Making Directed Trusts Work: The Uniform Directed Trust Act*

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Abstract

Directed trusts have become a familiar feature of trust practice in spite of considerable legal uncertainty about them. Fortunately, the Uniform Law Commission has just finished work on the Uniform Directed Trust Act (UDTA), a new uniform law that offers clear solutions to the many legal uncertainties surrounding directed trusts. This article offers an overview of the UDTA, with particular emphasis on four areas of practical innovation. The first is a careful allocation of fiduciary duties. The UDTA's basic approach is to take the law of trusteeship and attach it to whichever person holds the powers of trusteeship, even if that person is not formally a trustee. Thus, under the UDTA the fiduciary responsibility for a power of direction attaches primarily to the trust director (or trust protector or trust adviser) who holds the power, with only a diminished duty to avoid "willful misconduct" applying to a directed trustee (or administrative trustee). The second innovation is a comprehensive treatment of non-fiduciary issues, such as appointment, vacancy, and limitations. Here again, the UDTA largely absorbs the law of trusteeship for a trust director. The UDTA also deals with new and distinctive subsidiary problems that do not arise in ordinary trusts, such as the sharing of infor-

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mation between a trustee and a trust director. The third innovation is a reconciliation of directed trusts with the traditional law of cotrusteeship. The UDTA permits a settlor to allocate fiduciary duties between cotrustees in a manner similar to the allocation between a trust director and directed trustee in a directed trust. A final innovation is a careful system of exclusions that preserves existing law and settlor autonomy with respect to tax planning, revocable trusts, powers of appointment, and other issues. All told, if appropriately modified to fit local policy preferences, the UDTA could improve on the directed trust law of every state. The UDTA can also be used by practitioners in any state to identify the key issues in a directed trust and to find sensible, well-drafted solutions that can be absorbed into the terms of a directed trust.

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Introduction

Across the centuries, the law of trusts evolved on the assumption that the power to administer a trust would belong to a trustee. The investment, distribution, and management of a trust's property were all the responsibility of a trustee, rather than of a beneficiary, settlor, or anyone else who was not formally a trustee. This tradition is being challenged, however, by the growing trend toward drafting the terms of a trust to grant a power over the trust to a person who is not a trustee. In

such a trust, commonly known as a *directed trust*,[1] a person known as a *trust director*[2] (or, alternately, as a *trust protector* or *trust adviser*) does not hold legal title to the trust property and is not a trustee, but nevertheless may hold a power over the trust that might otherwise belong to a trustee. The powers and duties of a trustee in a directed trust, who may be known as a *directed trustee* or an *administrative trustee*,[3] are to varying degrees subject to the supervening power of the non-trustee trust director.

The fundamental policy question posed by directed trusts is how to divide the law of trusteeship between a trust director and a trustee.[4] When the power to administer a trust belongs exclusively to a trustee, there seems little question that the fiduciary duties and subsidiary rules of trusteeship should apply exclusively to the trustee. But when the terms of a trust divide power between a trustee and a trust director, applying the law of trusteeship becomes much harder. There is disagreement, for example, whether a trust director should be subject to the fiduciary duties of trusteeship, and whether a directed trustee should be subject to reduced fiduciary duties—or no fiduciary duties at all.[5] The case law is sparse, and notwithstanding the success of the Uniform Trust Code, existing statutes are in disarray.

Fortunately, the Uniform Law Commission (ULC) has just finished work on the Uniform Directed Trust Act (UDTA), a new uniform law that offers clear solutions to the many legal uncertainties surrounding

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1 The Uniform Directed Trust Act [UNIF. DIRECTED TRUST ACT (UNIF. LAW COMM'N 2017)], hereinafter "UDTA," defines a "directed trust" in § 2(2).

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

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

4 We will examine this point more deeply in a scholarly project tentatively entitled *The Rise of Directed Trusts: Unbundling Title, Power, and Fiduciary Duty*.

