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THE NEW UNIFORM DIRECTED TRUST ACT PAVES THE WAY FOR
CREATIVE AND THOUGHTFUL DIVIDED TRUSTEESHIP

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Chapter 14

The New Uniform Directed Trust Act Paves the Way for Creative and Thoughtful Divided Trusteeship*

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Across the centuries, the law of trusts evolved on the assumption that the power to administer a trust would belong entirely to a trustee. A growing trend in modern practice departs from this tradition by granting a power over a trust to a person who is not a trustee. In what has come to be called a “directed trust,”¹ a person known as a “trust director” (or sometimes a “trust protector” or “trust adviser”) can have extensive power over the trust without being a trustee or holding title to the trust

¹ The Uniform Directed Trust Act (UDTA) defines a “directed trust” in § 2(2).

property.² A trust director can be granted any power over a trust that might otherwise belong to a trustee, potentially rendering the trust director the key actor over nearly all of the trust’s core matters of administration. The responsibilities of a trustee in a directed trust are often so deeply limited that the trustee may be known as a “directed trustee” or “administrative trustee.”³

¶ 1400.1 Fundamental Policy Question

The fundamental policy question arising from the emergence of directed trusts is how the law should divide the powers, duties, and other rules of trusteeship among a directed trustee and trust director.⁴ Should a trust director be subject to the fiduciary duties of trusteeship? And should a directed trustee be subject to reduced fiduciary duties—or no fiduciary duties at all? The common law is uncertain and existing statutes are in disarray.

¶ 1400.2 The Uniform Directed Trust Act (UDTA)

Fortunately, the Uniform Law Commission (ULC) has just finished work on the Uniform Directed Trust Act (UDTA), a new uniform law that promotes settlor autonomy while offering clear solutions to the many legal uncertainties surrounding directed trusts. The UDTA was approved by the ULC in 2017 after several years of drafting in consultation with a committee of nationally recognized trust law experts from practice and academia. The UDTA provides clear, practical, and comprehensive solutions to all of the major legal difficulties in a directed trust. At the same time, the UDTA offers a host of practical innovations that improve on existing directed trust statutes.

¶ 1400.3 Four Areas of Improvement

In this chapter, which is derived from our forthcoming article, *Making Directed Trusts Work: The Uniform Directed Trust Act*,⁵ we examine the four primary areas of improvement offered by the UDTA relative to existing directed trust legislation. Those areas are:

- (1) a carefully thought-out set of provisions governing the act’s scope (see *infra* ¶¶ 1401–1402);
- (2) a comprehensive treatment of the fiduciary duties of a trust director and a directed trustee (see *infra* ¶¶ 1403–1407);
- (3) attention to non-fiduciary matters (see *infra* ¶ 1408); and
- (4) a reconciliation of the law of cotrusteeship that allows a settlor the freedom to pattern the fiduciary duties of a cotrusteeship after the fiduciary duties of

² The UDTA defines a “trust director” in § 2(9).

³ The UDTA defines a “directed trustee” in § 2(3).

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

⁵ John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 1 (forthcoming 2018).

a directed trusteeship (see *infra* ¶ 1409).

¶ 1401 A Capacious Scope Subject to Specific Exclusions

The UDTA's main function is to validate and regulate every power that counts as a "power of direction." Accordingly, the scope of the statute depends largely on which powers qualify as a "power of direction."

¶ 1401.1 Defining a "Power of Direction"

Section 2(5) defines a "power of direction" as "a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee."⁶ The heart of this definition is the broadly worded phrase "power over a trust."

The phrase is innovative, because of its great breadth. It covers all of the conventional powers of trusteeship, such as a power to invest or distribute trust property, as well as other less conventional powers, such as a power to amend or terminate the trust. The phrase is also broad enough to cover every form that such a power might take. The term "power of direction" includes both a power to direct a trustee to act (such as when a director tells a trustee to invest in particular assets) and a power in a director to act on his or her own (such as when the terms of a trust permit a director to sign an investment subscription agreement without the trustee's participation). The term power of direction also covers powers to veto or consent to a trustee's actions in advance or a power to release a trustee from liability for prior conduct.

