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TO: House Judiciary Committee
FROM: Kansas Judicial Council – Christine Graham
DATE: March 2, 2022
RE: 2021 SB 141 enacting the Uniform Directed Trust Act

The Kansas Judicial Council and its Probate Law Advisory Committee (PLAC) recommend SB 141, which contains the Uniform Directed Trust Act (UDTA). The Committee made no substantive changes from the Uniform version, only inserting appropriate cross-references to the Kansas Uniform Trust Code and required conforming amendments as needed.

The purpose of the UDTA is to provide a statutory framework for directed trusts. In a directed trust, a person other than the trustee is granted a power over some aspect of trust administration. This person is commonly referred to as a “trust protector,” “trust adviser” or, under the UDTA, a “trust director.” A trust director might be appointed to make investment decisions, to direct distributions to beneficiaries, or to amend or terminate the trust under certain conditions, as just a few examples.

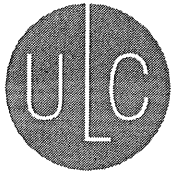
The UDTA clearly delineates the powers, fiduciary duties and liabilities of trust directors and directed trustees. It has broad provisions regarding the powers that can be granted to a trust director and promotes uniformity in the use of terminology, which can vary widely from state to state. The UDTA has been adopted in 15 states, including Nebraska and Colorado.

Without the UDTA, Kansas law is inadequate to support clients who want to structure a directed trust with bifurcated trustee powers and duties. Although some Kansas trusts appoint cotrustees with bifurcated powers, under current Kansas law, cotrustees are responsible for and have a duty to monitor each other's actions. See K.S.A. 58a-703. Even if a trust says otherwise, there is no statutory authority to support that. The UDTA would provide the statutory framework to draft a directed trust that effectively bifurcates those powers and duties.

The attached document from the Uniform Law Commission, "Why Your State Should Adopt the Uniform Directed Trust Act," provides a helpful summary of the benefits of the UDTA. I have also attached a copy of the UDTA with explanatory comments drafted by the Uniform Law Commission, which provides a more in-depth explanation of each section.

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM DIRECTED TRUST ACT

The Uniform Directed Trust Act (UDTA) provides clear, practical answers to the challenges raised by the rise of directed trusts. The act offers a simple framework for allocating fiduciary power and duty between a trust director and a trustee and comprehensively addresses the many practical questions raised by the presence of a trust director. Although many states have already enacted statutes to govern directed trusts, the UDTA improves on these statutes by offering solutions that are simpler, more precise, and more complete. Because directed trusts are now standard in sophisticated trust drafting, a comprehensive directed trust statute is essential for every state.

- ***The UDTA balances settlor autonomy and beneficiary safeguards.*** The UDTA divides fiduciary duty between a trustee and a trust director by allocating primary duty to the director while maintaining a minimum core of duty for the trustee to avoid willful misconduct. This approach balances a settlor's freedom of disposition with a beneficiary's need for fiduciary protections. In allocating fiduciary duty in this way, the UDTA clarifies and extends the division of fiduciary duties that has already been pioneered by Delaware. Delaware's success in attracting directed trusts indicates that the UDTA approach is workable in practice.
- ***The UDTA is comprehensive.*** In addition to providing a sensible and clear allocation of fiduciary duty, the UDTA address a host of other issues that have been largely overlooked by existing state statutes. The UDTA provides rules to govern the flow of information between trustees and trust directors, for example, and offers solutions to important practical problems concerning trust directors, such as succession, compensation, and removal. The UDTA's comprehensiveness is driven by a coherent drafting philosophy that largely extends a state's existing law of trusteeship to trust directors.
- ***The UDTA offers many technical innovations.*** Because the UDTA is the product of an extensive drafting process aided by nationally recognized trust law experts, the UDTA offers many technical innovations that improve on existing state statutes. Some of these innovations fix errors and oversights in existing statutes. Unlike most state statutes, for example, the UDTA makes clear that the settlor of a revocable trust is not a trust director. The UDTA also offers a number of novel innovations. It provides tools to assist a settlor's tax planning, for example, and resolves doubt about ancillary areas of a trust director's authority. The UDTA further innovates by treating all trust directors similarly, thereby avoiding the artificial and overly rigid categories of trust directors that make many existing statutes difficult to work with.

For further information about the UDTA, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.

UNIFORM DIRECTED TRUST ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
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JULY 14 - JULY 20, 2017

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 21, 2021

ABOUT ULC

The **Uniform Law Commission (ULC)**, also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 126th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

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- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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UNIFORM DIRECTED TRUST ACT

TABLE OF CONTENTS

PREFATORY NOTE.....	1
SECTION 1. SHORT TITLE.	3
SECTION 2. DEFINITIONS.....	3
SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.	7
SECTION 4. COMMON LAW AND PRINCIPLES OF EQUITY.	9
SECTION 5. EXCLUSIONS.....	9
SECTION 6. POWERS OF TRUST DIRECTOR.....	14
SECTION 7. LIMITATIONS ON TRUST DIRECTOR.	16
SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.	17
SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.....	21
SECTION 10. DUTY TO PROVIDE INFORMATION TO TRUST DIRECTOR OR TRUSTEE.	27
SECTION 11. NO DUTY TO MONITOR, INFORM, OR ADVISE.....	29
SECTION 12. APPLICATION TO COTRUSTEE.....	30
SECTION 13. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.....	32
SECTION 14. DEFENSES IN ACTION AGAINST TRUST DIRECTOR.	33
SECTION 15. JURISDICTION OVER TRUST DIRECTOR.....	34
SECTION 16. OFFICE OF TRUST DIRECTOR.	35
SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION.....	37
SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.	37
SECTION 19. REPEALS; CONFORMING AMENDMENTS.	37
SECTION 20. EFFECTIVE DATE.....	37

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). Likewise, if the terms of the trust condition the exercise of a power of appointment on the consent of a third party, that third party is not a trust director subject to the fiduciary or other provisions of this act.

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.

Historical Note. This Comment was amended in 2021 to add a sentence to the end of the third paragraph.

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:

- 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;
- 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. A modest power to reform a trust to correct a scrivener’s error would subject the holder of that power to less extensive fiduciary obligation than if the power were to amend the trust in light of changes in circumstances.

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.

Historical Note. This Comment was amended in 2021 to add a sentence to the end of the sixth paragraph.

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