5 *See, e.g.*, Alexander A. Bove, Jr., *A Protector by Any Other Name . . .*, 8 EST. PLAN. & CMTY. PROP. L.J. 1 (2015); Alexander A. Bove, Jr., *Trust Protectors in the United States. A Step Behind the Rest of the World*, 22 TR. & TR. 737 (2016); Matthew Conaglen & Elizabeth Weaver, *Protectors as Fiduciaries: Theory and Practice*, 18 TR. & TR. 17 (2012); William S. Echols, *Action in the Chasm: Defining Duties of the Trustee's Delegates*, 6 EST. PLAN. & CMTY. PROP. L.J. 397 (2014); David A. Diamond & Todd A. Flubacher, *The Trustee's Role in Directed Trusts*, 149 TR. & EST., Dec. 2010, at 24; Lawrence A. Frolik, *Trust Protectors: Why They Have Become "The Next Big Thing,"* 50 REAL PROP. TR. & EST. L.J. 267 (2015); Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, 31 PROB. & PROP. 1 (2017); R. Hugh Magill, *Allocating Fiduciary Responsibility*, 154 TR. & EST., May 2015, at 36; Alan Newman, *Trust Law in the Twenty-First Century: Challenges to Fiduciary Accountability*, 29 QUINNIPIAC PROB. L.J. 261 (2016); Charles A. Redd, *Directed Trusts - Who's Responsible?*, 154 TR. & EST., Sept. 2015, at 11; Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?,* 59 DRAKE L. REV. 67 (2010); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2005).

directed trusts.[6] The UDTA was approved by the ULC in 2017 after several years of drafting in consultation with a committee of nationally recognized experts in trust law from law practice, banks and trust companies, and academia.[7] The UDTA provides clear, practical, and comprehensive solutions to the major legal difficulties in a directed trust. At the same time, the UDTA offers a host of practical innovations that improve on the statutes that many states have already enacted to deal with directed trusts.

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

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

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[6] For enactment and other information, see ULC, ACTS, DIRECTED TRUST ACT, http://www.uniformlaws.org/Act.aspx?title=directed%20Trust%20Act (last visited, Oct. 9, 2018).

[7] For the committee roster and iterative development, see UNIF. LAW COMM'N, *Committees*, *Directed Trust Act*, http://www.uniformlaws.org/Committee.aspx?title=directed%20Trust%20Act (last visited, Oct. 9, 2018).

[8] UDTA §§ 8–9. The UDTA also requires a trustee to "take reasonable action" to comply with a director's exercise or nonexercise of its powers. UDTA § 9(a). However, as the comments to § 9 make clear, the duty to take reasonable action is a duty to act reasonably in carrying out the acts necessary to comply with a director's action, not a duty to ensure that the substance of the direction is reasonable. *See infra* Part II.B.4.

[9] *See* DEL. CODE ANN. tit. 12, § 3313 (2018); *see also* Diamond & Flubacher, *supra* note 5; Mary Clarke & Diana S.C. Zeydel, *Directed Trusts: The Statutory Approaches to Authority and Liability*, 35 EST. PLAN. 9 (2008); Magill, *supra* note 5; Richard W. Nenno, *Can Directed Trustees Limit Their Liability?*, 21 PROB. & PROP. 45 (2007); Redd, *supra* note 5.

[10] UDTA § 8(a). The phrasing derives from MODEL BUS. CORP. ACT § 8.30(b) (AM. BAR ASS'N 2017).

in addressing the immense variation among the powers that may be given to a trust director.[11]

A second innovation is to address non-fiduciary matters in the subsidiary law of trust administration. Although many directed trust statutes address fiduciary duties, no existing statute comprehensively addresses subsidiary matters such as acceptance, compensation, vacancy, and limitations periods. Unlike existing statutes, the UDTA anticipates these subsidiary issues and adopts the same basic solution that it applies to fiduciary duties—it takes the law of trusteeship and applies it to trust directors.[12] Thus, for example, the law of succession is the same for a trust director as it is for a trustee in a like position and under similar circumstances.[13] In addition to absorbing the law of trusteeship for trust directors in this way, the UDTA also deals with new and distinctive subsidiary problems that do not arise in ordinary trusts, such as the sharing of information between a trustee and a trust director.[14]