The drafting committee took two further steps to avoid any doubt about the breadth of the UDTA's concept of a power of direction. First, in the blackletter definition of "power of direction," the drafting committee included the further statement that "[t]he term includes a power over the investment, management, or distribution of trust property or other matters of trust administration."

Second, in the comments to a later section of the UDTA, the drafting committee provided a non-exclusive but highly detailed list of illustrations of the kinds of specific powers that would fall within the definition of a power of direction. The list includes a power to:

- direct investments, including a power to:
 - acquire, dispose of, exchange, or retain an investment;
 - make or take loans;
 - vote proxies for securities held in trust;
 - adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
 - adjust between principal and income or convert to a unitrust;
 - manage a business held in the trust; or

⁶ UDTA § 2(5).

- 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.⁷

¶ 1401.2 Defining a “Directed Trust,” “Directed Trustee,” and “Trust Director”

The UDTA defines its other key terms in relation to the capacious definition of a power of direction. A “directed trust” is “a trust for which the terms of the trust grant a power of direction.”⁸ A “trust director” is “a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee.”⁹ And a “directed trustee” is “a trustee that is subject to a trust director’s power of direction.”¹⁰

Crucially, these definitions are functional rather than formal, and they apply without regard to the terminology used by a particular trust. The definition of a “trust director,” for example, says that a person who satisfies the functional definition of a trust director “is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.”¹¹ In consequence, so long as a power satisfies the functional criteria prescribed by the UDTA’s definitions, the power will be a power of direction under the UDTA, even if the instrument that creates the power labels it a “power of protection.” Similarly, a person labeled as a “trust adviser” or “trust protector” is treated by the UDTA as a trust director, and a trustee labeled as an “administrative trustee” is treated as a directed trustee, so long as the person exhibits the functional characteristics of that position.

⁷ *Id.* § 6 cmt.

⁸ *Id.* § 2(2).

⁹ *Id.* § 2(9).

¹⁰ *Id.* § 2(3).

¹¹ *Id.* § 2(9).

¶ 1401.3 An Enabling Statute

Having validated a power of direction, the UDTA then addresses questions about what exactly such a power entails.

A. Enabling Versus Off-the-Rack

Existing state directed trust statutes fall along a continuum between two ideal types. *Enabling statutes*, typified by the statute in Delaware,¹² validate terms of a trust that grant a trust director a power of direction, but do not prescribe any specific powers for a trust director by default. A settlor has the freedom to grant a power of direction, but must specify which powers, if any, a particular director will have. In a state with this enabling form of statute, a power of direction can only be created by specific empowering language in the terms of the trust. The statute does not supply any powers by default.

By contrast, the *off-the-rack statutes* provide for one or more statutory forms of directed trust, with particular sets of powers given to a type or kind of trust director by default. Thus, under an off-the-rack form of statute, a settlor can create a directed trust by invoking one or more off-the-rack forms subject to further tailoring by the terms of the trust. By way of illustration, the South Dakota statute provides for the appointment of an “investment trust advisor” and a “distribution trust advisor,” each with different default powers.¹³

B. The UDTA Is an Enabling Statute

The UDTA drafting committee opted for an enabling structure. Section 6(a) provides that the terms of a trust may grant a power of direction to a trust director. With one exception to which we will turn next, the UDTA does not prescribe any powers for a trust director by default. The UDTA contains no distinct categories of trust directors or powers and no set of default powers that may be invoked by referencing a particular type of director. Instead, the contents of every power of direction must be prescribed by the terms of the trust that creates it.

¶ 1401.4 Further Powers by Default

Although the UDTA does not generally supply powers by default, the act does contain one important exception. Section 6(b)(1) provides that “[u]nless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director” by the terms of a trust. In other words, if the terms of a trust supply an express power, then by default the UDTA supplies further powers as “appropriate” to the exercise or nonexercise of that expressly granted power. The comment elaborates that “[a]ppropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director.”¹⁴

¹² See Del. Code Ann. tit. 12, § 3313 (2017).

¹³ S.D. Codified Laws §§ 55-1B-9, 55-1B-10, 55-1B-11 (2017).

¹⁴ UDTA § 6(b)(1) cmt.

