee intended this exclusion to address the concern that a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. "Professionally drafted trusts commonly include a provision that overrides the default law of trustee removal by authorizing the beneficiaries or a third party to remove the trustee and appoint a successor (perhaps limited to an independent corporate trustee)."[77] Under the exclusion of § 5(b)(2), such a power is not a power of direction, and the person holding the power is not a trust director. Accordingly, a person who holds a power to appoint or remove a trustee is not subject to the fiduciary duties of a trust director.

Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it "must conform to any valid requirements or limitations imposed by the trust terms."[78] If the terms of the trust do not impose any requirements or limitations on the power to remove, then "it is unnecessary for the holder to show cause" before exercising the power.[79]

3. Power of Settlor Over a Revocable Trust

Under modern law, a trustee of a revocable trust owes its duties to the settlor rather than to the beneficiaries.[80] Moreover, because the settlor may at any time revoke the trust and take back the trust property, the trustee must "comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee's normal fiduciary duties."[81] In other words, under modern law every revocable trust includes an implied term under which the trustee must comply with a direction from the settlor about how to administer the trust. And as a matter of normal and customary drafting practice, this implied term is express in many revocable trusts. A typical professionally drafted revocable trust will provide that "the trustee to distribute to the settlor so much or all of the income and principal as the settlor wishes and to invest the trust property as the settlor directs."[82]

Because the definition of a "trust director" in UDTA § 2(9) includes a person who is granted a "power of direction … whether or not the person is a … settlor of the trust," and because as we have seen a "power of direction" is defined by § 2(5) capaciously to include any "power over a trust,"[83] the drafting committee reasoned that an exclusion for a settlor's powers over a revocable trust was necessary to avoid the risk of disrupting existing practice by transforming every settlor of a revocable trust into a trust director subject to the fiduciary and other rules applicable to a trust director. Accordingly, UDTA § 5(b)(3) excludes "a … power of a settlor over a trust to the extent the settlor has a power to revoke the trust."[84]

Conceptually, this exclusion has much in common with the exclusion under § 5(b)(1) for a nonfiduciary power of appointment.[85] A settlor's power to revoke a revocable trust is functionally not very different from a nonfiduciary general power of appointment.[86] Moreover, as with the § 5(b)(1) exclusion for a nonfiduciary power of appointment, the § 5(b)(3)

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[76] UDTA § 5(b)(2).

[77] Dukeminier & Sitkoff, supra note __, at 751.

[78] Restatement (Third) of Trusts § 37 cmt. c (2003).

[79] Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006).

[80] *See, e.g.*, UTC § 603(a) (2004); [Feder & Sitkoff].

[81] Restatement (Third) of Trusts § 74(1) (2003);

[82] David J. Feder & Robert H. Sitkoff, Revocable Trusts and Incapacity Planning: More than Just a Will Substitute, 24 Elder L.J. 1, 11-11 (2016) (giving the Northern Trust formbook as an example).

[83] [cx]

[84] UDTA § 5(b)(3). The comment explains that the "drafting committee intended that this exception would apply only to that portion of a trust over which the settlor has a power to revoke, that is, 'to the extent' of the settlor's power to revoke." Id. cmt. With respect to an agent or conservator of the settlor, the comment elaborates thus: "To the extent that a conservator or agent of the settlor may exercise the settlor's power to revoke, as under Uniform Trust Code § 602(e)–(f) (2001), subsection (b)(3) of this section would apply to the conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within subsection (b)(1)." Id.

[85] [cx]

[86] *See, e.g.* Restatement (Third) of Trusts § 74(2) (2003).

exclusion for a settlor's power over a revocable trust corrects an unacknowledged drafting error in many existing enabling directed trust statutes, including the Delaware statute. Under the Delaware statute, the settlor of a typically drafted revocable trust would be "given authority by the terms of a governing instrument to direct … a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary," with the consequence that under a literal reading of the statute the settlor would be a trust adviser presumptively subject to fiduciary duty "when exercising such authority."[87]

[To come: explain how this corrects a major error in existing statutes.]

4. Power of a Beneficiary

The definition of a "trust director" in UDTA § 2(9) includes a person who is granted a "power of direction … whether or not the person is a beneficiary."[88] The definition includes a beneficiary to ensure that a power over a trust that affects another beneficiary is not be exempt from the UDTA merely because the person who holds the power happens also to be a beneficiary. Otherwise, the mandatory fiduciary duties of a trust director under § 8(a)(2), discussed below,[89] could be circumvented by giving the director a peppercorn beneficial interest in the trust.

Including a beneficiary in the definition of a trust director, however, creates the risk that a beneficiary who holds a power over a trust might be subjected to the fiduciary duties and other obligations of a trust director even if the power affects solely the beneficiary. To resolve this problem, UDTA § 5(b)(4) excludes "a … power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of … (A) the beneficiary[,] or (B) another beneficiary represented by the beneficiary [under applicable virtual representation law] with respect to the exercise or nonexercise of the power."[90]

Subparagraph (A) of this exclusion is consistent with traditional law, under which "[a] power that is for the sole benefit of the person holding the power is not a fiduciary power."[91] Thus, for example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded by § 5(b)(4)(A). To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. A power over a trust held by a beneficiary may be a "power of direction" if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by § 5(b)(4) unless the power to bind the other beneficiary arises by reason of virtual representation so that subparagraph (B) applies.

The same rules apply if the beneficiary's power is jointly held. Thus, for example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries other than by virtual representation. In this respect the UDTA would reverse the result in *Vena v. Vena*,[92] in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under UDTA § 8, discussed below, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

The carve-out for virtual representation in subparagraph (B) reflects the drafting committee's intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without subparagraph (B), the capacious definition of "power of direction" in Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.[93]

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[87] Del. Code tit. 12, § 3313(a). [Placeholder for discussion of presumptive status.]

[88] UDTA § 2(9).

[89] [cx]

[90] UDTA § 5(b)(4).

[91] Restatement (Third) of Trusts § 75 cmt. d (2007).

[92] 899 N.E.2d 522 (Ill. App. 2008).

[93] The comment elaborates:

> By way of illustration, under Uniform Trust Code § 304 (2000), a beneficiary who suffers from an incapacitating case of Alzheimer's disease may sometimes be represented by another beneficiary in litigation against a trustee for breach of trust. In such a case, paragraph (4) of this section prevents the beneficiary who represents the beneficiary with Alzheimer's from being a trust director. Instead, the safeguards provided by the law of virtual representation will apply. Under § 304, for example, the representative beneficiary and the beneficiary with Alzheimer's disease must have "a substantially identical interest with respect to the particular question or dispute," and have "no conflict of interest" with each other.

[To come: how this improves on existing statutes]

5. The Settlor's Tax Objectives

The final exclusion in UDTA § 5 protects against disruption of normal and customary tax planning. UDTA § 5(b)(5) excludes "a … power over a trust if … the terms of the trust provide that the power is held in a nonfiduciary capacity … and the power must be held in a nonfiduciary capacity to achieve the settlor's [federal] tax objectives."[94] The drafting committee intended this exclusion to address the concern that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor's federal tax objectives.

Perhaps the most salient example is a power to substitute assets meant to ensure grantor trust tax status. To ensure that a trust is a grantor trust for federal income tax purposes, planners commonly include in the terms of a trust a provision that allows the settlor or another person to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity.[95] The power to substitute assets must be held in a nonfiduciary capacity to ensure grantor trust status. If the power is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust.

The problem is that, as we shall see below, UDTA § 8 mandates that all trust directors are fiduciaries.[96] Without the exclusion under § 5(b)(5), therefore, the common drafting practice of a nonfiduciary to substitute assets would be impossible. The tax status of existing trusts with such a provision would be thrown into disarray. The exclusion ensures that any power over a trust that is nonfiduciary under the terms of the trust and must be nonfiduciary to achieve the settlor's federal tax objectives will remain nonfiduciary, notwithstanding the UDTA.

In light of the evolving nature of tax planning, the frequency of amendments to the tax law, and the potential for disagreement about which powers must be nonfiduciary to achieve the settlor's federal tax objectives, the drafting committee reasoned that a standard referring broadly to a settlor's federal tax objectives was preferable to a prescribed list of sections of the tax code.[97]

E. Choice of Law and Prospective Application

Two final technical details regarding the scope of the UDTA merit attention: (1) choice of law, and (2) prospective application.

1. Choice of Law

On the reasoning that powers and duties in a directed trust are matters of trust administration,[98] UDTA § 3(a) follows the prevailing conflict of laws rule by linking application of the UDTA to a trust's principal place of administration.[99] If a trust's principal place of administration is in state *X*, and state *X* has enacted the UDTA, then the UDTA as enacted in *X* applies to the trust. But how is a trust's principal place of administration to be determined?

Under UDTA § 3(b), the terms of a directed trust that "designate the principal place of administration of the trust are valid and controlling" if (1) a trustee is located in the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust administration occurs in the designated jurisdiction. This provision establishes a

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[94] UDTA § 5(b)(5).

[95] [treatise or formbook cite]

[96] [cx]

[97] The comment explains why the limitation covers only federal tax objectives and not state tax objective:

> The drafting committee deliberately opted to reference tax objectives only under federal law, thereby excluding tax objectives under state law. The concern was that some states levy a tax on income in a trust if the trust has a fiduciary in the state. If this exclusion reached state tax law, then in such a state a trust director could argue that the director is not a fiduciary, because the settlor would not have wanted the trust to pay income tax. The consequence would be to negate fiduciary status for virtually all trust directors in those states. The purpose of this exception is to protect normal and customary estate planning techniques, not to allow circumvention of the central policy choice encoded in Section 8 that a trust director is generally subject to the same default and mandatory fiduciary duties as a similarly situated trustee.

[98] *See* Restatement (Second) of Conflict of Laws § 271 cmt. a (1971).

[99] *See* UDTA § 3(a) ("This [act] applies to a trust … that has its principal place of administration in this state.").

safe harbor for a settlor's designation of the principal place of administration for a directed trust. Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of Section 108(a) to add the presence of a trust director as a sufficient connection with the designated jurisdiction.

Other than the expansion in subsection (b)(2) of the Uniform Trust Code's safe harbor for a settlor's designation of a trust's principal place of administration, the drafting committee did not undertake to prescribe rules for ascertaining a trust's principal place of administration. In this respect, the drafting committee followed the Uniform Trust Code in "not attempt[ing] to further define principal place of administration."[100] Accordingly, for a directed trust in a state that enacts the UDTA, just as for all trusts in a Uniform Trust Code state, if the safe harbor of subsection (b) does not apply, the question of a trust's principal place of administration will be governed by the state's existing law on principal place of administration.[101]

2. Prospective Application

UDTA § 3(a) applies the act to all trusts administered in an enacting state regardless of whether the trust was in existence on the effective date of this act. However, under §3(a)(1)-(2), the act applies only with respect to a decision or action occurring on or after the effective date or, if the trust's principal place of administration was changed to the enacting state after the effective date, only with respect to a decision or action occurring on or after that change. Because as we shall see some of the standards of conduct prescribed by the UDTA depart from the Uniform Trust Code and Restatement (Third) of Trusts,[102] the drafting committee reasoned that the act should apply prospectively, following the model of the Uniform Prudent Investor Act.[103]

III. Allocating Fiduciary Responsibility in a Directed Trust

The core of the UDTA's contribution is the act's allocation in §§ 8 through 11 of fiduciary responsibility among trust directors and directed trustees. The UDTA's basic approach is to place the primary fiduciary responsibility for a power on the person who holds the power. Thus, if a power belongs to a trust director, then the primary fiduciary responsibility for that power belongs to the director, rather than the directed trustee who merely facilitates the director's exercise of the power. The UDTA thus relieves a directed trustee from the full fiduciary duties of a unitary trusteeship, and leaves a directed trustee with only a reduced duty to avoid "willful misconduct" in deciding whether to comply with a director's directions.

In making a trust director the primary bearer of fiduciary responsibility for his or her power, the UDTA employs the novel and technically innovative strategy of absorbing the existing fiduciary law of trusteeship. In most instances, the UDTA applies to a trust director the same fiduciary duties that would apply to a trustee in a like position and under similar circumstances. In addition, the UDTA prescribes clear rules that negate any duty of cross-monitoring among trust directors and trustees while at the same requiring trust directors and trustees to share information.

In its overarching concept and the details of its execution, the UDTA represents a dramatic improvement on the fiduciary rules of the existing directed trust statutes. The UDTA is both more complete and more precise in its fiduciary regime than Delaware or any other state. The UDTA's fiduciary regime is also potentially adaptable to every state. Although the UDTA follows the Delaware model of applying a standard of "willful misconduct" to a directed trustee, the provision that applies the willful misconduct standard could be altered to meet the policy desires of states that prefer no fiduciary duty for a directed trustee, such as South Dakota, New Hampshire, and Nevada. These states might achieve the many technical innovations of the UDTA while still maintaining their preferred policies towards the liability of a directed trustee.

A. Trust Directors (UDTA § 8)

The first question the drafting committee took up in the UDTA was the fiduciary duties of a trust director. Should a trust director's duty in the exercise or nonexercise of his or her powers be the same as a trustee? Some different level or form of duty? Or perhaps no duty at all? In answering these questions, the drafting committee was deeply influenced by a survey of the existing directed trust statues, which showed a remarkable unanimity on these questions. Almost every state directed trust statute treats a trust director as a fiduciary of some kind.[104]

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[100] Uniform Trust Code § 108 cmt.

[101] *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 271-72, 279 (1971).

[102] [cx]

[103] *See* Uniform Prudent Investor Act § 11 (1994).

[104] *See, e.g.*, [citations].

Treating a trust director as a fiduciary makes sense, because a trust director is, by definition, a person with a power over a trust. Power and duty are deeply connected in trust fiduciary law,[105] and it seems self-evident that the person who has a power over a trust is the person best positioned to bear the associated fiduciary responsibility for that power.

1. Absorption of Trustee Duties

The UDTA implements the policy that a trust director is a fiduciary in § 8. The basic rule of § 8(a) is that "a trust director has the same fiduciary duty and liability" as a "trustee in a like position and under similar circumstances."[106] If the director holds the power individually, then the director bears the fiduciary duty of a sole trustee.[107] If the director holds the power jointly with a trustee or another director, the director bears the fiduciary duty of a cotrustee.[108]

With respect to the default or mandatory character of a trust director's duties, UDTA § 8(a)(2) answers that "the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances."[109] In other words, duties that are default for a trustee are also default for a similarly situated trust director; and duties that are mandatory for a trustee are also mandatory for a similarly situated trust director. Thus, if the terms of the trust include an exoneration clause for or grant of extended discretion to a trust director, those terms would have the same effect on the duty and liability of the director as they would for a trustee.[110] Of course, the UDTA allows the terms of a trust to impose additional duties on a trust director beyond those of a trustee or those imposed by UDTA section 8.[111]

The strategy of trust director fiduciary duty under the UDTA is thus one of absorption. The UDTA absorbs for a trust director the same law of fiduciary duty that would apply to a similarly situated trustee. Because a trust director exercises a power over a trust like a trustee, a trust director bears the same fiduciary duties as a trustee in the exercise of those powers.