Suppose, for example, that the terms of a trust grant a trust director a power to direct investments, but do not expressly grant the director the power to bring an action against the trustee for refusing to comply with the director's exercise of this power. In this case, § 6(b)(1) would supply the director with a further power to bring an action to redress the trustee's noncompliance.

¶ 1402 The Exclusions

Because the term "power of direction" is so broad, it might embrace some matters collateral to the emergence of directed trusts. Section 5 contains five categorical exclusions that preserve existing law and settlor autonomy with respect these collateral issues.

¶ 1402.1 Nonfiduciary Powers of Appointment

The first exclusion concerns powers of appointment. Arguably a power of appointment satisfies the definition of a "power of direction," because the donee of the power has the requisite "power over a trust granted to [the donee] by the terms of the trust," specifically "a power over the . . . distribution of trust property."¹⁵ Thus, without an exclusion for a nonfiduciary power of appointment, the UDTA would treat a power of appointment as a power of direction, making the donee a trust director subject to the fiduciary and other rules applicable to a trust director, and making the trustee a directed trustee, with a lower standard of fiduciary duty than a non-directed trustee. Many existing directed trust statutes do not address this possibility, with the effect that under those statutes, a power of appointment is arguably a power of direction.

To avoid this problem, UDTA § 5(b)(1) provides that the act "does not apply to a . . . power of appointment." Section 5(a) defines a "power of appointment" as "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property." Accordingly, if the terms of a trust grant a person not serving as trustee a nonfiduciary power to direct distributions of trust property, under the UDTA that power will be construed as a power of appointment rather than as a power of direction and will therefore not be subject to the act.

To resolve doubt about whether a power over distribution is a nonfiduciary power of appointment or a fiduciary power of direction, UDTA § 5(c) prescribes a rule of construction under which a power over distribution in a person not serving as a trustee is presumptively a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust indicate otherwise.

As a planning matter, the exclusion for a nonfiduciary power of appointment ensures that a settlor may grant to a person or a committee of persons a power over distribution of the trust property in *either* a fiduciary capacity (i.e., a power of direction subject to the UDTA) *or* a nonfiduciary capacity (i.e., a nonfiduciary power of appointment

¹⁵ *Id.* § 2(5).

excluded by UDTA § 5(b)(1)). Nonfiduciary powers of appointment are an entrenched feature of the background law of trusts that the UDTA does not attempt to change.¹⁶

¶ 1402.2 Power to Appoint or Remove a Trustee or Trust Director

UDTA § 5(b)(2) excludes “a . . . power to appoint or remove a trustee or trust director.” The drafting committee intended this exclusion to address the concern that a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts.¹⁷ Under the exclusion of § 5(b)(2), such a power is not a power of direction, and the person holding the power is not a trust director. Accordingly, a person who holds a power to appoint or remove a trustee is not subject to the fiduciary duties of a trust director.

¶ 1402.3 Power of Settlor Over a Revocable Trust

Under modern law, a trustee of a revocable trust owes its duties to the settlor rather than to the beneficiaries.¹⁸ Moreover, because the settlor may at any time revoke the trust and take back the trust property, the trustee must “comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties.”¹⁹

Because the definition of a “trust director” in UDTA § 2(9) includes any person who is granted a “power of direction . . . whether or not the person is a . . . settlor of the trust,” and because a “power of direction” is defined by § 2(5) capaciously to include any “power over a trust,” the drafting committee reasoned that an exclusion for a settlor’s powers over a revocable trust was necessary to avoid the risk of disrupting existing practice by transforming every settlor of a revocable trust into a trust director subject to the fiduciary and other rules applicable to a trust director. Section 5(b)(3) therefore excludes “a . . . power of a settlor over a trust to the extent the settlor has a power to revoke the trust.” Many state directed trust statutes fail to make a similar exclusion, with the effect that those statutes could be read as making settlors and trustees of revocable trusts trust directors and directed trustees.

¶ 1402.4 Power of a Beneficiary

The definition of a “trust director” in UDTA § 2(9) includes a person who is granted a “power of direction . . . whether or not the person is a beneficiary.” The definition includes a beneficiary to ensure that a power over a trust that affects another beneficiary is not exempt from the UDTA merely because the person who holds the power also happens to be a beneficiary.