In absorbing the fiduciary law of trusteeship, the UDTA offers a technical improvement on the existing statutes. Although almost all states treat a trust director as a fiduciary (at least by default), they neglect to specify which kind of fiduciary a trust director is supposed to be. They say that a trust director is a "fiduciary" without saying that a trust director bears the fiduciary duties specifically of a trustee.[112] Most states thus leave open the question of what the fiduciary duties of a trust director will entail and how a settlor or judge might discern them. A trust director and her counsel might have to guess, for example, whether case law regarding the fiduciary duties of a trustee extend to a trust director.

The UDTA solves these problems by expressly analogizing a trust director to a trustee. The duty of a trust director is not that of an agent or a corporate director or of some novel kind of fiduciary, but the duty of a trustee in a like position and under similar circumstances. The fiduciary duties of trusteeship apply to a trust director, provided that they would apply to a trustee with similar powers under similar circumstances.

Specifically absorbing the fiduciary duties of a trustee offers several advantages. The first, as we have just seen, is certainty. Under the UDTA, courts and the parties to a trust will not have to guess about which fiduciary law applies to a directed trustee, because the statute expressly absorbs the fiduciary duties of trusteeship. A closely related advantage of absorbing the law of trusteeship is that it avoids the need to spell out the entirety of the law applicable to trust directors. By absorbing the law of trusts, the UDTA avoids the need to replicate something like Article 8 of the Uniform Trust Code for trust directors.

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[105] The Restatement characterizes this as "a basic principle of trust administration," namely, that "a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee's fiduciary obligations." Restatement (Third) of Trusts § 70 cmt. a (2007). Thus, "even a power expressly conferred by the trust instrument, or by statute, is subject to the fundamental duties of prudence, loyalty, and impartiality, to a duty to adhere to the terms of the trust, and to the other fiduciary duties of trusteeship." Id.

[106] UDTA § 8(a)(1).

[107] Id. § 8(a)(1)(A).

[108] Id. § 8(a)(1)(B).

[109] Id. § 8(a)(2).

[110] On extended discretion, see clauses, see Uniform Trust Code § 814(a) (2004); Restatement (Third) of Trusts § 50 cmt. c (2003). On exculpation clauses, see Uniform Trust Code § 1008 (2000); Restatement (Third) of Trusts § 96 (2012).

[111] UDTA § 8(c).

[112] [Example citations.]

A third advantage is that by absorbing the trust fiduciary law of each enacting state, the UDTA accommodates diversity across the states in the particulars of a trustee's default and mandatory fiduciary duties, such as the duties to diversify and to give information to beneficiaries, both of which have become increasingly differentiated across the states.[113] Thus, in a state that allows the terms of a trust to negate a trustee's duty to give information to a beneficiary or a trustee's duty to diversify, the terms of a trust could likewise negate those duties as applied to a trust director.[114] Lastly, absorption allows for changes to the law of a trustee's fiduciary duties to be absorbed automatically into the duties of a trust director without need for regular conforming revisions to the UDTA.

2. Sensitivity to Context

Although the UDTA absorbs the fiduciary duties of a trustee, those duties apply to a trust director as they would to a trustee "in a like position and under similar circumstances."[115] Rather than treating all trust directors identically, therefore, a court must be sensitive to the peculiar circumstances of each. And in some circumstances, applying the fiduciary law of trusteeship will require sensitivity to the position of a director who may be required by the terms of a trust to act differently from a conventional trustee. The comment to § 8 gives this example: "In assessing the actions of a director that holds a power to modify a trust, … a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust's terms and purposes and the director's particular powers."[116] The comment elaborates:

> Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Fiduciary principles are thus amenable to application in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust.[117]

As part of this flexibility and sensitivity to context, the drafting committee contemplated that a settlor could construct a trust director's power to be springing. That is, a trust director's duties could arise at a particular moment, rather than applying continuously, such that the director would not be under a constant obligation to monitor the administration of a trust. By way of example, the comment to § 8 explains that "a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary."[118]

3. Exclusions

Recall that UDTA § 5 excludes certain powers from the scope of the act: a power of appointment, a power to remove a trustee or trust director, a power in a settlor in a revocable trust, a power in a beneficiary that affects only that beneficiary's interest, and a power that must be held in a nonfiduciary capacity to achieve a settlor's federal tax objectives.[119] Because the UDTA does not apply to these powers, the holder of such a power is not a trust director subject under § 8 to the fiduciary duties of a similarly situated trustee.

In addition to these categorical exclusions, UDTA § 8(b) carves out from fiduciary duty and liability under the act a trust director who is a medical professional acting in the professional's capacity as such.[120] For example, a power in a physician to determine a settlor's mental capacity or a beneficiary's sobriety is a power of direction, and the physician is a trust director, but the physician would have "no duty or liability under" the UDTA in exercising this power.

This exclusion should offer significant comfort to doctors and other medical professionals who might be asked by a settlor to exercise a power over a trust, and who might otherwise "refuse appointment as a trust director if such service would expose the professional to fiduciary duty under this act."[121] Crucially, however, "the professional would remain subject to

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[113] [citations]

[114] This result obtains under UDTA § 8(a)(2).

[115] Id. § 8(a)(1).

[116] Id. cmt.

[117] Id.

[118] Id.

[119] [cx]

[120] UDTA § 8(b) ("Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].").

[121] Id. cmt.

any rules and regulations otherwise applicable to the professional, such as the rules of medical ethics. … Moreover, a trustee subject to a direction by a health-care professional is still subject to the duties under Section 9 to take reasonable action to comply with the professional's direction and to avoid willful misconduct in doing so."[122]

The exclusion for a medical professional from duty or liability under the UDTA is yet another of the UDTA's many technical innovations. Many existing state statutes have unwittingly created liability risk for actors unintentionally swept into the definition of trust director, such as a family physician asked to evaluate a settlor's capacity in a revocable trust, as under common formbook boilerplate.[123] The UDTA avoids those serious errors.

4. Rules for Charitable and Supplemental Needs Trusts

The UDTA contains a further provision in § 7 that addresses specifically the role of a trust director in a special needs trust or a charitable trust. With respect to "a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law" or "a charitable interest in the trust," § 7 imposes all the same "rules" that would apply to "a trustee in a like position and under similar circumstances."[124]

This provision counts as yet another technical innovation of the UDTA, one that protects against avoidance of state-level policy limits on trustee action in such a trust. For example, many states require a trustee to give notice to the Attorney General before taking certain actions with respect to a charitable interest in a trust. Some states also disempower a trustee from taking certain actions with respect to a payback provision in a trust meant to comply with the reimbursement requirements of Medicaid law.

The drafting committee referenced "rules" rather than "duties" in § 7 in order to make clear that the section absorbs every provision of state law in the areas specified, regardless of whether the law in these areas is classified as a duty, a limit on a trustee's powers, a regulation, or otherwise. In referencing rules, rather than duties, § 7 stands in contrast to § 8. Whereas § 8 use of the term "duty" is intended to absorb only obligations of a fiduciary nature, § 7 absorbs all rules, whether fiduciary, regulatory, or otherwise—but only in the two limited subject areas enumerated in section 7, rather than the whole range of a director's possible conduct.

B. Directed Trustees (UDTA § 9)

In a directed trust, the trust director is not the only fiduciary at work. A directed trust also includes a directed trustee, and the fiduciary duty of a directed trustee is perhaps the most controversial issue in the law of directed trusts. The duty of a directed trustee has attracted immense debate, because the appropriate level of duty is not obvious.[125] On the one hand, the authority to exercise a power of direction belongs to a trust director, not a trustee. On the other hand, the actions that make the power of direction effective must often be taken by the trustee. If a director decides to sell trust property, for example, typically it is the trustee, as legal title holder, who must execute the transaction. The question thus arises, what is the fiduciary responsibility, if any, of a directed trustee in taking a directed action?

1. Existing Standards

When the drafting committee surveyed the approaches of existing directed trust statutes, a few trends emerged very clearly. The first was that the approach of Uniform Trust Code § 808 had failed. UTC § 808(b) provides:

> If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.[126]

[122] Id. cmt.

[123] [Northern Trust form]

[124] UDTA § 7.

[125] *See, e.g.*, [citations]

[126] UTC § 808(b).

This provision's failure is evident in its profound unpopularity. Although § 808(b) remains in force in many states that adopted it as part of a wholesale enactment of the Uniform Trust Code,[127] the UDTA drafting committee found that no state that had undertaken to legislate specifically on the topic of directed trusts had adopted the § 808(b) standard, and many states that had adopted the UTC had altered § 808(b) to adopt a different standard.[128] In other words, every state that had specifically considered the duty of a directed trustee has chosen a standard other than that provided by UTC § 808(b).

The UTC § 808(b) standard was therefore not a serious contender for the UDTA. Instead, the debate within the UDTA drafting committee centered on two distinct approaches that had clearly emerged as the main alternatives across the state directed trust statutes. In one group are the states that provide that a directed trustee has no duty or liability for complying with an exercise of a power of direction. Taking these statutes at face value, in these states a directed trustee is never liable for complying with a trust director's exercise of a power of direction, even if the exercise constitutes a breach of the trust director's fiduciary duties, and even if the directed trustee knows as much. For example, if a trust director has a power to sell certain trust property and the director orders the trustee to sell the property to the director's spouse at a bargain price in breach of the director's duty, then under the statutes that impose no duty on a directed trustee the trustee faces no liability for deeding the property to the director's spouse, even if the trustee knows that the sale is a breach of the director's duty. The states in this no duty group include Alaska, New Hampshire, Nevada, and South Dakota.[129]

The policy rationale for this first group of statutes is that duty should follow power. If a director has the exclusive authority to exercise a power of direction, then the director should be the exclusive bearer of fiduciary duty for the power. Advocates of this approach say that placing the exclusive duty on a director does not diminish the total duty owed to a beneficiary, because a settlor of a directed trust could have chosen to make the trust director the sole trustee instead. Thus, on greater-includes-the-lesser reasoning, a settlor who could have named a trust director to serve instead as a trustee should also be able to give the trust director the duties of the trustee. Under these no duty statutes, a beneficiary's only recourse for misconduct by a trust director is an action against the director.

In the second group of states, a directed trustee is not liable for complying with a direction of a trust director unless by doing so the directed trustee would personally engage in "willful" or "intentional" misconduct. Whether a trustee is liable for selling trust property at a bargain price to a director's spouse, for example, depends on whether the sale would count as "willful misconduct" on the part of the directed trustee. The group of states with a willful misconduct or similar standard includes Delaware, Illinois, Texas, and Virginia.[130]

The policy rationale for the willful misconduct statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a trust director. Although a settlor could have made a trust director the sole trustee, the settlor of a directed trust did not actually do so—and under traditional understandings of trust fiduciary law, a trustee must always be accountable to a beneficiary in some way.[131]

The states in this second group also recognize, however, that to facilitate a settlor's intent that a trust director rather than a directed trustee is to be the primary or even sole decisionmaker regarding a power of direction, it is appropriate to reduce the level of a directed trustee's duty below the level that would usually apply to a non-directed trustee to the extent the directed trustee acts subject to a power of direction. Accordingly, under the "willful misconduct" statutes, a beneficiary's main recourse for misconduct by a trust director is an action against the director. But the beneficiary also has recourse against the trustee to the extent that the trustee's compliance with the director's exercise his powers amounted to "willful misconduct" by the trustee.

Relative to a non-directed trust, this second approach has the effect of increasing the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, but in addition, the directed trustee is under a duty to avoid willful misconduct.

2. The UDTA's Willful Misconduct Standard

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[127] [E.g., Oregon 130.685; Texas 114.003; Pennsylvania 20 § 7778.]

[128] [E.g., Utah 75-7-906; Arizona 14-10808; Missouri 456.8-808(8)]

[129] [Alaska 13.36.375(c); New Hampshire 564-B:8-808; Nevada 1634.5549(1); South Dakota 55-1B-2].

[130] [Delaware 12 § 3313; Illinois 760 ILCS 5/16.3(f); Texas 114.003; Virginia 64.2-770.]

[131] *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (2012) ("Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.").

After extensive deliberation and debate, the drafting committee opted to follow the second group of statutes. UDTA § 9(a) says that "the trustee is not liable" for taking "reasonable action to comply with a trust director's exercise or nonexercise of a power of direction" except as provided in § 9(b).[132] Section 9(b), in turn, provides that a "directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction … to the extent that by complying the trustee would engage in willful misconduct."[133] The UDTA thus generally requires a trustee to comply with a director's direction and relieves the trustee from liability for so doing, unless by complying with the direction the trustee would engage in willful misconduct, in which case the trustee has a duty not to comply.

The drafting committee opted for the willful misconduct standard over a complete abolition of duty for several reasons. One reason was that the committee considered willful misconduct more consistent with traditional fiduciary policy. The willful misconduct standard preserves a minimum of duty for a trustee and thus maintains the traditional notion that a trustee is a fiduciary.

The drafting committee was also persuaded by the popularity of directed trusts in Delaware, which pioneered the willful misconduct standard. Delaware's success with the willful misconduct standard establishes that a directed trust regime that preserves a willful misconduct safeguard is workable and does not excessively interfere with settlor autonomy. A total elimination of duty in a directed trustee is therefore unnecessary to satisfy the needs of directed trust practice.

[To come: Paragraph on the role of courts in figuring out over time what is willful misconduct; variations across states in definition; and the decision not to include a definition.]

[To come: Paragraph on safe harbor for petition for instructions. Example in drafting session, based on Delaware case, was instruction to wire the money to the Caymans. Important technical innovation is both requiring compliance while giving a safe harbor for not complying via a petition for instructions.]

3. Potential for Adaptation

Although the UDTA adopts a willful misconduct standard, the standard is not central to the UDTA's architecture. The broader structure of the UDTA is potentially also consistent with the no duty approach that prevails in many states directed trust states. Thus, South Dakota, New Hampshire, Nevada or another state that desires no duty for a directed trustee could adapt the UDTA by passing the act as it now stands, with the one alteration of eliminating the willful misconduct standard and replacing it with language that waives a directed trustee's duty entirely.[134]

This approach is appealing because it would allow a state to benefit from the many technical innovations in the UDTA without compromising on the state's basic policy preferences. The rest of the UDTA should be attractive to almost every state, because there is little else about the UDTA that should be controversial besides the fiduciary liability of a directed trustee. The many innovations canvassed in Part I in the scope and exclusions of the UDTA, for example, ought to be uncontroversially beneficial no matter how a state wishes to draw the duty of a directed trustee.

4. Reasonable action

Although the willful misconduct standard is perhaps the most salient of the UDTA provisions governing the fiduciary duty of a directed trustee, § 9 also contains other important provisions as well. Section 9(a) says that subject to the prohibition on willful misconduct in subsection (b), "a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) and the trustee is not liable for the action."[135] In other words, unless complying with a direction would cause a trustee to engage in willful misconduct, the trustee has an affirmative duty to comply.

This duty to comply depends on context and requires compliance with whatever the terms of a trust require. A power of direction under which a trust director may give a trustee an express direction will require the trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a

[132] UDTA § 9(a).

[133] UDTA § 9(b).

[134] To clarify, the willful misconduct standard would need to be changed to no duty in both § 9 and § 10. We discuss § 10 below at infra [cx].

[135] UDTA § 9(a).

duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes a duty on the trustee to take reasonable action to facilitate the amendment and then comply with its terms.

A trustee's duty to comply is thus limited by the scope of the trust director's power of direction. A directed trustee must not comply with a direction that is outside of the director's power of direction. To do so would violate the trustee's duty under § 9(a) and the trustee's background duty to act in accordance with the terms of the trust.[136] For example, an attempt by a director to exercise a power of direction in a form contrary to that required by the terms of the trust, such as an oral direction if the terms of the trust require a writing, is not within the trust director's power and does not require compliance by a trustee.

In addition to imposing a duty to comply, UDTA § 9(a) also provides a standard for assessing a trustee's compliance. A trustee must "take *reasonable* action" to comply with a trust director's exercise or nonexercise of the director's powers.[137] If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure that he or she purchases the security within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty to take reasonable action thus preserves the conventional duties of trusteeship regarding the execution of a trust director's orders. The duty to take reasonable action does not, however, impose a duty to ensure that the substance of a direction is reasonable. To the contrary, subject to the willful misconduct rule of UDTA § 9(b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule, a trustee is liable only for its own breach of trust in the ministerial execution of a direction, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio; the trustee is only required to employ reasonable care in executing the purchase at a reasonable price, time, and manner.

The affirmative duty to comply and the reasonability standard for execution in compliance both count as major technical innovations in the UDTA and improve substantially on existing statutes. The Delaware statute, for example, neglects to impose an affirmative duty of compliance, leaving some doubt about whether a trustee even has such a duty.[138] More worrisome, a literal reading of the Delaware statute would suggest that a directed trustee does not have to act reasonably even when it chooses to comply.[139] Under the Delaware statute, , a trustee might not face any liability for its own negligence in executing a direction, so long as the negligence does not rise to willful misconduct. A trustee who unreasonably delays in executing a trust director's order to sell property, for example, would arguably not be liable so long as the delay was merely negligent or imprudent, rather than willful.[140] The UDTA's solution of requiring a trustee to take reasonable action is thus intent-implementing. Manifestly, a settlor would not want an appropriately exercised power of direction to be undermined by a trustee's sloppy, lackadaisical execution.

5. Limits on a power to release a trustee from liability

The UDTA offers yet another technical innovation in the form of the limits it establishes on a trust director's power to release a trustee from liability. Since, as we have seen, a power of direction can include any "power over a trust,"[141] one

[136] *See, e.g.*, Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory "the duty of a trustee to act … in accordance with the terms … of the trust"); Restatement (Third) of Trusts § 76 (2007) ("The trustee has a duty to administer the trust … in accordance with the terms of the trust.").

[137] UDTA § 9(a) (emphasis added).

[138] The duty to comply would have to found in the background rule of trust fiduciary law that a trustee must administer the trust in accordance with its terms. *See* sources cited supra note [cx].

[139] *See* Del. Code tit. 12, § 3313 (b) ("If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.").

[140] Delaware provides that "If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act." 12 Del.C. § 3313(b). One could arguably locate a duty of reasonable action into the phrase "in accordance with such a direction," by saying that a trustee who executes a direction negligently is not acting "in accordance" with the direction. But this puts too much pressure on vague statutory language that was probably never self-consciously designed to bear it.

[141] UDTA § 2(5).

possible form of a power of direction is to empower a director to release a trustee or another director from liability for acts done in the past or the future. Such a power, although apt in some circumstances, is nevertheless vulnerable to manipulation and abuse. Suppose, for example, a trustee lies to a trust director to induce the director to release the trustee from liability. Should a wrongfully procured release be effective?

To address these problems, UDTA § 9(c) provides that a power to release a trustee or another trust director from liability for breach of trust is not effective under three circumstances: "(1) the breach involved the trustee's or other director's willful misconduct; (2) the release was induced by improper conduct of the trustee or other director in procuring the release; or (3) at the time of the release, the director did not know the material facts relating to the breach." The drafting committee based the second and third of these safeguards on Uniform Trust Code § 1009.[142] These two provisions thus apply to a release of a trustee given by a trust director the same safeguards applicable to a release given by a beneficiary. The first limit is an innovation of the UDTA. Consistent with the mandatory minimum duty of a directed trustee under § 9(b) to avoid willful misconduct, § 9(c)(1) prohibits release by a trust director of a trustee or other director for willful misconduct.

C. Information Sharing Among Trustees and Trust Directors (UDTA § 10)

Another question in a directed trust is how much information a trust director and a directed trustee should share with each other. If a director has a power to invest trust assets and a trustee has a power to distribute them, how much must the director and the trustee tell each other about how they carry out their respective responsibilities? And what if a trust director has the power to amend the trust? Does the director have a duty to inform the trustee of an amendment or an intention to make an amendment? The question of what information a trustee and director must share is important, because the various fiduciaries in a directed trust often cannot reliably exercise their powers without information from the other fiduciaries. A trustee tasked with tax filings and other administrative tasks cannot function without a valuation of trust property invested by a trust director in nonmarket assets.

Most existing directed statutes ignore this problem, making the problem a source of litigation.[143] Although many states have provisions that govern communications between a directed trustee and a beneficiary, few states make any provision for communications between a trustee and a trust director.[144] Delaware and South Dakota, for example, are silent on the issue, leaving courts and parties to guess at what a director's and a trustee's duties to share information might be—or else to assume that a director and a trustee have no duties to share information. Illinois says that a director has a duty to communicate with a trustee—but not that a trustee has a duty to communicate with a director.[145]

Silence on the issue of trustee-trust director communication is not a workable solution, because background trust fiduciary law does not solve the problem on its own. The generic declarations in many statutes that a trust director is a fiduciary is insufficient, because these statutes say nothing about what exactly a trust director's fiduciary duty entails. There is no precedent that would read a duty to share information into the broad declaration that a trust director is a "fiduciary." Additionally, even if these statutes imply something about the duty of a trust director, they say nothing about the duty of a trustee. The law of trusts has not traditionally imposed a duty on a trustee to share information with a fiduciary other than a cotrustee, so in the absence of a statute, it is not obvious whether a trustee even has such a duty.

The UDTA's strategy in § 8 of applying the duties of a similarly situated trustee to a trust director does not entirely solve the problem either. Although UDTA § 8 is more far more specific than other statutes, it is still inadequate, because as just noted the duties of a trustee did not historically include a duty to communicate with a fiduciary other than a cotrustee.

1. The UDTA Solution

The problem of trustee-trust director communication thus requires a special rule. UDTA § 10(b) provides that a trust director "shall provide information to a trustee or another trust director to the extent the information is reasonably related both to: (1) the powers or duties of the director; and (2) the powers or duties of the trustee or other director."[146] Section 10(a) imposes a similar duty on a directed trustee to share information with a trust director.

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[142] UTC § 1009 is consistent with prevailing common law and similar in substance to Restatement (Third) of Trusts § 97 (2012).

[143] *See* Shelton v. Tamposi, 62 A.3d 741 (N.H. 2013) [explain].

[144] The Colorado statute is an exception. It requires a trustee and trust director to share information with each other under certain circumstances. *See* Colo. Rev. Stat. § 15-16-806(1)-(2).

[145] *See* 760 ILCS 5/16.3(h).

[146] UDTA § 10(b).

These mirror-image duties to share information mandate the sharing of just enough information, balancing each fiduciary's need for information with the settlor's intent to divide responsibility for administering the trust. Sections 10(a) and 10(b) require a trustee or director to share information only if the information is reasonably related to the powers or duties of both the person communicating the information and the person receiving it. The information must be related to the powers or duties of the person communicating the information, because otherwise that person could not be expected to possess or understand the information. The information must also be related to the powers or duties of the person receiving the information, because otherwise the person would not need the information. For both the person communicating the information and the person receiving it, the relationship of the information to powers and duties must be "reasonable." A director cannot compel disclosure of information that is only tangentially related to the director's powers or duties or that the director desires to know merely for the sake of curiosity.

2. Affirmative and Responsive Duties to Inform

The duties of a trustee and trust director to share information include both an affirmative duty to provide information (even in the absence of a request for that information) and a responsive duty to reply to requests for information. For example, if a trust director exercises a power to modify the terms of a trust, the director would have an affirmative duty to inform the trustees and other trust directors whose powers or duties are reasonably related to the amendment whether or not the trustees or other trust directors inquired about the amendment. Similarly, the director would have a responsive duty to provide information about the amendment upon a request by a trustee or another trust director whose powers or duties were reasonably related to the amendment.

3. Safe Harbor for Reliance on Information

UDTA § 10 also provides safe harbors for trust directors and trustees who act in reliance on information provided to them by another trust fiduciary under that section.[147] The safe harbor only applies, however, if the trustee or trust director who relies on the information is not engaged in willful misconduct. For example, § 10(c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in Section 9, the rationale for the safe harbor and willful misconduct limit is to implement a settlor's division of labor between a trustee and director, subject to a mandatory fiduciary minimum.

4. Duty to Inform Beneficiaries

The duty in UDTA § 10 governs disclosure of information among trustees and trust directors. It does not govern disclosure to a beneficiary by a trustee or a trust director. The duty of a directed trustee to inform a beneficiary is governed principally by the background trust fiduciary law of an enacting state.[148] The duty of a trust director to inform a beneficiary is governed principally by UDTA § 8, which as we have seen prescribes the fiduciary duties of a trust director. However, the duties of both a trustee and a trust director to inform a beneficiary are limited by UDTA § 11, to which we turn next.

D. Cross-Monitoring (UDTA § 11)

The requirement under UDTA § 10 of information sharing among trustees and trust directors raises further questions. Suppose a trustee learns that a trust director is acting in breach of the director's duties? Or what if a trust director learns that a trustee is acting in breach of its duties? The UDTA's allocation of fiduciary responsibility in §§ 8 and 9 limit a trustee's and trust director's duty to *prevent* each other's misconduct. But what about a trustee's or trust director's duty to *notify beneficiaries* about each other's misconduct?

1. No Duties to Monitor, Inform, or Advise

In *Rollins v. Branch Banking & Trust Company of Virginia*,[149] the court considered the fiduciary liability of a trustee who was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's failure. As *Rollins* illustrates, a directed trustee might discover a director's misconduct before a beneficiary does. But if a trustee has a duty to share this information with the beneficiary—to

[147] UDTA §§ 10(c)-(d).

[148] *See, e.g.*, Uniform Trust Code § 813 (amended 2004); Restatement (Third) of Trusts § 82 (2007). Such law is expressly preserved by UDTA § 4.

[149] 56 Va. Cir. 147 (2002).

inform a beneficiary that the trustee disagrees with a director's choices—that duty could become a backdoor for undoing the limitation on a directed trustee's fiduciary responsibility under UDTA § 9.

After *Rollins*, many states enacted fixes to their directed trust statutes to relieve a directed trustee from liability for a *Rollins*-like failure to warn a beneficiary. Following these statutes, the UDTA offers its own form of relief. UDTA § 11(a) provides that "a trustee does not have a duty to … monitor a trust director … or … inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director."[150] Section 11(b) provides a mirror-image rule for a trust director, relieving a director of a duty to monitor, inform, or give advice to others about the conduct of a trustee or other trust director.

This provision offers significant technical improvements on similar provisions in the existing directed statutes. Unlike many existing statutes, UDTA § 11 covers both trustees and trust directors. Many statutes relieve a trustee of a duty to monitor a trust director, but say nothing about whether a director has a duty to monitor a trustee. Additionally, the language in UDTA § 11 is clearer and more concise than many state statutes, cutting through unnecessary and imprecise verbiage to state the point directly.[151]

2. *Survival of General Duty of Disclosure.*

Although UDTA § 11 confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director, § 11 does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law.[152] The same is true for a trust director, on whom UDTA § 8(a) imposes the fiduciary duties of a similarly situated trustee.

For example, if a trust director has a power to direct investments and the director uses that power to concentrate the trust portfolio, UDTA § 11 would relieve a directed trustee of any duty to warn a beneficiary about the risks of such a concentration. The trustee would remain under any otherwise applicable duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust.

3. *No Assumption of Duty*

In addition to waiving a directed trustee's duty to monitor, inform, or give advice as under UDTA § 11, many state directed trust statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions."[153] The purpose of these provisions is to ensure that if a directed trustee chooses to monitor, inform, or give advice, the trustee does not take on a continuing obligation to do so or concede a prior duty to have done so. UDTA § 11 improves on these provisions by dispensing with the opacity of an administrative classification and achieving the intended result directly. Section 11(a)(2) provides that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Section 11(b)(2) applies the same rule to a trust director.

IV. Adapting the Subsidiary Rules of Trusteeship

The third stop on our tour through the UDTA is the act's adaptation of a variety of subsidiary rules of trusteeship for application to a trust directorship. No existing statute comprehensively addresses subsidiary matters such as acceptance, compensation, vacancy, and limitations periods. Unlike existing statutes, the UDTA anticipates these subsidiary issues and adopts the same basic solution that it applies to fiduciary duties—the UDTA takes the law of trusteeship and adapts it for application to a trust directorship. These provisions are therefore among the more important technical innovations of the UDTA, as they improve on existing statutes by providing rules to answer questions that could easily be overlooked in the drafting of a directed trust.[154]

A. Rule of Decision for Jointly Held Powers of Direction

[150] UDTA § 11(a).

[151] [comparison cites/quotes]

[152] *See, e.g.*, Uniform Trust Code § 813 (2004); Restatement (Third) of Trusts § 82 (2007).

[153] *See, e.g.*, Del. Code Ann. tit. 12, § 3313(e) (2017).

[154] [cx to default further powers under § 6(b) as one example already covered]

UDTA § 6(b)(2) provides a default rule of construction under which "trust directors with joint powers must act by majority decision." The UDTA thus provides a presumptive rule of majority action for multiple trust directors with joint powers, such as a three-person committee with a power of direction over investment or distribution.[155] In opting for a default of majority action, the drafting committee took notice that majority action is the prevailing default rule for cotrustees.[156]

B. Office of Trust Director

UDTA § 16 applies the law of trusteeship to a trust directorship with regard to seven subjects: acceptance,[157] bond,[158] reasonable compensation,[159] resignation,[160] removal,[161] and vacancy.[162] UDTA § 16 thus adopts the same basic solution that UDTA § 8 applies to fiduciary duties of taking the law of trusteeship and applying it to trust directors.[163] However, owing to the practical differences in the powers that are commonly given to a trust director and a trustee, the drafting committee expected that the rules of trusteeship would need to be applied to a trust director with sensitivity to context.

For example, UDTA § 16(1) adopts for a trust director the same law that applies to a trustee regarding acceptance of appointment. Whether a trust director has accepted an appointment is thus determined by the same principles that determine whether a trustee has accepted appointment. As a practical matter, however, a judge will have to be thoughtful about extending the rules of trusteeship to a trust director, because the circumstances of a trust director are often (though not always) different from the circumstances of a trustee. A trustee, for example, is expected to participate actively in the administration of the trust. At a minimum, a trustee must hold title to trust assets, which often forces the trustee to take some sort of action almost immediately. A trustee is therefore usually capable of signaling acceptance by conduct.[164] Even if the trustee has not expressly accepted appointment, the trustee may signal acceptance by actions alone.