Including a beneficiary in the definition of a trust director, however, creates the possibility that a beneficiary who holds a power over a trust might be subjected to the

¹⁶ See, e.g., Uniform Powers of Appointment Act (Unif. Law Comm’n 2013); Restatement (Third) of Property: Wills and Other Donative Transfers §§ 17.1–23.1 (Am. Law Inst. 2011).

¹⁷ See, e.g., Robert H. Sitkoff & Jesse Dukeminier, *Wills, Trusts, and Estates* 751 (10th ed. 2017).

¹⁸ See, e.g., Unif. Trust Code § 603(a) (Unif. Law Comm’n 2004).

¹⁹ Restatement (Third) of Trusts § 74(1)(a)(i) (Am. Law Inst. 2007).

fiduciary duties and other obligations of a trust director even if the power affects solely that beneficiary and no other. To resolve this problem, UDTA § 5(b)(4) excludes “a . . . power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of . . . (A) the beneficiary[,] or (B) another beneficiary represented by the beneficiary [under applicable virtual representation law] with respect to the exercise or nonexercise of the power.”

Subparagraph (A) of this exclusion is consistent with traditional law, under which “[a] power that is for the sole benefit of the person holding the power is not a fiduciary power.”²⁰ To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power and is therefore a fiduciary power. A power over a trust held by a beneficiary may thus be a “power of direction” if it affects the beneficial interest of another beneficiary.

For example, a power in a beneficiary or a majority of beneficiaries to release the trustee from a claim by another beneficiary is a power of direction if it has the effect of binding other beneficiaries. Categorizing the power as a power of direction gives the minority beneficiaries 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.

¶ 1402.5 The Settlor’s Tax Objectives

UDTA § 5(b)(5) excludes “a . . . power over a trust if . . . the terms of the trust provide that the power is held in a nonfiduciary capacity” and “the power must be held in a nonfiduciary capacity to achieve the settlor’s [federal] tax objectives.” The drafting committee intended this exclusion to address the concern that certain powers held by a person other than a trustee must be nonfiduciary to achieve the settlor’s federal tax objectives.

Perhaps the most salient example is a power to substitute assets. Such a power is commonly included in a trust to ensure grantor trust tax status. But for this drafting strategy to work, the power must be held in a nonfiduciary capacity. If the power is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust.

By providing that all trust directors are fiduciaries, UDTA § 8 could disrupt this familiar drafting practice. The exclusion in § 5(b)(5) solves this problem by ensuring that any power over a trust that is nonfiduciary under the terms of the trust and must be nonfiduciary to achieve the settlor’s federal tax objectives will be excluded from coverage by the UDTA.

¶ 1403 Allocating Fiduciary Responsibility in a Directed Trust

With the scope of the UDTA in view, we can now turn to the statute’s substantive provisions. Many of the main substantive provisions concern fiduciary duties. The

²⁰ *Id.* § 75 cmt. d.

UDTA's basic approach is to tie duty to power. The primary bearer of fiduciary responsibility for a power is the person who holds the power, whether that person is a trust director or a trustee.

¶ 1404 Trust Directors: Absorption of Trustee Duties

The first challenge was to construct fiduciary duties for trust directors, whose fiduciary status would otherwise be uncertain.

¶ 1404.1 Default and Mandatory Rules

UDTA § 8(a)(1) provides that “a trust director has the same fiduciary duty and liability” as a “trustee in a like position and under similar circumstances.” If the director holds the power individually, then the director bears the fiduciary duty of a sole trustee.²¹ If the director holds the power jointly with a trustee or another director, the director bears the fiduciary duty of a cotrustee.²²

Moreover, UDTA § 8(a)(2) provides that “the terms of the trust may vary the director’s duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.” Thus, if the terms of the trust include an exoneration clause for or grant of extended discretion to a trust director, those terms would have the same effect on the duty and liability of the director as they would for a trustee.

Although almost all states treat a trust director as a fiduciary (at least by default), they neglect to specify which kind of fiduciary a trust director is supposed to be. By expressly analogizing a trust director to a trustee, the UDTA offers a clearer framework than existing statutes.