The challenge in applying UDTA § 16(1), therefore, is that not every trust director may take action quickly like a trustee. Some trust directors may not take any action for long stretches of time, if ever. A director with a power to determine a settlor's competence, for example, may not act for years or even decades. When a trust director delays acting in this way, perceiving acceptance by conduct may become difficult.[165] A judge must therefore be sensitive in applying the law of trustee acceptance to a trust director, and must try to discern what would be appropriate under the circumstances. Likewise, with respect to a bond to secure performance by a trust director under § 16(2), in the usual case the director would not have custody of the trust property, hence requiring a bond from a trust director would not be normally be appropriate.

Vacancy presents a similar question of adaptation in light of context. Under Uniform Trust Code § 704 (2004), for example, "a vacancy in a trusteeship need not be filled" if "one or more cotrustees remain in office." Under § 16(6) of the UDTA, the same rule applies to trust directors. If three of five trust directors with a joint power to determine the settlor's capacity remain in office, the court "need not" fill the vacancies, though the vacancies should be filled if doing so would be more consistent with the settlor's plan. Likewise, if the sole trust director with power over investment of the trust property ceases to serve, in most circumstances the vacancy should be filled, and this is true even if other directors with unrelated powers remain in office. An apt analogy is to a trust with several cotrustees, each of whom has controlling authority over different aspects of the trust's administration. If any of those trustees ceases to serve, in many circumstances a court should appoint a successor even though other cotrustees remain in office.

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[155] The duty and liability of a trust director is governed by Section 8, which applies the fiduciary duty of trusteeship to a trust director. Thus, under Section 8(a)(1)(B), a trust director that holds a power of direction jointly with a trustee or another trust director would be subject to the fiduciary duty of a cotrustee.

[156] *See* Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (2003). The comment to UDTA § 6(b)(2) clarifies that the drafting committee assumed that in the event of a deadlock among trust directors with joint powers, by analogy to a deadlock among cotrustees, a court could "direct exercise of the [joint] power or take other action to break the deadlock." Restatement (Third) of Trusts § 39 cmt. e (2003).

[157] *See, e.g.*, Uniform Trust Code § 701(a)–(b) (2000); Restatement (Third) of Trusts § 35 (2003).

[158] *See, e.g.*, Uniform Trust Code § 702(a)–(b) (2000); Restatement (Third) of Trusts § 34(3) (2003).

[159] *See, e.g.*, Uniform Trust Code § 708 (2000); Restatement (Third) of Trusts § 38 cmt. i (2003).

[160] *See, e.g.*, Uniform Trust Code § 705 (2001) and Restatement (Third) of Trusts § 36 (2003).

[161] *See, e.g.*, Uniform Trust Code § 706 (2000) and Restatement (Third) of Trusts § 37 cmt. e (2003).

[162] *See*, e.g., Uniform Trust Code § 704 (2004); [RST?].

[163] The drafting committee intended that these rules would be "default or mandatory as applied to a trust director depend[ing] on whether [the rule] is default or mandatory as applied to a trustee." UDTA § 16 cmt.

[164] [Citation]

[165] UDTA § 16(1) cmt.

The provision in UDTA § 16(3) for "reasonable compensation" for a trust director also merits some discussion. Reasonable compensation for a trust director will vary based on the nature of the director's powers, and therefore in some circumstances may well be zero. Thus, in the comments and in the legislative note accompanying § 16(3), the drafting committee strongly urged that a state that provides statutory commissions for a trustee should refrain from using the same commission formula for a trust director and should instead use a rule of reasonable compensation. Statutory commissions will often overcompensate a trust director, especially a director that does not participate actively on an ongoing basis in the administration of the trust. At the same time, the state might take the occasion of enacting the UDTA to abandon statutory commission for a trustee too, as the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed.[166]

C. Litigation Issues

As we have seen, the UDTA imposes on a trust director the fiduciary duties of a trustee "in a like position and under similar circumstances."[167] The drafting committee thus contemplated that a breach of those duties by a trust director would be a breach of trust,[168] and that existing law governing standing to enforce a trust would resolve the question of who could bring an action for redress against the director.[169] But what of limitation periods and defenses? Providing statutory answers to these questions is another technical improvement of the UDTA relative to most existing directed trust statutes.

With respect to limitation periods, UDTA § 13 absorbs the rules that would apply to a trustee in a like position and under similar circumstances. Thus, subsection (a) applies to a trust director any statutory limitation rule enjoyed by a trustee, and subsection (b) applies to a trust director any rule of repose or limitation arising from a report or accounting to the beneficiaries.[170] However, subsection (b) is phrased so that it applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of the director's conduct."

With respect to defenses in an action for breach of trust, UDTA § 15 makes available to a trust director the same defenses that would be available to a trustee in a like position and under similar circumstances. The comment to § 15 confirms that such defenses could include laches or estoppel;[171] consent, release, or ratification by a beneficiary;[172] reasonable reliance on the terms of a trust;[173] and reasonable care in ascertaining the happening of an event affecting administration or distribution.[174]

[Exoneration/exculpation cross-reference to fiduciary section.]

Another question likely to arise in litigation involving a trust director is the ability of the director to seek indemnification for attorney's fees. The drafting committee contemplated that, in the event the terms of a trust are silent on this question, it would be governed by UDTA § 6(b)(1). As we have seen, § 6(b)(1) establishes a default rule that allows a trust director to exercise "any further power appropriate to the exercise or nonexercise of a power of direction granted to the

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[166] An apt analogy is to a trustee that hires others to "render services expected or normally to be performed by the trustee." Restatement (Third) of Trusts § 38 cmt. c(1) (2003); *see also* Uniform Prudent Investor Act § 9 cmt. (1994) ("If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.").

[167] UDTA § 8, discussed supra [cx].

[168] For the avoidance of doubt, UDTA § 2(1) confirms expressly in blackletter that the term "'breach of trust' includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts."

UDTA § 15 confirms that "by accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director." Several existing state directed trust statutes contain a similar provision, [citations], which is familiar from law of trusteeship. *See, e.g.,* Uniform Trust Code § 202(a) (2000).

[169] *See, e.g.*, Restatement (Third) of Trusts § 94 (2012).

[170] The comment to UDTA § 13 confirms that "[l]aches, which strictly speaking is an equitable defense rather than a limitations period, would apply to an action against a trust director under Section 14."

[171] *See, e.g.*, Restatement (Third) of Trusts § 98 (2012).

[172] *See, e.g.*, Uniform Trust Code § 1009 (2001); Restatement (Third) of Trusts § 97(b)–(c) (2012).

[173] *See, e.g.*, Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994).

[174] *See, e.g.*, Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt. f (2007)).

director."[175] By default, therefore, a trust director would have a power to incur attorney's fees and other expenses and to direct indemnification for them if doing so would be "appropriate" to the exercise of the director's expressly granted powers. Such a direction would normally be appropriate if a trustee in a like position and under similar circumstances would be entitled to indemnification of costs and expenses.

V. Reconciling Cotrusteeship

The final stop on our tour through the UDTA is the reconciliation in Section 12 of the law of cotrusteeship with the broad settlor autonomy recognized by the UDTA for a directed trust. We begin with a review of the traditional law of cotrusteeship, and how the UDTA preserves that law by default. We then consider the innovation of the UDTA whereby the terms of a trust may relieve a cotrustee of fiduciary responsibility for a matter in which the cotrustee is directed by another cotrustee, subjecting the directed cotrustee to the less demanding fiduciary standards for a directed trustee under Sections 9, 10, and 11 of the UDTA

A. Traditional Law

The traditional understanding of cotrusteeship is that it is a safeguard imposed by the settlor. The beneficiaries are protected against trustee misconduct by the presence of multiple trustees, each of whom is under a fiduciary duty to take reasonable steps to prevent a breach by the other trustees.[176] As one Scots judge put the point in 1897:

> It is, of course, disagreeable to take a cotrustee by the throat, but if a man undertakes to act as trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs, in letting things slide and losing money rather than create ill feeling.[177]

A complex web of default and mandatory rules, much of which persists in today's law, reflects this understanding of cotrusteeship as a beneficiary safeguard. Under traditional law, for example, the default rule was that cotrustees were required to act unanimously, though the prevailing default today is by majority.[178] Yet even today, each cotrustee is under a duty to participate actively in the administration of the trust.[179] And the modern authorities are uniform in recognizing a duty in each cotrustee "to use reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress."[180]

The prevailing view is that the duty to prevent or seek redress for a cotrustee's breach of trust applies even if the settlor limits the role or function of one of the cotrustees. The Restatement (Third) of Trusts explains: "Even in matters for which a trustee is relieved of responsibility, … if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct."[181] Moreover, "even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate."[182]

The foregoing rules for a cotrustee stand in stark contrast with the less demanding fiduciary standards for a directed trustee under Sections 9, 10, and 11 of the UDTA. The drafting committee therefore gave considerable attention to reconciling the law of cotrusteeship with the new law of directed trusts. The committee's aim was to maintain existing trust practice while bringing to cotrusteeship the broad settlor autonomy recognized by the UDTA for a directed trust.

B. Cotrusteeship Under the UDTA

1. Law of Cotrusteeship by Default

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[175] UDTA § 6(b)(1), discussed supra [cx].

[176] *See, e.g.*, Restatement (Third) of Trusts § 81(2) cmts. d-e (2007).

[177] Miller's Trustees v. Polson, (1897) SC 1038, 1043 (Scot.).

[178] [RST and UTC 703(a)]

[179] *See, e.g.*, Restatement (Third) of Trusts § 81(1) cmt. c (2007); Uniform Trust Code § 703(c) (2000).

[180] Restatement (Third) of Trusts § 81(2) (2007); *see also* Uniform Trust Code § 703(g) (2000).

[181] Restatement (Third) of Trusts § 81(2) cmt. b (2007).

[182] Id. [Placeholder for uncertainty about mandatory status under UTC.]

The UDTA preserves the distinction between a directed trust and a cotrusteeship. Under the UDTA, a "power of direction" cannot be held by a person while the person is serving as a trustee, nor can a person be a "trust director" while the person is serving as a trustee.[183] In consequence, a cotrustee with a power to direct another cotrustee is not a trust director, and the other cotrustee is not a directed trustee. Instead, relations between multiple trustees remain subject by default to the law of cotrusteeship.

2. Authorizing Opt Out from Cotrusteeship Law

Under the UDTA, however, the terms of a trust can opt out of the default law of cotrusteeship, and instead subject cotrustees to the more permissive rules of a directed trusteeship as prescribed by §§ 9, 10, and 11. The drafting committee reasoned that, because a "settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee," there was little reason not to allow the settlor to apply "the fiduciary rules of [a directed trust] to a cotrusteeship."[184] To this end, Section 12 provides:

> The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under Sections 9 through 11.[185]

Under the UDTA, therefore, if the terms of the trust so provide, a cotrustee may have only the duty required by the reasonable action and willful misconduct standards specified in Section 9 with respect to another cotrustee's exercise or nonexercise of a power of that other cotrustee. Likewise, the terms of a trust can displace the duty under traditional law to take reasonable action to prevent a breach of trust by a cotrustee and the rule giving every trustee access to information regarding all aspects of the administration of the trust, replacing those rules with the narrower rules for a directed trustee under Section 10 for information sharing and Section 11 for cross-monitoring.

3. A Question of Construction

Whether the traditional law of cotrusteeship or the more permissive rules of a directed trust apply to a particular cotrusteeship is a question of construction. The default rule is that the traditional law of cotrusteeship applies. But if the terms of the trust manifest a contrary intent, under Section 12 the reduced fiduciary duties of a directed trusteeship will apply instead.

For example, a familiar drafting strategy is to name cotrustees but also to provide that in the event of disagreement about a particular matter the decision of a specified trustee controls and the other cotrustee has no liability in that event. Another familiar drafting strategy is to give one cotrustee power over investment over certain of the trust property. For example, a family cotrustee might have controlling power over decisions pertaining to a family business held in the trust. It is common in this kind of trust to relieve the cotrustee who does not direct investments from liability for matters remitted to the control of the other cotrustee.

Under traditional law, in spite of such a provision, the cotrustee who does not exercise a controlling power would remain under a duty to take reasonable steps to prevent a breach by the controlling cotrustee. Under the UDTA, by contrast, the non-controlling cotrustee would be liable only for its own willful misconduct, and would not be otherwise responsible for the actions of the controlling cotrustee.[186] Under the UDTA, in other words, the controlling cotrustee would be treated like a trust director, and the non-controlling cotrustee would be treated like a directed trustee.

4. Title Holding and Third Party Rights

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[183] UDTA §2(5), (9).

[184] Id. cmt. The drafting committee also took note of similar provisions in [three states]. After Section 12 was in draft form, [two] other states adopted similar provisions.

[185] UDTA § 12. The legislative note gives instructions for revising UTC § 703 to conform with this provision. The comment to § 12 also explains that it applies only "to a cotrustee that takes direction," akin to a directed trustee, and not the duties of a cotrustee that gives direction, akin to a trust director, because under § 8 the duties of a trust director are those of a similarly situated trustee.

[186] The prospective basis limit reflects the rule under UDTA § 3(a) that the act applies to a trust created before the effective date of the act, but only as to a decision or action occurring on or after that date. Nothing in Section 12 requires an express reference to that provision to invoke the rule prescribed by it. UDTA § 12 cmt.

The change in the law of cotrusteeship effected by the UDTA pertains only to fiduciary governance within the trust. The UDTA does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee.[187] The principal difference between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to the trust property, whereas in a directed trusteeship, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee's capacity as such.[188] Instead, the UDTA changes only the degree to which the terms of a trust may reduce a cotrustee's duty and liability.

[187] Id.

[188] Id.

UNIFORM DIRECTED TRUST ACT

drafted by the

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ON UNIFORM STATE LAWS

and by it

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ON UNIFORM STATE LAWS

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UNIFORM DIRECTED TRUST ACT

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UNIFORM DIRECTED TRUST ACT

PREFATORY NOTE

Background. The Uniform Directed Trust Act addresses an increasingly common arrangement in contemporary estate planning and asset management known as a "directed trust." In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust's administration. There is no consistent vocabulary to describe the person other than a trustee that holds a power in a directed trust. Several terms are common in practice, including "trust protector," "trust adviser," and "trust director." There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary duty of a trustee, sometimes called an "administrative trustee" or "directed trustee," with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called a "power of direction." The holder of a power of direction is called a "trust director." A trustee that is subject to a power of direction is called a "directed trustee." The main contribution of the act is to address the many complications created by giving a power of direction to a trust director, including the fiduciary duty of a trust director and the fiduciary duty of a directed trustee.

Enabling Settlor Autonomy Consistent with Fiduciary Minimums. By validating terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust Act promotes settlor autonomy in accordance with the principle of freedom of disposition. At the same time, the act imposes a mandatory minimum of fiduciary duty on both a directed trustee and a trust director in accordance with the traditional principle that a trust is a fiduciary relationship. *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (2012) ("[F]or reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.").