¶ 1404.2 Sensitivity to Context

Although the UDTA absorbs the fiduciary duties of a trustee, those duties apply to a trust director as they would to a trustee “in a like position and under similar circumstances.”²³ Rather than treating all trust directors identically, therefore, a court must be sensitive to the peculiar circumstances of each. By way of example, the comment to UDTA § 8 explains that “a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary.”

¶ 1404.3 Exclusion for Medical Professionals

Section 8(b) carves out from fiduciary duty a trust director who is a medical professional acting in his or her capacity as such. For example, a power in a physician to determine a settlor’s mental capacity or a beneficiary’s sobriety is a power of direction, and the physician is a trust director, but the physician would have “no duty or liability under” the UDTA in exercising this power. This exclusion is yet another of

²¹ UDTA § 8(a)(1)(A).

²² *Id.* § 8(a)(1)(B).

²³ *Id.* § 8(a)(1).

the UDTA's many practical refinements. Some existing state statutes have unwittingly created liability risk for medical professionals by making them into fiduciary trust directors.

¶ 1404.4 Further Rules for Charitable and Supplemental Needs Trusts

The UDTA addresses in § 7 “a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law” or “a charitable interest in the trust.” Section 7 says that for these matters, all “the same rules” that would apply to “a trustee in a like position and under similar circumstances” apply also to a trust director. This provision protects against avoidance of state-level policy limits through the use of a directed trust.

¶ 1405 Directed Trustees: Reasonable Action and Willful Misconduct

Constructing fiduciary duties for directed trustees is the most controversial question of policy for directed trusts.

¶ 1405.1 Existing Standards

After addressing the fiduciary duty of a trust director, the UDTA addresses the fiduciary duty of a directed trustee. When the drafting committee surveyed the approaches of existing directed trust statutes on this issue, it emerged that the approach of Uniform Trust Code (UTC) § 808 had failed to gain significant support among the states. Every state that had specifically considered the duty of a directed trustee (rather than simply enacting the full UTC) had chosen a standard other than that provided by UTC § 808(b). The debate within the UDTA drafting committee therefore focused instead on the two main alternative approaches in the existing state directed trust laws.

In one group are the states that provide that a directed trustee has no duty or liability for complying with an exercise of a power of direction. Taking these statutes at face value, in these states a directed trustee is never liable for complying with a trust director's exercise of a power of direction, even if the exercise constitutes a breach of the trust director's fiduciary duties, and even if the directed trustee knows as much. The rationale for this first group of statutes is that duty should follow power. If a director has the exclusive authority to exercise a power of direction, then the director should be the exclusive bearer of fiduciary duty for the power. The states in this no-duty group include Alaska, New Hampshire, Nevada, and South Dakota.²⁴

In the second group of states, a directed trustee is not liable for complying with a direction of a trust director unless by doing so the directed trustee would personally engage in “willful” or “intentional” misconduct. The rationale for the willful misconduct statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a trust director. The states in this second group also recognize, however, that to facilitate a settlor's intent that a trust director rather than a directed trustee is to be the primary or even sole decisionmaker regarding a power of direction, it is appropriate to reduce the

²⁴ See Alaska Stat. § 13.36.375(c); New Hampshire Rev. Stat. Ann. § 564-B:8-808; Nev. Rev. Stat. § 163.5549(1); S.D. Codified Laws § 55-1B-2.

directed trustee's duty below the level that would usually apply to a non-directed trustee to the extent the directed trustee acts subject to the power of direction. The group of states with a willful misconduct or similar standard includes Delaware, Illinois, Texas, and Virginia.²⁵

¶ 1405.2 The UDTA's "Willful Misconduct" Standard

UDTA § 9(a) provides that "the trustee is not liable" for taking "reasonable action to comply with a trust director's exercise or nonexercise of a power of direction" except as provided in § 9(b). Section 9(b), in turn, provides that a "directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction . . . to the extent that by complying the trustee would engage in willful misconduct." The UDTA thus generally requires a trustee to comply with a director's direction and relieves the trustee from liability for so doing, unless by complying with the direction the trustee would engage in willful misconduct, in which case the trustee has a duty not to comply.