Structure of the Act. The heart of the Uniform Directed Trust Act appears in Sections 6 through 11, which address the powers and duties of a trust director and a directed trustee. Sections 6 through 8 address the kinds of powers that the terms of a trust can grant to a trust director and the default and mandatory fiduciary duties of the director. Section 9 addresses the fiduciary duty of a directed trustee. Sections 10 and 11 further elaborate the duties of a trust director and directed trustee, prescribing specific rules for information sharing and monitoring among trust directors and trustees. Section 12 addresses cotrusteeship, enabling a settlor to apply the fiduciary standards of conduct for a directed trust under this act to a cotrusteeship. The remaining sections address a variety of important technical issues in this act's relationship to existing law and in the administration of a directed trust, including rules of construction for recurring matters that might be overlooked in the drafting of a directed trust.

Fiduciary Duty in a Directed Trust. Under the Uniform Directed Trust Act, a trust director has the same default and mandatory fiduciary duties as a trustee in a like position and under similar circumstances (Section 8). In complying with a trust director's exercise of a power of direction, a directed trustee is liable only for the trustee's own "willful misconduct" (Section 9). The logic behind these rules is that in a directed trust the trust director functions much like a trustee in an undirected trust. Accordingly, the trust director should have the same duties as a trustee in the exercise or nonexercise of the director's power of direction, and the fiduciary duty of the directed trustee is reduced with respect to the director's power of direction.

In preserving some minimal fiduciary duty in a directed trustee, the drafting committee was influenced by the prominent directed trust statute in Delaware, which provides likewise. *See* Del. Code Ann. tit. 12, § 3313 (2017). The popularity of directed trusts in Delaware establishes that a directed trust statute that preserves in a directed trustee a duty to avoid "willful misconduct" is workable in practice. The drafting committee therefore declined the suggestion that the Uniform Directed Trust Act should eliminate the fiduciary duty of a directed trustee completely.

In summary, under the Uniform Directed Trust Act a beneficiary's main recourse for misconduct by a trust director is an action against the director for breach of the director's fiduciary duty to the beneficiary. The beneficiary also has recourse against a directed trustee, but only to the extent of the trustee's own willful misconduct. Compared with a non-directed trust in which a trustee holds all power over the trust, a directed trust subject to this act provides for more aggregate fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, and in addition the directed trustee has a duty to avoid willful misconduct.

UNIFORM DIRECTED TRUST ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Directed Trust Act.

Comment

This act governs an arrangement commonly known as a "directed trust." In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust's administration. Under this act, such a power is called a "power of direction," the person that holds the power is called a "trust director," a trustee that is subject to the power is called a "directed trustee," and the trust is a "directed trust" (see Sections 2(5), (9), (3), and (2) respectively). This act applies to any arrangement that exhibits the functional features of a directed trust within the meaning of this act, even if the terms of the trust use other terminology, such as "trust protector," "trust advisor," or "administrative trustee."

SECTION 2. DEFINITIONS. In this [act]:

(1) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts.

(2) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(3) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(4) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(5) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in Section 5(b).

(6) "Settlor" means a person, including a testator, that creates, or contributes property to,

a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(8) "Terms of a trust" means:

(A) except as otherwise provided in subparagraph (B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law; [or]

(ii) court order[; or

(iii) a nonjudicial settlement agreement under [Uniform Trust Code Section 111]].

(9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

(10) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

Legislative Note: *A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 103(18), defining "terms of a trust," or Uniform Trust Decanting Act (2015)*

Section 2(28), defining "terms of the trust," should update those definitions to conform to paragraph (8). A state that has enacted Uniform Trust Code Section 103(15) and (20) could replace paragraphs (6) and (10) of this section with cross-references to those provisions. A state that has not enacted Uniform Trust Code Section 111 should replace the bracketed language of paragraph (8)(B)(iii) with a cross reference to the state's statute governing nonjudicial settlement or should omit paragraph (8)(B)(iii) if the state does not have such a statute.

Comment

(1) Breach of trust. The definition of "breach of trust" in paragraph (1) makes clear that the term includes a breach by a trust director or a trustee of a duty imposed on that director or trustee by the terms of the trust, this act, or other law pertaining to trusts. Historically, the term has been used to reference a breach of duty by a trustee, as under Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (2012). By expanding the meaning of the term to include a breach of duty by a trust director, this paragraph resolves any doubt about whether such conduct is also a "breach of trust."

In defining a breach of trust to include a breach of a duty imposed by this act, it is important to recognize that some of the duties imposed by this act are default rules that may be varied by the terms of the trust. The drafting committee contemplated that a trust director or a trustee would not be in breach of trust for conduct that was authorized by the terms of a trust to the extent that those terms are permissible under this act or other applicable law.

(2) Directed trust. Under paragraph (2), a "directed trust" is a trust for which the terms of the trust grant a power of direction. A "power of direction" is defined by paragraph (5).

(3) Directed trustee. The definition of "directed trustee" in paragraph (3) refers only to a trustee that is subject to direction by a trust director. A trustee that is subject to direction by a cotrustee is not for that reason a directed trustee, as paragraphs (5) and (9) exclude a person from being a trust director while that person is serving as trustee. The term "directed trustee" thus includes many but not all trustees that in practice are sometimes called "administrative trustees." Relations between multiple trustees are governed by the law of cotrusteeship as modified by Section 12.

(4) Person. The definition of "person" in paragraph (4) follows the current Uniform Law Commission definition.

(5) Power of direction. The definition of "power of direction" in paragraph (5) is expansive. It includes any "power over a trust" to the extent the power is exercisable at a time the power holder is not serving as a trustee. A power of direction may be structured as a power to direct the trustee in the exercise of the trustee's powers—for example, a power to direct the trustee in the investment or management of the trust property. A power of direction may also be structured as a power to act independently—for example, by amending the terms of a trust or releasing a trustee from liability.

The definition includes a power only to the extent the power is exercisable at a time the power holder is not serving as a trustee. The purpose of this limitation is to exclude a person serving as trustee from the definition of a trust director, even though as trustee the person will inevitably have a "power over a trust." A trust director, in other words, is someone other than a trustee. The contribution of this act is to address the complications created by giving a person other than a trustee—that is, a trust director—a power over a trust. A power over a trust held by a trustee is governed by existing trust fiduciary law.

The restriction in the definition to powers held by a person that is "not serving as a trustee" is also designed to be consistent with the definition of "trustee" in paragraph (10). Under paragraph (10), the term "trustee" includes an original, additional, and successor trustee. The definition of power of direction thus clarifies that a person that qualifies as a trustee under paragraph (10) by virtue of having served as an original trustee in the past or having been named as a successor trustee in the future may nevertheless be a "trust director" at a time when the person is not serving as a trustee. An original trustee that has ceased serving as a trustee but continues to hold a power over investments, for example, is a trust director under paragraph (5) even though the person also qualifies as a trustee under paragraph (10).

The definition confirms that a power of direction may include a power over "matters of trust administration" as well as a power over "investment, management, or distribution of trust property." These examples are meant to illustrate the potential scope of a power of direction rather than to limit it. In using the term "administration," the drafting committee intended a meaning at least as broad as that found in the context of determining a trust's "principal place of administration," such as under Section 3(b). The drafting committee also intended the terms "investment, management, or distribution" to have a meaning at least as broad as that found in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee's default powers. The comment to Section 6 provides examples of the kinds of specific powers that the drafting committee contemplated would fall within the definition of a power of direction.

(6) Settlor. The definition of "settlor" in paragraph (6) follows Uniform Trust Code § 103(15) (2004).

(7) State. The definition of "state" in paragraph (7) follows the current Uniform Law Commission definition.

(8) Terms of a trust. The definition of "terms of a trust" in paragraph (8) updates the comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court orders and nonjudicial settlement agreements, both of which are of growing practical significance and are sometimes used to vary the terms of a trust from a settlor's original intent. The definition also takes notice of a power in a trustee or a trust director to modify the terms of a trust.

The expanded definition of "terms of a trust" in this paragraph is consistent with the Restatement, which recognizes the possibility that the terms of a trust may later be varied from the settlor's initial expression. *See* Restatement (Third) of Trusts § 76 cmt. b(1) (2007) ("References … to the terms of the trust … also refer to trust terms as reformed or modified by court decree, and as modified by the settlor or others or by consent of all beneficiaries.")

(internal cross-references omitted).

(9) Trust director. The definition of a "trust director" in paragraph (9) refers to a person other than a serving trustee that is granted a power of direction by the terms of a trust. Such a person is a trust director even if the terms of the trust or the parties call the person a "trust adviser" or "trust protector" or otherwise purport to disclaim trust director status. A person may be a trust director even if the person is a beneficiary or settlor of the trust, though certain powers of a beneficiary and a settlor are excluded from the application of this act by Section 5.

A serving trustee cannot be a "trust director" for the same reasons that under paragraph (5) a power over a trust cannot be a "power of direction" while the person that holds the power is serving as a trustee. Relations between multiple trustees are governed by the law of cotrusteeship as modified by Section 12.

(10) Trustee. Following Uniform Trust Code § 103(20) (2004), paragraph (10) provides that the term "trustee" includes an original, additional, and successor trustee, and a cotrustee.

SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.

(a) This [act] applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(1) If the trust was created before [the effective date of this [act]], this [act] applies only to a decision or action occurring on or after [the effective date of this [act]].

(2) If the principal place of administration of the trust is changed to this state on or after [the effective date of this [act]], this [act] applies only to a decision or action occurring on or after the date of the change.

(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of administration of the trust are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction;

(2) a trust director's principal place of business is located in or a trust director is a resident of the designated jurisdiction; or

(3) all or part of the administration occurs in the designated jurisdiction.

Legislative Note: *A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 108(a) could omit subsection (b) and instead add subsection (b)(2) to Section 108 if the state also adds to the state's Uniform Trust Code the definitions of power of direction and trust director from Section 2(5) and (9).*

Comment

Subsection (a). Subsection (a) addresses two matters. First, because powers and duties in a directed trust are matters of trust administration, see Restatement (Second) of Conflict of Laws § 271 cmt. a (1971), this subsection follows the prevailing conflict of laws rule by linking application of this act to the trust's principal place of administration. As with other matters of administration, the parties are protected against inconsistent court orders by the common law principle of "primary supervision." *See* id. § 267 cmt. e.

Second, this subsection applies this act to all trusts administered in an enacting state regardless of whether the trust was in existence on the effective date of this act. However, under subsections (a)(1) and (2), this act applies only with respect to a decision or action occurring on or after the effective date or, if the trust's principal place of administration was changed to the enacting state after the effective date, only with respect to a decision or action occurring on or after that change. Because some of the standards of conduct prescribed by this act depart from Uniform Trust Code § 808 (2000) and Restatement (Third) of Trusts § 75 (2007), the drafting committee reasoned that the act should apply prospectively, following the model of Uniform Prudent Investor Act § 11 (1994).

Subsection (b). Subsection (b), which derives from Uniform Trust Code § 108(a) (2000), establishes a safe harbor for a settlor's designation of the principal place of administration for a directed trust. Such a designation is valid if (1) a trustee is located in the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust administration occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of Section 108(a) to add the presence of a trust director as a sufficient connection with the designated jurisdiction.

Other than the expansion in subsection (b)(2) of the Uniform Trust Code's safe harbor for a settlor's designation of a trust's principal place of administration, the drafting committee did not undertake to prescribe rules for ascertaining a trust's principal place of administration. In this respect, the drafting committee followed the Uniform Trust Code in "not attempt[ing] to further define principal place of administration." Uniform Trust Code § 108 cmt. Accordingly, for a directed trust in an enacting state, just as for all trusts in a Uniform Trust Code state, if the safe harbor of subsection (b) does not apply, the question of a trust's principal place of administration will be governed by the state's then-existing law on principal place of administration. *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 271-72, 279 (1971).

SECTION 4. COMMON LAW AND PRINCIPLES OF EQUITY. The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

Comment

This section confirms that the common law and principles of equity remain applicable to a directed trust except to the extent modified by this act or other law. For example, other than the safe harbor under Section 3(b) for a term of a trust that designates the trust's principal place of administration, the law of an enacting state by which principal place of administration is determined would continue to apply to a directed trust. Provisions such as this one are familiar from other uniform acts. *See, e.g.*, Uniform Powers of Appointment Act § 104 (2013); Uniform Trust Code § 106 (2000). The drafting committee contemplated that, by ordinary principles of statutory interpretation, other statutes pertaining to trusts such as the Uniform Trust Code (2000), Uniform Trust Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent Investor Act (1994), would continue to apply to a directed trust except as modified by this act.

SECTION 5. EXCLUSIONS.

(a) In this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(b) This [act] does not apply to a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary[under Uniform Trust Code Sections 301 through 305] with respect to the exercise or nonexercise of the power;

or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986[, as amended][, and regulations issued thereunder][, as amended].

(c) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

Legislative Note: *A state that has not enacted Uniform Trust Code (Last Revised or Amended in 2010) Sections 301 through 305 should replace the bracketed language in subsection (b)(4)(B) with a cross reference to the state's statute governing virtual representation or should omit the bracketed language if the state does not have such a statute.*

A state that does not permit the phrase "as amended" when incorporating federal statutes or permit reference to "regulations issued thereunder" should delete the bracketed language in subsection (b)(5)(B).

Comment

This section excludes five categories of powers that the drafting committee concluded should not be covered by this act for reasons of policy, coverage by other law, or both. Questions regarding a power that falls within one of these exclusions, such as the duty of the holder of the power and the duty of a trustee or other person subject to the power, are governed by law other than this act.

(1) Power of appointment. Subsection (b)(1) excludes a "power of appointment," which is defined by subsection (a) to mean "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property." This definition of "power of appointment" is based on the definition in Uniform Powers of Appointment Act § 102(13) (2013). The definition is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (2011), refers to as a "discretionary" power of appointment, that is, one in which "the donee may exercise the

power arbitrarily as long as the exercise is within the scope of the power."

Accordingly, if the terms of a trust purport to grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under this act that power will be construed as a power of appointment governed by law other than this act, such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of Property: Wills and Other Donative Transfers §§ 17.1–23.1 (2011).

The exclusion prescribed by subsection (b)(1) applies only to a nonfiduciary power of appointment. It does not apply to a fiduciary power of distribution. Thus, if the terms of a trust grant a person a fiduciary power to direct a distribution of trust property, and the power is exercisable while the person is not serving as trustee, then the power is a power of direction subject to this act.

To resolve doubt about whether a power over distribution is a power of appointment or a power of direction, subsection (c) prescribes a rule of construction under which a power over distribution is a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust provide that the power is held in a fiduciary capacity.

A power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because a serving trustee can never be a trust director (see Sections 2(5) and (9)). Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity (making it a fiduciary distributive power) or is instead a nonfiduciary power of appointment is governed by law other than this act, such as under Restatement (Third) of Trusts § 50 cmt. a (2003).

(2) Power to appoint or remove. Subsection (b)(2) excludes "a power to appoint or remove a trustee or trust director." This exclusion addresses the compelling suggestion to the drafting committee that granting a person a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it "must conform to any valid requirements or limitations imposed by the trust terms." Restatement (Third) of Trusts § 37 cmt. c (2003). If the terms of the trust do not impose any requirements or limitations on the power to remove, then "it is unnecessary for the holder to show cause" before exercising the power. Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006).