The drafting committee opted for the willful misconduct standard over a complete abolition of duty for several reasons. One was that the committee considered willful misconduct more consistent with traditional fiduciary policy. Another was that Delaware, which pioneered the willful misconduct standard, has enjoyed great popularity among settlors of directed trusts. Delaware's success establishes that a directed trust regime that preserves a willful misconduct safeguard is workable and does not excessively interfere with settlor autonomy.

¶ 1405.3 Reasonable Action

Section 9(a) provides that, subject to the prohibition on willful misconduct in subsection (b), "a directed trustee shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or further power under § 6(b)(1), and the trustee is not liable for the action."

The duty imposed by § 9(a) 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 comply with its terms.

Moreover, a directed trustee must "take *reasonable* action" 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 he or she purchases the security within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty to take reasonable action does not, however, impose a duty to ensure that the substance of a direction is reasonable. To the contrary, subject to the willful

²⁵ See Del. Code Ann. tit. 12, § 3313; 760 Ill. Comp. Stat. 5/16.3(f); Tex. Prop. Code Ann. § 114.003; Va. Code Ann. § 64.2-770.

misconduct rule of UDTA § 9(b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable.

¶ 1405.4 Limits on a Power to Release a Trustee from Liability

UDTA § 9(c) provides that a power to release a trustee or another trust director from liability for breach of trust is not effective under three circumstances: “(1) the breach involved the trustee’s or other director’s willful misconduct; (2) the release was induced by improper conduct of the trustee or other director in procuring the release; or (3) at the time of the release, the director did not know the material facts relating to the breach.” The first limit preserves the mandatory minimum duty of a directed trustee. The second and third derive from UTC § 1009, which applies the same safeguards to a release of trustee liability given by a beneficiary.

¶ 1406 Information Sharing Among Trustees and Trust Directors

Another question in a directed trust is how much information a trust director and a directed trustee should share with each other. Whereas most existing directed statutes ignore this problem, the UDTA confronts it directly.

¶ 1406.1 The UDTA Solution

UDTA § 10(b) provides that “a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to: (1) the powers or duties of the director; and (2) the powers or duties of the trustee or other director.” Section 10(a) imposes a similar duty on a directed trustee to share information with a trust director.

Sections 10(a) and 10(b) require a trustee or director to share information only if the information is reasonably related to the powers or duties of both the person communicating the information and the person receiving it. The information must be related to the powers or duties of the person communicating the information, because otherwise that person could not be expected to possess or understand the information. The information must also be related to the powers or duties of the person receiving the information, because otherwise the person would not need the information.

The duties of a trustee and trust director to share information include both an affirmative duty to provide information (even in the absence of a request for that information) and a responsive duty to reply to requests for information.

¶ 1406.2 Safe Harbor for Reliance on Information

UDTA § 10(c)–(d) provides safe harbors for trust directors and trustees who act in reliance on information provided to them by another trust fiduciary. The safe harbors only apply, however, if the trustee or trust director who relies on the information has not engaged in willful misconduct. For example, § 10(c) protects a trustee if the trustee acts in reliance on a trust director’s valuation of an asset, unless by accepting the

valuation the trustee would engage in willful misconduct.

¶ 1407 Cross-Monitoring

¶ 1407.1 No Duties to Monitor, Inform, or Advise

Many state directed trust statutes relieve a directed trustee from liability for a failure to warn a beneficiary about a directed trustee's disagreement with a trust director's actions. Following these statutes, UDTA § 11(a) provides that "a trustee does not have a duty to . . . monitor a trust director" or "inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director." Section 11(b) provides a mirror-image rule for a trust director, relieving a director of a duty to monitor, inform, or give advice to others about the conduct of a trustee or other trust director.

¶ 1407.2 Survival of General Duty of Disclosure

UDTA § 11 does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law. The same is true for a trust director, on whom UDTA § 8(a) imposes the fiduciary duties of a similarly situated trustee. For example, if a trust director has a power to direct investments and the director uses that power to concentrate the trust portfolio, UDTA § 11 would relieve a directed trustee of any duty to warn a beneficiary about the risks of such a concentration. However, the trustee would remain under any otherwise applicable duty to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries.