(3) Revocable trust. Subsection (b)(3) excludes a power of a settlor over a trust to the extent the settlor has a power to revoke the trust. The drafting committee intended that this exception would apply only to that portion of a trust over which the settlor has a power to revoke, that is, "to the extent" of the settlor's power to revoke.

Because the settlor of a revocable trust may at any time revoke the trust and take back the trust property, under modern law, including Uniform Trust Code § 603(a) (2004), the trustee's duties run to the settlor rather than to the beneficiaries. The trustee must "comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the

trustee's normal fiduciary duties." Restatement (Third) of Trusts § 74(1)(a)(i) (2007).

Without the exclusion of this subsection, the definitions contained in paragraphs (3), (5), and (9) of Section 2 could have been read to transform a settlor's power over a revocable trust into fiduciary powers of a trust director, thus subjecting the settlor to the fiduciary duties of a trust director under Section 8 and the trustee to the modified fiduciary duties of a directed trustee under Sections 9 through 11.

To the extent that a conservator or agent of the settlor may exercise the settlor's power to revoke, as under Uniform Trust Code § 602(e)–(f) (2001), subsection (b)(3) of this section would apply to the conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within subsection (b)(1).

(4) Power of a beneficiary. Paragraph (4) excludes a power of a beneficiary to the extent that the exercise or nonexercise of the power affects (A) the beneficial interest of the beneficiary, or (B) the beneficial interest of another beneficiary who is represented by the beneficiary under virtual representation law.

Subparagraph (A) follows from traditional law, under which "[a] power that is for the sole benefit of the person holding the power is not a fiduciary power." Restatement (Third) of Trusts § 75 cmt. d (2007). Thus, for example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded from this act. To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. Hence, a power over a trust held by a beneficiary may be a power of direction subject to this act if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by this paragraph unless the power to bind the other beneficiary arises by reason of virtual representation.

The same rules apply if the beneficiary's power is jointly held. Thus, for example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries by reason of the power other than by virtual representation. This act would therefore reverse the result in Vena v. Vena, 899 N.E.2d 522 (Ill. App. 2008), in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under this act, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

The carve-out for virtual representation in subparagraph (B) reflects the drafting committee's intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without the exclusion of this subsection, the definitions contained in paragraphs (5) and (9) of Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.

By way of illustration, under Uniform Trust Code § 304 (2000), a beneficiary who suffers from an incapacitating case of Alzheimer's disease may sometimes be represented by another beneficiary in litigation against a trustee for breach of trust. In such a case, paragraph (4) of this section prevents the beneficiary who represents the beneficiary with Alzheimer's from being a trust director. Instead, the safeguards provided by the law of virtual representation will apply. Under § 304, for example, the representative beneficiary and the beneficiary with Alzheimer's disease must have "a substantially identical interest with respect to the particular question or dispute," and have "no conflict of interest" with each other.

(5) The settlor's tax objectives. Subsection (b)(5) excludes a power if (A) the terms of the trust provide that the power is held in a nonfiduciary capacity, and (B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under federal tax law. This exclusion is responsive to multiple suggestions to the drafting committee that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor's federal tax objectives.

For example, to ensure that a trust is a grantor trust for federal income tax purposes, a common practice is to include in the trust instrument a provision that allows the settlor or another person to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity. If the power to substitute assets is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust. Without the exception of subsection (b)(5), therefore, this common drafting practice might no longer ensure grantor trust status in a state that enacts this Act, and the tax status of existing trusts with such a provision would be thrown into disarray.

In light of the evolving nature of tax planning, the frequency of amendments to the tax law, and the potential for disagreement about which powers must be nonfiduciary to achieve the settlor's federal tax objectives, the drafting committee reasoned that a standard referring broadly to a settlor's tax objectives was preferable to a prescribed list of sections of the tax code.

The drafting committee deliberately opted to reference tax objectives only under federal law, thereby excluding tax objectives under state law. The concern was that some states levy a tax on income in a trust if the trust has a fiduciary in the state. If this exclusion reached state tax law, then in such a state a trust director could argue that the director is not a fiduciary, because the settlor would not have wanted the trust to pay income tax. The consequence would be to negate fiduciary status for virtually all trust directors in those states. The purpose of this exception is to protect normal and customary estate planning techniques, not to allow circumvention of the central policy choice encoded in Section 8 that a trust director is generally subject to the same default and mandatory fiduciary duties as a similarly situated trustee.

SECTION 6. POWERS OF TRUST DIRECTOR.

(a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust director.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under subsection (a); and

(2) trust directors with joint powers must act by majority decision.

Comment

Validating a trust director. Subsection (a) validates a provision for a trust director in the terms of a trust. This subsection does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust. A trust director may be named by the terms of the trust, by a procedure prescribed by the terms of the trust, or in accordance with Section 16(6).

Breadth of subsection (a). Without limiting the definition of a "power of direction" in Section 2(5), the drafting committee specifically contemplated that subsection (a) would validate terms of a trust that grant a power to a trust director to:

- direct investments, including a power to:
  - acquire, dispose of, exchange, or retain an investment;
  - make or take loans;
  - vote proxies for securities held in trust;
  - adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
  - adjust between principal and income or convert to a unitrust;
  - manage a business held in the trust; or
  - select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee's or another director's delegation of the trustee's or other director's powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

This subsection does not, however, override the background law that regulates the formation of a trust, such as the requirements that a trust be lawful, not contrary to public policy, and possible to achieve. *See, e.g.*, Uniform Trust Code § 404 (2000); Restatement (Third) of Trusts §§ 29–30 (2003).

Pet and other noncharitable purpose trust enforcers. Statutes in every state validate a trust for a pet animal and certain other noncharitable purposes. Following Uniform Probate Code § 2-907(c)(4) (1993) and Uniform Trust Code §§ 408(b) and 409(2) (2000), most of these statutes authorize enforcement of the trust by a person named in the terms of the trust. In a state that enacts this act, such a person would be a trust director.

Exclusions. Like the other provisions of this act, this section does not apply to matters that are excluded by Section 5. Thus, because Sections 5(b)(1)-(2) exclude a "power of appointment," and a "power to appoint or remove a trustee or trust director," subsection 6(a) does not authorize the granting of such powers. Instead, such a power is governed by law other than this act.

Subsection (b). Subsection (b) prescribes two rules of construction that apply unless the terms of a trust provide otherwise.

(1) Further appropriate powers. Subsection (b)(1) prescribes a default rule under which a trust director may exercise any "further" power that is "appropriate" to the director's exercise of the director's express powers granted by the terms of the trust under subsection (a). The term "appropriate" is drawn from Uniform Trust Code § 815(a)(2)(B) (2000). Appropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director. Examples of further powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director's powers.

Delegation by trust director. In some circumstances, it may be appropriate under subsection (b)(1) for a trust director to exercise a further power to delegate the director's powers, much as it may sometimes be appropriate for a trustee to delegate its powers. Under Section 8, a trust director is subject to the same fiduciary duty regarding delegation as a trustee in a like position and under similar circumstances. In most states, therefore, a trust director would be required to exercise reasonable care, skill, and caution in selecting, instructing, and monitoring an agent, and a director that did so would not be liable for the action of the agent. In accordance with prevailing law governing delegation by a trustee, see, e.g., Uniform Trust Code § 807 (2000); Uniform Prudent Investor Act § 9 (1994); Restatement (Third) of Trusts § 80 (2007), the drafting committee contemplated that in performing a function delegated by a trust director, the agent would owe a duty to exercise reasonable care.

Trust director's standing to sue. Subsection (b)(1) addresses the situation that arose in Schwartz v. Wellin, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The court held that a trust director, which the terms of the trust referred to as a "trust protector," lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure, because the director was neither a real party in interest nor a party that could pursue a claim if not a real party in interest.

In some circumstances, subsection (b)(1) may produce a different outcome. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is "authorized by statute." Subsection (b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be "appropriate" to a director's exercise or nonexercise of a power granted by the terms of the trust under subsection (a). It would normally be "appropriate," for example, for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction. The requisite statutory authorization might also come from subsection (a) if the terms of the trust expressly confer a power of litigation on a director.

(2) Majority decision. Subsection (b)(2) provides a default rule of majority action for multiple trust directors with "joint powers," such as a three-person committee with a power of direction over investment or distribution. Majority action is the prevailing default for cotrustees. *See* Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (2003). In the event of a deadlock among trust directors with joint powers, by analogy to a deadlock among cotrustees, a court could "direct exercise of the [joint] power or take other action to break the deadlock." Restatement (Third) of Trusts § 39 cmt. e (2003).

The duty and liability of a trust director is governed by Section 8, which applies the fiduciary duty of trusteeship to a trust director. Thus, under Section 8(a)(1)(B), a trust director that holds a power of direction jointly with a trustee or another trust director would be subject to the fiduciary duty of a cotrustee.

SECTION 7. LIMITATIONS ON TRUST DIRECTOR. A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power under Section 6(b)(1) regarding:

(1) a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A)[, as amended][, and regulations issued thereunder][, as amended]; and

(2) a charitable interest in the trust, including notice regarding the interest to [the Attorney General].

Legislative Note: *A state that does not permit the phrase "as amended" when incorporating federal statutes or that does not permit reference to "regulations issued thereunder" should delete the bracketed language in paragraph (1) accordingly.*

In paragraph (2), "Attorney General" is in brackets to accommodate a state that grants

enforcement authority over a charitable interest in a trust to another public official.

Comment

This section applies to a trust director the same rules that apply to a trustee in two specific situations in which many states have particular regulatory interests. The first, in paragraph (1), concerns a payback provision necessary to comply with the reimbursement requirements of Medicaid law in a trust for a beneficiary with a disability. The second, in paragraph (2), concerns a charitable interest in a trust.

In both circumstances, this section imposes all the same rules that would apply to a trustee in a like position and under similar circumstances. For example, many states require a trustee to give notice to the Attorney General before taking certain actions with respect to a charitable interest in a trust. Some states also disempower a trustee from taking certain actions with respect to a payback provision in a trust meant to comply with the reimbursement requirements of Medicaid law.

The drafting committee referenced "rules" rather than "duties" in order to make clear that this section absorbs every provision of state law in the areas specified by paragraphs (1) and (2), regardless of whether the law in these areas is classified as a duty, a limit on a trustee's powers, a regulation, or otherwise. In referencing rules, rather than duties, this section stands in contrast to Section 8(a) and the other sections of this act that apply a trustee's duties to a trust director. Section 8(a) and these other sections absorb only duties of a fiduciary nature, whereas this section absorbs all rules, whether fiduciary, regulatory, or otherwise. Also unlike Section 8(a), this section applies only to two limited subject areas, rather than to the whole range of a director's possible conduct.

SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.

(a) Subject to subsection (b), with respect to a power of direction or further power under Section 6(b)(1):

(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(2) the terms of the trust may vary the director's duty or liability to the same

extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this [act] to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this [act].

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

Comment

Duty and liability of a trust director. This section addresses the duty and liability of a trust director. It should be read in conjunction with Section 10, which governs information sharing among directed trustees and trust directors, and Section 11, which eliminates certain duties to monitor, inform, or give advice. The drafting committee contemplated that this section, along with Sections 10 and 11, would prescribe the mandatory minimum fiduciary duties of a trust director, displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).

Subsection (a). Subsection (a) imposes the same fiduciary duties on a trust director that would apply to a trustee in a like position and under similar circumstances. A trust director with a power to make or direct investments, for example, has the same duties that would apply to a trustee with the same power, including a duty to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries. *See, e.g.*, Restatement (Third) of Trusts §§ 77–79, 90–92 (2007). The theory behind subsection (a) is that if a trust director has a power of direction, the director is the most appropriate person to bear the duty associated with the exercise or nonexercise of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a non-directed trust, and thus should have the same duties as a trustee.

Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the default duties that would ordinarily apply to a trustee in a like position and under similar circumstances. Subsection (a)(2) sets the mandatory minimum duties of a trust director by absorbing the mandatory minimum duties that the terms of a trust cannot vary for a trustee in a like position and under similar circumstances. The default and mandatory rules applicable to a trustee include those prescribed by the other provisions of this act.

In making a trust director a fiduciary, subsection (a) follows the great majority of the existing state directed trust statutes. Subsection (a) is more specific than many state statutes,

however, as the existing statutes tend to say only that a trust director is a "fiduciary," without specifying which kind of fiduciary or which fiduciary duties apply. Subsection (a) provides greater clarity by specifically absorbing the fiduciary duty of a similarly situated trustee.

Absorption of existing trust fiduciary law. Subsection (a) operates by absorbing existing state law rather than by inventing a new body of law. Absorbing existing state law in this manner offers several advantages. First, it avoids the need to spell out the entirety of trust fiduciary law. That is, it avoids the need to replicate something like Article 8 of the Uniform Trust Code for trust directors. Second, absorbing the trust fiduciary law of each enacting state accommodates diversity across the states in the particulars of a trustee's default and mandatory fiduciary duties, such as the duties to diversify and to give information to the beneficiaries, both of which have become increasingly differentiated across the states. Third, absorption allows for changes to the law of a trustee's fiduciary duties to be absorbed automatically into the duties of a trust director without need for periodic conforming revisions to this act.

Varied circumstances of trust directors. In applying the law of trustee fiduciary duties to a trust director, a court must make use of the flexibility built into fiduciary law. Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Fiduciary principles are thus amenable to application in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust. In assessing the actions of a director that holds a power to modify a trust, for example, a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust's terms and purposes and the director's particular powers.

The trust director's duty of disclosure. Under subsection (a), a trust director is subject to the same duties of disclosure as a trustee in a like position and under similar circumstances. For example, if a trust director intends to direct a nonroutine transaction, to change "investment … strategies," or to take "significant actions … involving hard-to-value assets or special sensitivity to beneficiaries," the director is under a duty of affirmative advance disclosure, just like a trustee. Restatement (Third) of Trusts § 82 cmt. d (2007). A trust director's disclosure duties are limited, however, by Section 11, which eliminates certain duties to monitor, inform, or give advice.

Sole versus joint powers. Under subsection (a), a trust director has the same fiduciary duties as a sole trustee when a power of direction is held individually and the same fiduciary duties as a cotrustee when a power of direction is held jointly. A trust director that individually holds a power to amend the trust, for example, does not have the duties of a cotrustee to monitor the actions of the trustee concerning investments or the actions of another trust director concerning the determination of a beneficiary's capacity.

Subject to Section 11, a trust director that holds a power of direction jointly with a trustee or another trust director, by contrast, has the duties of a cotrustee regarding the actions of that trustee or other trust director that are within the scope of the jointly held power. Thus, a trust director that jointly exercises a power to direct investments with other trust directors has the same fiduciary duties as a cotrustee regarding its own actions and the actions of the other directors with respect to the power. Under subsection (a)(2), a settlor may vary the duty and

liability of a trust director that holds a power of direction jointly to the same extent the settlor could vary the duty and liability of a cotrustee under Section 12 or otherwise.

Springing powers without a duty to monitor. The drafting committee contemplated that a settlor could construct a trust director's power to be springing such that the director would not be under a continuous obligation to monitor the administration of the trust. For example, a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor can vary the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary duties of a trustee, under Uniform Trust Code § 105(b)(2) (2004) the terms of a trust could waive all of the director's otherwise applicable duties other than the duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." A director with a power to direct a distribution upon a beneficiary's request, for example, would be subject to this mandatory duty when it responds to a beneficiary's request.

Extended discretion. Under subsection (a), if the terms of a trust give a trust director extended discretion, such as "sole," "absolute," or "uncontrolled" discretion, those terms would have the same effect on the duty and liability of the director as they would have for a trustee. Under prevailing law, a trustee with extended discretion may not "act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power." Restatement (Third) of Trusts § 50 cmt. c (2003); *see also* Uniform Trust Code § 814(a) (2004).

Exculpation or exoneration. A trust director is likewise subject to the same rules as a trustee with regard to an exculpation or exoneration clause. Under prevailing law, such as Uniform Trust Code § 1008 (2000) and Restatement (Third) of Trusts § 96 (2012), an exculpation or exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless indifference. Under subsection (a)(2) of this section, the same rules would apply to an exculpation or exoneration clause for a trust director. Thus, if the terms of a trust provide that a director can never be liable to a beneficiary, then the trust director would have the same liability as a trustee would have under a similar exculpatory clause.

Directed director. The terms of a trust may provide that a trust director has a power over a trust that requires another director to comply with the director's exercise or nonexercise of the power. In other words, a director may have the power to direct another director. In such a trust, subsection (a)(1) would absorb for the directed director the same fiduciary duties that would apply to a directed trustee. A directed director would thus be subject to the willful misconduct standard that Section 9 applies to a directed trustee. Under subsection (a)(2), the terms of a trust may vary the duty of a directed director to the same extent they could vary the duty of a directed trustee.

Subsection (b)—health-care professionals. Subsection (b) refers to a trust director who is "licensed, certified, or otherwise authorized or permitted by law … to provide health care in the ordinary course of the director's business or practice of a profession." This phrasing is based on the definition of "health-care provider" in Uniform Health-Care Decisions Act § 1(8) (1993). To the extent that a trust director acts in the director's business or practice of a profession to provide

health care, the director is relieved from duty and liability under this act unless the terms of the trust provide otherwise.

This subsection addresses the concern that a health-care professional might refuse appointment as a trust director if such service would expose the professional to fiduciary duty under this act. For example, the terms of a trust might call for a health-care professional to determine the capacity or sobriety of a beneficiary or the capacity of a settlor. In making such a determination, under subsection (b) the health-care professional would not be subject to duty or liability under this act.

Although the professional would not be subject to duty or liability under this act, the professional would remain subject to any rules and regulations otherwise applicable to the professional, such as the rules of medical ethics. The professional would also be subject to the other provisions of this act that do not create a duty or liability, such as the rules of construction prescribed by Sections 6(b) and 16. Moreover, a trustee subject to a direction by a health-care professional under subsection (b) of this section is still subject to the duties under Section 9 to take reasonable action to comply with the professional's direction and to avoid willful misconduct in doing so.

Subsection (c)—no ceiling on duties. Subsection (c) confirms that the duties under this section are defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.

SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.

(a) Subject to subsection (b), a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1), and the trustee is not liable for the action.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under Section 6(b)(1) to the extent that by complying the trustee would engage in willful misconduct.

(c) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(1) the breach involved the trustee's or other director's willful misconduct;

(2) the release was induced by improper conduct of the trustee or other director in procuring the release; or

(3) at the time of the release, the director did not know the material facts relating to the breach.

(d) A directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions.

(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

Legislative Note: *A state that has enacted the Uniform Trust Code (Last Revised or Amended in 2010) should move Section 808(a) into Section 603, delete Section 808(b) through (d), and add "subject to [insert cite to Uniform Directed Trust Act Sections 9, 11, and 12]," to the beginning of subsection (b)(2) of Section 105. Section 105(b)(2) prescribes the mandatory minimum fiduciary duty of a trustee, which is superseded with respect to a directed trustee by the willful misconduct mandatory minimum of this section.*

The term "court" in subsection (d) of this section should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.

Comment

Duties of a directed trustee. This section addresses the duty and liability of a directed trustee. It should be read in conjunction with Section 10, which governs information sharing among directed trustees and trust directors, and Section 11, which eliminates certain duties to monitor, inform, or advise. The drafting committee contemplated that this section, along with Sections 10 and 11, would prescribe the mandatory minimum fiduciary duties of a directed trustee, displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).

Subsection (a)—duty to take reasonable action; nonliability other than under subsection (b). Subject to subsection (b), subsection (a) requires a directed trustee to take reasonable action to comply with a trust director's exercise or nonexercise of the director's power of direction or further power under Section 6(b)(1) and provides that the trustee is not liable for so acting.

The duty of a trustee in subsection (a) to take reasonable action depends on context. A power of direction under which a trust director may give a trustee an express direction will require the trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes a duty on the trustee to take reasonable action to facilitate the amendment and then comply with its terms. The duty prescribed by subsection (a) is to take reasonable action to comply with whatever the terms of the trust require of a trustee in connection with a trust director's exercise or nonexercise of the director's power of direction or further power under Section 6(b)(1).

A trustee's duty to take reasonable action is limited by the scope of the trust director's power of direction. A directed trustee should not comply with a direction that is outside of the director's power of direction and beyond the director's further powers under Section 6(b)(1). To do so would violate the trustee's duty under subsection (a) and the trustee's background duty to act in accordance with the terms of the trust. *See, e.g.*, Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory "the duty of a trustee to act … in accordance with the terms … of the trust"); Restatement (Third) of Trusts § 76 (2007) ("The trustee has a duty to administer the trust … in accordance with the terms of the trust."). For example, an attempt by a director to exercise a power of direction in a form contrary to that required by the terms of the trust, such as an oral direction if the terms of the trust require a writing, is not within the trust director's power.

Subsection (a) requires a trustee to act reasonably as it carries out the acts necessary to comply with a trust director's exercise or nonexercise of the director's powers. If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure that the security is purchased within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty to take reasonable action under subsection (a) does not, however, impose a duty to ensure that the substance of the direction is reasonable. To the contrary, subject to subsection (b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule of subsection (b), a trustee is liable only for its own breach of trust in executing a direction, and not for the director's breach of trust in giving the direction. Returning to the example of a direction to purchase a security, the trustee is not required to assess whether the purchase of the security would be prudent in relation to the trust's investment portfolio; the trustee is only required to execute the purchase reasonably.

Powers jointly held with a trust director. A trustee may hold a power of direction jointly with a trust director. For example, the terms of a trust may confer a power to determine the capacity of a beneficiary upon a committee of people, and the committee may include both the trustee and the beneficiary's son, who is a trust director. When a trustee holds a power jointly with a trust director, the trustee continues to have the normal duties of a trustee regarding its own exercise or nonexercise of the joint power. Subsection (a), in other words, does not relieve the trustee from the trustee's normal duties as to powers that belong directly to the trustee, including powers held jointly with a trust director. In deciding how to vote as a member of the committee to determine the beneficiary's capacity, for example, the trustee would be subject to the same duties as if it held its power jointly with another trustee instead of with another trust director.

A trustee's participation in joint decisionmaking with a trust director, however, must be distinguished from the trustee's execution of those joint decisions. Although the trustee is subject to the normal fiduciary duties of trusteeship in making a decision jointly with a trust director, the trustee is subject to the reduced duty of subsections (a) and (b) in executing the decision. Returning to the example of a committee including a trustee with power to determine a beneficiary's capacity, the trustee has its normal fiduciary duties in deciding how to cast its vote

about whether the beneficiary lacks capacity. But the trustee has only the duties prescribed by subsections (a) and (b) when the trustee takes action to comply with the decision of the committee.

Powers to veto or approve. The terms of a trust may give a trust director a power to veto or approve the actions of a trustee. A trustee, for example, may have the power to invest trust property, subject to the power of a trust director to review and override the trustee's decision. A trustee that operates under this kind of veto or approval power has the normal duties of a trustee regarding the trustee's exercise of its own powers, but has only the duties of a directed trustee regarding the trust director's exercise of its power to veto or approve. Thus, the trustee would be subject to the normal duty of prudence in deciding which investments to propose to a director, but then would be subject only to the willful misconduct rule of subsection (b) in choosing whether to comply with the director's veto or disapproval of the proposed investments.

Subsection (b)—willful misconduct. Subsection (b) provides an exception to the duty of compliance prescribed by subsection (a). Under subsection (b), a trustee must not comply with a trust director's exercise or nonexercise of a power of direction or a further power under Section 6(b)(1) to the extent that by complying the trustee would engage in "willful misconduct."

The willful misconduct standard in subsection (b) is to be distinguished from the duty to take reasonable action in subsection (a). The reasonable action rule of subsection (a) applies to the manner by which a trustee complies with a power of direction. The willful misconduct standard of subsection (b) applies to the decision of whether to comply with a power of direction.

The willful misconduct standard in subsection (b) is a mandatory minimum. The terms of a trust may not reduce a trustee's duty below the standard of willful misconduct. Terms of a trust that attempt to give a trustee no duty or to indicate that a trustee is not a fiduciary or is an "excluded fiduciary" or other such language are not enforceable under subsection (b). Instead, such provisions should be construed to provide for the willful misconduct standard of subsection (b).

The drafting committee settled upon the "willful misconduct" standard after a review of the existing directed trust statutes. Roughly speaking, the existing statutes fall into two groups. In one group, which constitutes a majority, are the statutes that provide that a directed trustee has no duty or liability for complying with an exercise of a power of direction. This group includes Alaska, New Hampshire, Nevada, and South Dakota.

The policy rationale for these no duty statutes is that duty should follow power. If a director has the exclusive authority to exercise a power of direction, then the director should be the exclusive bearer of fiduciary duty in the exercise or nonexercise of the power. Placing the exclusive duty on a director does not diminish the total duty owed to a beneficiary, because a settlor of a directed trust could have chosen to make the trust director the sole trustee instead. Thus, on greater-includes-the-lesser reasoning, a settlor who could have named a trust director to serve instead as a trustee should also be able to give the trust director the duties of the trustee. Under the no duty statutes, a beneficiary's only recourse for misconduct by the trust director is an action against the director for breach of the director's fiduciary duty to the beneficiary.

In the other group of statutes, which includes Delaware, Illinois, Texas, and Virginia, a directed trustee is not liable for complying with a direction of a trust director unless by so doing the directed trustee would personally engage in "willful" or "intentional" misconduct. The policy rationale for these statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a director. Although the settlor could have made the trust director the sole trustee, the settlor did not actually do so—and under traditional understandings of trust law, a trustee must always be accountable to a beneficiary in some way. *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (2012) ("Notwithstanding the breadth of language in a trust provision relieving a trustee from liability for breach of trust, for reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.").

The states in the second group also recognize, however, that to facilitate the settlor's intent that the trust director rather than the directed trustee be the primary or even sole decisionmaker, it is appropriate to reduce the trustee's duty below the usual level with respect to a matter subject to a power of direction. Accordingly, under these statutes a beneficiary's main recourse for misconduct by the trust director is an action against the director for breach of the director's fiduciary duty to the beneficiary. The beneficiary also has recourse against the trustee, but only if the trustee's compliance with the director's exercise or nonexercise of the director's powers amounted to "willful misconduct" by the trustee. Relative to a non-directed trust, this second approach has the effect of increasing the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, but in addition the directed trustee has a duty to avoid willful misconduct.

After extensive deliberation and debate, the drafting committee opted to follow the second group of statutes on the grounds that this model is more consistent with traditional fiduciary policy. The popularity of directed trusts in Delaware, which also adopts the willful misconduct standard, establishes that a directed trust regime that preserves a willful misconduct safeguard is workable and that a total elimination of duty in a directed trustee is unnecessary to satisfy the needs of directed trust practice.

The willful misconduct standard prescribed by this subsection changes the policy of Uniform Trust Code § 808 (2000), which is similar in substance to Restatement (Third) of Trusts § 75 (2007). Section 808(b) provides:

> If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

In deciding to adopt a different standard, the drafting committee was deeply influenced by the fact that a growing number of states that had previously adopted Section 808 have since abandoned or modified it to follow one of the two other models discussed above. The drafting committee was also strongly influenced by the fact that a review of every existing specialized

state statute on directed trusts showed that no state that has legislated specifically on the issue of directed trustee fiduciary duties has chosen to follow Section 808.

Subsection (c)—release by trust director. The terms of a trust may empower a trust director to release a trustee or another trust director from liability for breach of trust. If the director grants such a release, the trustee or other director is not liable to the extent of the release. The terms of a trust may authorize such a release to be given at any time, whether before or after the trustee or other director acts. The precise scope of a power of release and the manner of its exercise depend on the terms of the trust.

Although a settlor has wide latitude in designing a power of direction, subsection (c) prescribes three mandatory safeguards that limit a director's power to release a trustee or other director from liability. First, consistent with the policy of subsection (b), a trustee or other director cannot be released for a breach that involves the trustee's or the other director's own willful misconduct. Second, consistent with prevailing law governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if it was procured by the improper conduct of the trustee or other director. Third, again consistent with prevailing law governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if at the time of the release the director did not know the material facts relating to the breach. The drafting committee based the second and third of these safeguards on Uniform Trust Code § 1009 (2001), which is similar in substance to Restatement (Third) of Trusts § 97 (2012).

Subsection (d)—petition for instructions. Subsection (d) confirms that, in accordance with existing law, a directed trustee that has reasonable doubt about its duty under this section may petition the court for instructions. *See, e.g.*, Restatement (Third) of Trusts § 71 (2007) ("A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions."). The safe harbor of this subsection is permissive rather than mandatory. Though a trustee may satisfy its duties by petitioning for instructions, this subsection does not require a trustee to petition.

Subsection (e)—no ceiling on duties. Subsection (e) confirms that the duties prescribed by this section are defaults and minimums, not ceilings. The terms of a trust may impose further duties in addition to those prescribed by this section.

SECTION 10. DUTY TO PROVIDE INFORMATION TO TRUST DIRECTOR OR TRUSTEE.

(a) Subject to Section 11, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the trustee; and

(2) the powers or duties of the director.

(b) Subject to Section 11, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the director; and

(2) the powers or duties of the trustee or other director.

(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(d) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

Comment

Subsections (a) and (b)—Duty to provide information. This section imposes duties on trustees and trust directors to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director. The drafting committee contemplated that the duties created by this section would provide trustees and trust directors with sufficient information to fulfill their obligations under trust law as well as other law, including banking, securities, and tax law.

Disclosure to beneficiaries. This section governs disclosure of information to trustees and trust directors. The duty of a trust director to disclose information to a beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director, subject to Section 11. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee's duty to inform a beneficiary about the actions of a trust director.

Reasonableness. This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or duties of the person receiving the disclosure. The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The information must also be reasonably related to the powers or duties of the person receiving the disclosure, because otherwise that person would not need the information. Examples of matters that might require disclosure under this section include asset valuations, modifications to the terms of a trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors.