¶ 1407.3 No Assumption of Duty to Monitor, Inform, or Advise

Many state directed trust statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions."²⁶ The purpose of these provisions is to ensure that if a directed trustee chooses to monitor, inform, or give advice, the trustee does not take on a continuing obligation to do so or concede a prior duty to have done so. UDTA § 11(a)(2) improves on these provisions by providing that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume or concede a duty to do so. Section 11(b)(2) applies the same rule to a trust director if it monitors a trustee or other trust director.

¶ 1408 Adapting the Nonfiduciary Rules of Trusteeship

The law of trusts includes a large body of nonfiduciary rules. Unlike most existing statutes, the UDTA anticipates uncertainty about these other rules and addresses their application to a directed trust.

²⁶ See, e.g., Del. Code Ann. tit. 12, § 3313(e) (2017).

¶ 1408.1 Rule of Decision for Jointly Held Powers of Direction

UDTA § 6(b)(2) provides a default rule of construction under which “trust directors with joint powers must act by majority decision.” This provision follows the similar default rule for cotrustees.²⁷

¶ 1408.2 Office of Trust Director

UDTA § 16 applies the law of trusteeship to a trust directorship with regard to six subjects: acceptance, bond, reasonable compensation, resignation, removal, and vacancy. However, owing to the practical differences in the powers that are commonly given to a trust director and a trustee, the drafting committee expected that the rules of trusteeship would need to be applied to a trust director with sensitivity to context.

By way of illustration, UDTA § 16(1) adopts for a trust director the same law that applies to a trustee regarding acceptance of appointment. As a practical matter, however, the circumstances of a trust director are often (though not always) different from the circumstances of a trustee. A trustee, for example, is usually expected to participate actively in the administration of the trust, and thus is usually capable of signaling acceptance by conduct. By contrast, some trust directors—such as a director with a power to determine a settlor’s competence—may not take any action for long stretches of time, if ever, making the signaling of acceptance by conduct impractical. Courts should thus be sensitive in applying the law of acceptance.

The provision in UDTA § 16(3) for “reasonable compensation” for a trust director also merits some discussion. Reasonable compensation for a trust director will vary based on the nature of the director’s powers, and therefore in some circumstances may well be zero. Thus, in the comments and in the legislative note accompanying § 16(3), the drafting committee strongly urged that a state that provides statutory commissions for a trustee should refrain from using the same commission formula for a trust director and should instead use a rule of reasonable compensation. Statutory commissions will often overcompensate a trust director, especially a director that does not participate actively in the administration of the trust.

¶ 1408.3 Litigation Issues

Because a breach of duty by a trust director is a breach of trust,²⁸ existing law governing standing to enforce a trust resolves the question of who could bring an action for redress against the director.²⁹ But what of limitation periods and defenses?

UDTA § 13 absorbs the limitation rules that would apply to a trustee in a like position and under similar circumstances. Thus, subsection (a) applies to a trust director any statutory limitation rule enjoyed by a trustee, and subsection (b) applies to a trust director any limitation arising from a report or accounting to the beneficiaries. However, subsection (b) is phrased so that it applies regardless of whether the report

²⁷ See, e.g., Restatement (Third) of Trusts § 39 (Am. Law Inst. 2003).

²⁸ See UDTA § 2(1).

²⁹ See, e.g., Restatement (Third) of Trusts § 94 (Am. Law Inst. 2012).

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.

UDTA § 14 makes available to a trust director the same defenses that would be available to a trustee in a like position and under similar circumstances. The comment confirms that such defenses could include laches or estoppel; consent, release, or ratification by a beneficiary; reasonable reliance on the terms of a trust; and reasonable care in ascertaining the happening of an event affecting administration or distribution. By operation of § 8, moreover, an exoneration or exculpation clause would have the same protective effect for a trust director as it would for a similarly situated trustee.

Another question likely to arise in litigation involving a trust director is the ability of the director to seek indemnification for attorney's fees. As we have seen, UDTA § 6(b)(1) establishes a default rule that allows a trust director to exercise "any further power appropriate to the exercise or nonexercise of a power of direction granted to the director." By default, therefore, a trust director would have a power to incur attorney's fees and other expenses and to direct indemnification for them if doing so would be "appropriate" to the exercise of the director's expressly granted powers.