Both an affirmative and a responsive duty to inform. This section imposes an affirmative duty to provide information (even in the absence of a request for that information) as well as a responsive duty to reply to requests for information. For example, if a trust director exercises a power to modify the terms of a trust, the director would have an affirmative duty to inform the trustees and other trust directors whose powers or duties are reasonably related to the amendment whether or not the trustees or other trust directors inquired about it. Similarly, the director would have a responsive duty to provide information about the amendment upon a request by a trustee or another trust director whose powers or duties were reasonably related to the amendment.

Interaction with Section 11. The duties of a trustee (in subsection (a)) and of a trust director (in subsection (b)) to disclose information are subject to the limitations of Section 11. Thus, although a trustee has a duty under this section to disclose information that is related to both the powers or duties of the trustee and the powers or duties of the director, a trustee does not have a duty to inform or give advice to the trust director concerning instances in which the trustee would have exercised the director's powers differently. The same is true for a trust director.

Shelton v. Tamposi. In Shelton v. Tamposi, 62 A.3d 741 (N.H. 2013), the terms of the trust left distribution in the hands of the trustee, but shifted power over investment to a trust director (the "investment director"). As a result, the trustee could not liquidate investments to raise the cash necessary to fund a distribution to one of the beneficiaries. Under subsection (b), the trust director would have been under a duty to give the trustee information about the effects of the director's investment program on the trust's cash position, and the trustee would have been under a duty to give the director information about the cash requirements of the trustee's distribution program. Moreover, in making and implementing the investment program, under Section 8(a) the trust director would be subject to the same duties as a similarly situated trustee, just as the trustee would be subject to the duties of a trustee in making and implementing the distribution program.

Subsections (c) and (d)—Subsection (c) provides a safe harbor for a trustee that acts in reliance on information provided by a trust director. Subsection (d) provides a similar safe harbor for a trust director for information provided by a trustee or other trust director. Under both subsections, the safe harbor only applies if the trustee or trust director that acts in reliance on the information is not engaged in willful misconduct. For example, subsection (c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in Section 9, the rationale for the safe harbor and willful misconduct limit is to implement the settlor's division of labor subject to a mandatory fiduciary minimum.

No ceiling on duties to share information. This section imposes a mandatory floor, rather than a ceiling, on a directed trustee's and a trust director's duty to share information. The terms of a trust may specify more extensive duties of information sharing among directed trustees and trust directors.

SECTION 11. NO DUTY TO MONITOR, INFORM, OR ADVISE.

(a) Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(2) by taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1).

(b) Unless the terms of a trust provide otherwise:

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(B) inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director; and

(2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph (1).

Comment

Following existing statutes. Subsection (a) provides that a trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have acted differently than the director. Many existing state statutes are to similar effect, though the language in this section is simpler and more direct. Subsection (b) applies the same rule to a trust director regarding the actions of a trustee or another trust director.

The existing statutes on which this section is based were meant to reverse the result in Rollins v. Branch Banking & Trust Company of Virginia, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments, but the court nevertheless held the trustee liable for failing to advise the

beneficiaries about the risks of the investment director's actions.

Survival of trustee's and trust director's general duty of disclosure. Although this section confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director, this section does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law such as under Uniform Trust Code § 813 (2004) or Restatement (Third) of Trusts § 82 (2007). The same is true for a trust director, on whom Section 8(a) imposes the fiduciary duties of a trustee.

For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of the director's decision to concentrate the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable law. The trustee would also remain under the duty imposed by Section 10 to provide a trust director with information reasonably related to its powers and duties.

No assumption of duty. In addition to waiving a directed trustee's duty to monitor, inform, or give advice as under subsection (a)(1), many state statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions." *See, e.g.*, Del. Code Ann. tit. 12, § 3313(e) (2017). The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to monitor, inform, or give advice, the trustee does not assume a continuing obligation to do so or concede a prior duty to have done so. This section dispenses with the opacity of an administrative classification and achieves the intended result more directly. Subsection (a)(2) provides that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Subsection (b)(2) applies the same rule for a trust director.

SECTION 12. APPLICATION TO COTRUSTEE. The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under Sections 9 through 11.

Legislative Note: *A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 703(c) or (g) should revise those sections to make them subject to this section. In the alternative, the state could insert this section as a new subsection in Section 703, and make subsections (c) and (g) subject to that new subsection if the state also adds to its Uniform Trust Code the definitions of "directed trustee," "power of direction," and "trust director" from Section 2(3), (5), and (9).*

Comment

Traditional law. Under traditional law, each cotrustee "has a duty to use reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress." Restatement (Third) of Trusts § 81(2) (2007). This rule applies even if the settlor limits the role or function of one of the cotrustees. "Even in matters for which a trustee is relieved of responsibility, … if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct." *Id.* cmt. b. Moreover, "even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate." *Id.* These rules for cotrusteeship contrast with the less demanding fiduciary standards for a directed trusteeship under Sections 9, 10, and 11 of this act.

Settlor autonomy. This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. There seems little reason to prohibit a settlor from applying the fiduciary rules of this act to a cotrusteeship given that the settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee. The rationale for permitting the terms of a trust to reduce the duty of a cotrustee that is subject to direction by another trustee is the same as the rationale for permitting the terms of a trust to reduce the duty of a directed trustee. In both instances, a trustee must act according to directions from another person and therefore the other person, not the trustee, should bear the full fiduciary responsibility for the action.

Accordingly, if the terms of a trust so provide, a cotrustee may have only the duty required by the reasonable action and willful misconduct standards specified in Section 9, and be subject to the narrower rules governing information sharing and monitoring specified in Sections 10 and 11, with respect to another cotrustee's exercise or nonexercise of a power of that other cotrustee. If the terms of a trust indicate that a directed cotrustee is to have no duty or is not a fiduciary, then the effect will be to reduce the cotrustee's duties to those prescribed by Sections 9 through 11, just as would be the effect of similar language for a directed trustee.

Mechanics of choosing directed trustee duties. Under this section the default rule is that, if a settlor names cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed trusteeship will only apply to a cotrustee if the terms of the trust manifest such an intent. Whether this section applies to a given trust is thus a question of construction. This section does not impose a requirement of express reference to this section or to this act. Moreover, under Section 3(a), this section applies to a trust created before the effective date of this act, but only as to a decision or action on or after that date.

For example, a familiar drafting strategy is to name cotrustees but also to provide that in the event of disagreement about a particular matter the decision of a specified trustee controls and the other cotrustee has no liability in that event. Under traditional law, notwithstanding this provision, the other cotrustee would be liable if it did not take reasonable steps to prevent a breach by the controlling cotrustee. Under this section, on a prospective basis the other cotrustee

would be liable only for its own willful misconduct akin to a directed trustee.

Cotrustees as directed trustees and trust directors. The terms of a trust can place a cotrustee in a position of either giving direction, like a trust director, or taking direction, like a directed trustee. This section only applies to a cotrustee that takes direction. This section does not address the duties of a cotrustee that is not directed. Nor does this section address the duties of a cotrustee that gives direction. Under Section 8, the background law of an enacting state that applies to a directing cotrustee also applies to a similarly situated trustee. The drafting committee intended that the language "with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee" would refer only to a power of another cotrustee and not a power held jointly with the directed cotrustee, because a cotrustee cannot be thought of as taking direction from another cotrustee if the two cotrustees exercise a power jointly.

No third-party effects. Although this section changes the degree to which the terms of a trust may reduce a cotrustee's duty and liability, it does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee. The principal difference between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to the trust property, whereas in a directed trusteeship, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee's capacity as such.

SECTION 13. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.

(a) An action against a trust director for breach of trust must be commenced within the same limitation period as[under Uniform Trust Code Section 1005] for an action for breach of trust against a trustee in a like position and under similar circumstances.

(b) A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have[under Uniform Trust Code Section 1005] in an action for breach of trust against a trustee in a like position and under similar circumstances.

Legislative Note: *A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 1005 should update the bracketed language to refer to that enactment. A state that has enacted a statute other than Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should replace the bracketed language with a cross reference to that statute. A state that has not enacted a statutory limitation should delete the bracketed language.*

Comment

This section absorbs for a trust director the law of an enacting state governing limitations on an action against a trustee. A limitation applies to a trust director as it would to a trustee in a like position and under similar circumstances. Whether the law is default or mandatory as applied to a trust director, for example, is determined by whether it is default or mandatory as applied to a trustee.

Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state by way of a statutory limitations period, such as under Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee, another trust director, or some other party.

Subsection (b) extends to a trust director the same limitation period that a trustee enjoys under the law of an enacting state arising from the making of a report or accounting, such as under Uniform Trust Code § 1005(a)–(b) (2000). The rule of subsection (b) applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of the director's conduct.

Laches, which strictly speaking is an equitable defense rather than a limitations period, would apply to an action against a trust director under Section 14.

SECTION 14. DEFENSES IN ACTION AGAINST TRUST DIRECTOR. In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

Comment

Absorption. This section makes available to a trust director the same defenses that are available to a trustee in a like position and under similar circumstances in an action for breach of trust. A trust director can assert any defense that would be available to a trustee in a comparable action for breach of trust under existing state law, including:

- laches or estoppel (see Restatement (Third) of Trusts § 98 (2012));
- consent, release, or ratification by a beneficiary (see Uniform Trust Code § 1009 (2001); Restatement (Third) of Trusts § 97(b)–(c) (2012));
- reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and
- reasonable care in ascertaining the happening of an event affecting administration or

distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt. f (2007)).

Exculpation or exoneration. The comments to Section 8 address the effect of an exculpation or exoneration clause on the duty and liability of a trust director.

Attorney's fees and indemnification. Attorney's fees and indemnification for a trust director are governed by Section 6(b)(1), which establishes a default rule that allows a trust director to exercise "any further power appropriate to the exercise or nonexercise of a power of direction granted to the director." By default, therefore, a trust director has a power to incur attorney's fees and other expenses and to direct indemnification for them if doing so would be "appropriate" to the exercise of the director's express powers.

SECTION 15. JURISDICTION OVER TRUST DIRECTOR.

(a) By accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

Comment

Under subsection (a), by accepting appointment as a trust director of a trust subject to this act, the director submits to personal jurisdiction of the courts of this state with respect to "any matter related to a power or duty of the director." This subsection does not apply to a person that has not accepted appointment as a trust director (the question of whether a person has accepted appointment is governed by Section 16(1)). The drafting committee contemplated that a purported director could contest acceptance, and therefore jurisdiction, in the normal course of a judicial proceeding in which the matter arose, as under Fed. R. Civ. P. § 12(b)(2).

Jurisdiction over a person that has accepted appointment as trust director is mandatory. The terms of a trust or an agreement among the trust director and other parties cannot negate personal jurisdiction over a trust director under this section. However, this section does not preclude a court from declining to exercise jurisdiction under the doctrine of forum non conveniens.

Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of obtaining jurisdiction over a trust director.

SECTION 16. OFFICE OF TRUST DIRECTOR. Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:

(1) acceptance[under Uniform Trust Code Section 701];

(2) giving of bond to secure performance[under Uniform Trust Code Section 702];

(3) reasonable compensation[under Uniform Trust Code Section 708];

(4) resignation[under Uniform Trust Code Section 705];

(5) removal[under Uniform Trust Code Section 706]; and

(6) vacancy and appointment of successor[under Uniform Trust Code Section 704].

Legislative Note: *A state that has enacted the Uniform Trust Code (Last Revised or Amended in 2010) provisions cited in this section should update the bracketed language to refer to the appropriate provisions of that enactment. A state that has enacted relevant statutory provisions other than the provisions of the Uniform Trust Code cited in this section should replace the bracketed language with cross references to those provisions, except that a state that allows statutory commissions rather than reasonable compensation for a trustee is advised for the reasons given in the comments below to apply a rule of reasonable compensation to a trust director. A state that has not enacted relevant statutory provisions should delete the bracketed language.*

Comments

This section applies the law of trusteeship to a trust directorship with regard to seven subjects. Whether the law is default or mandatory as applied to a trust director depends on whether it is default or mandatory as applied to a trustee.

Paragraph (1)—acceptance. This paragraph absorbs an enacting state's law governing acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a trust directorship. However, whereas a trustee is expected to participate actively in the administration of the trust, and is therefore usually capable of signaling acceptance by conduct, some trust directors, such as a director with a power to determine the settlor's competence, may not take any action for long stretches of time, if ever. This delay in action may complicate acceptance by conduct.

Paragraph (2)—bond. This paragraph absorbs an enacting state's law governing bond to secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director. The drafting committee assumed that bond would seldom be required for a trust director, as in the usual case the director would not have custody of the trust property.

Paragraph (3)—reasonable compensation. This paragraph absorbs an enacting state's law governing reasonable compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement (Third) of Trusts § 38 cmt. i (2003), for application to compensation of a trust director. The drafting committee contemplated that, just as in total "the reasonable fees for multiple trustees may be higher than for a single trustee," Restatement (Third) of Trusts § 38 cmt. i (2003), so too the total reasonable fees for a trust with a directed trustee and a trust director may be higher than for a single trustee.

Reasonable compensation for a trust director will vary based on the nature of the director's powers, and in some circumstances may well be zero. A state that provides a statutory commission for a trustee should therefore refrain from using the commission for a trust director and should instead use a rule of reasonable compensation. Statutory trustee commissions will often overcompensate a trust director, especially a director that does not participate actively on an ongoing basis in the administration of the trust. The problem will be especially serious in a trust with multiple such directors.

Moreover, the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to "render services expected or normally to be performed by the trustee." Restatement (Third) of Trusts § 38 cmt. c(1) (2003); *see also* Uniform Prudent Investor Act § 9 cmt. (1994) ("If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.").

Paragraph (4)—resignation. This paragraph absorbs an enacting state's law governing resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and Restatement (Third) of Trusts § 36 (2003), for application to resignation by a trust director.

Paragraph (5)—removal. This subsection absorbs an enacting state's law governing removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of Trusts § 37 cmt. e (2003), for application to removal of a trust director.

Paragraph (6)—vacancy. This section absorbs an enacting state's law applicable to a vacancy in a trusteeship for application to a vacancy in a trust directorship. For example, under Uniform Trust Code § 704 (2004), "a vacancy in a trusteeship need not be filled" if "one or more cotrustees remain in office." So too, if three of five trust directors with a joint power to determine the settlor's capacity remain in office, the court "need not" fill the vacancies, though the vacancies should be filled if doing so would be more consistent with the settlor's plan. Likewise, if the sole trust director with power over investment of the trust property ceases to serve, in most circumstances the vacancy should be filled, and this is true even if other directors

with unrelated powers remain in office. An apt analogy is to a trust with several cotrustees, each of whom has controlling authority over different aspects of the trust's administration. If any of those trustees ceases to serve, in many circumstances a court should appoint a successor even though other cotrustees remain in office.

Costs and indemnification. The power of a trust director to incur reasonable costs and to direct indemnification for expenses would in most cases be covered by Section 6(b)(1).

SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 19. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 20. EFFECTIVE DATE. This [act] takes effect . . . .