¶ 1409 Reconciling Cotrusteeship

A directed trust stands in close proximity to a cotrusteeship, as both are substitute ways of dividing trust administration. The UDTA thus addresses the relationship between directed trusts and cotrusteeship.

¶ 1409.1 Traditional Law

The law of cotrusteeship is distinguished by its imposition of additional safeguards to protect the beneficiary. First, by default, multiple trustees may act only by majority, with the effect that a single cotrustee does not have the power to deal with trust property on its own.³⁰ Second, each cotrustee is under a duty "to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress."³¹ Even if the settlor limits the role or function of one of the cotrustees, "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."³² Third, "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."³³

³⁰ See Sitkoff & Dukeminier, *supra* note 17, at 610.

³¹ Restatement (Third) of Trusts § 81(2) (Am. Law Inst. 2007).

³² *Id.* cmt. b.

³³ *Id.*

¶ 1409.2 Contrast with Directed Trust Under the UDTA

These rules for a cotrustee stand in stark contrast with the less demanding fiduciary standards for a directed trustee under UDTA §§ 9, 10, and 11. The drafting committee therefore undertook to reconcile the law of cotrusteeship with the new law of directed trusts.

¶ 1409.3 UDTA Preserves Law of Cotrusteeship by Default

The UDTA begins by expressly preserving the distinction between a directed trust and a cotrusteeship. Under the definitions in the UDTA, a power can only qualify as a “power of direction” if it belongs to a person who is not serving as a trustee.³⁴ Similarly, a “trust director” can only be a person who is not serving as a trustee.³⁵ In consequence, a cotrustee with a power to direct another cotrustee is not a trust director, and the other cotrustee is not a directed trustee. Instead, the two cotrustees remain cotrustees, presumptively subject to the traditional law of cotrusteeship.

¶ 1409.4 Authorizing Opt-Out from Traditional Law

UDTA § 12, however, authorizes a settlor to arrange the fiduciary duties of cotrustees to resemble those of a directed trustee and trust director. If the terms of the trust so provide, a cotrustee may have only the duty required of a directed trustee—and not the stronger common law duties of a cotrustee—with respect to another cotrustee’s exercise of its powers. Thus, in deciding how to act with regard to another cotrustee’s exercise of its powers, a cotrustee may have only the duty required of a directed trustee by the reasonable action and willful misconduct standards specified in UDTA § 9. The terms of a trust can displace a cotrustee’s traditional duty to take reasonable action to prevent a breach of trust by another cotrustee. The UDTA also allows a settlor to change the traditional rule giving every cotrustee access to information regarding all aspects of the trust’s administration. A settlor can replace those rules with the narrower rules for a directed trustee under Section 10 for information sharing and Section 11 for cross-monitoring.

¶ 1409.5 A Question of Construction

Whether the traditional law of cotrusteeship or the more permissive rules of a directed trust apply to a particular cotrusteeship is a question of construction. For example, a familiar drafting strategy is to name cotrustees and 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. Under traditional law, in spite of such a provision, the cotrustee who does not exercise a controlling power would remain under a duty to take reasonable steps to prevent a breach by the controlling cotrustee. Under the UDTA, by contrast, the non-controlling cotrustee would be liable only for its own willful misconduct and would not otherwise be responsible for the actions of the controlling cotrustee.

³⁴ UDTA § 2(5).

³⁵ *Id.* § 2 (9).

¶ 1409.6 Title Holding and Third Party Rights

The UDTA does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee. Instead, the UDTA changes only the degree to which the terms of a trust may reduce a cotrustee's duty and liability.

¶ 1410 Conclusion

The fundamental policy question arising from directed trusts is how the law of trusteeship should be divided among a directed trustee and trust director. The UDTA provides clear, practical, and comprehensive answers. At the same time, the UDTA offers a host of practical innovations that improve on existing directed trust statutes.

The improvements in the UDTA are so significant that the UDTA is appropriate for adoption by every state. Although some states may wish to change the "willful misconduct" standard for the fiduciary responsibility of a directed trustee to a standard of no liability, this change could be easily made while leaving the rest of the UDTA intact and gaining its benefits.