A third innovation is to reconcile the traditional law of cotrusteeship with the broader settlor autonomy recognized in a directed trust.[15] The UDTA expands the settlor's autonomy in designing a cotrusteeship by authorizing the terms of a trust to allocate fiduciary responsibility among cotrustees in a way that mirrors the allocation among a trust director and a directed trustee.[16] Thus, under the UDTA, a cotrustee who is subject to direction by another cotrustee can be relieved of fiduciary responsibility in the same way that the UDTA relieves a directed trustee who is directed by a trust director. The UDTA does not apply this treatment by default, but rather it gives a settlor the freedom to do so by choice.

A fourth and final innovation is a carefully thought-out system of exclusions that preserves existing law and settlor autonomy with respect to a host of issues that are collateral to the emergence of directed trusts.[17] Among other things, the UDTA preserves tax planning in existing trusts by excluding from the act any power that must be held in a nonfiduciary capacity to achieve a settlor's federal tax objectives.[18] The UDTA also preserves existing plans by preventing the settlor of a revocable trust or the donee of a power of appointment from being unintentionally characterized as a trust director by virtue of having a power

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11 *See infra* Part II.A.
12 UDTA §§ 13, 14, 16; *infra* Part III.
13 *See* UDTA § 16(4)–(6).
14 UDTA § 10; *see infra* Part II.C.
15 UDTA § 12; *see infra* Part IV.
16 UDTA § 12.
17 *Id.* § 5; *see infra* Part I.D.
18 *See* UDTA § 5(b)(5).

over the trust.[19] This exclusion is important, because it corrects an unacknowledged drafting error in many existing directed trust statutes, including the Delaware statute, which, if read literally, would make the settlor of a revocable trust and the donee of a power of appointment into trustee-like fiduciaries by virtue of their powers over the trust.[20] The UDTA anticipates and corrects this error.

These and other practical 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 standard for the fiduciary responsibility of a directed trustee or trust director,[21] no other provisions of the UDTA should provoke serious controversy. A state that wishes to modify the fiduciary duty of a directed trustee or trust director could easily do so while leaving the rest of the UDTA intact and gaining its benefits. The UDTA is so much simpler, more comprehensive, and more practically adept than the existing statutes that, with a few small adjustments, every state could use the UDTA to improve its law while still remaining consistent with its distinctive policy preferences.

The UDTA can also serve as a resource for drafters of directed trusts even in states that have not adopted in at least two ways. First, the extensive provisions of the UDTA, which address numerous issues not touched on by the existing state statutes, can serve as a guide or a checklist for issues a drafter should address expressly in the terms of a directed trust. Second, the solutions to those issues provided by the UDTA offer a model—and indeed, even model language—for how to address them in the terms of a directed trust.

Let us now turn to the details. Part I examines the scope of the UDTA and its careful system of exclusions that preserve existing law and settlor autonomy with respect to collateral matters—that is, the fourth of the four innovations noted above. We will then consider the other three innovations in the order given above. Thus, Part II examines the UDTA's answer to the core question of allocating fiduciary responsibility among a trust director and a directed trustee and the deeply intertwined questions of information sharing and cross-monitoring among trust directors and directed trustees. Part III examines the UDTA's coverage of the various non-fiduciary matters in the subsidiary law of trust administration that might be overlooked in drafting a directed trust and that for the most part are not addressed by the existing statutes. Part IV examines the UDTA's reconciliation of the law of cotrusteeship with the

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19 *See id.* § 5(b)(1), (3).

20 *Id.* § 5(b)(3); *infra* Part I.D.1, I.D.3.

21 We discuss below the different standards of fiduciary duty prevailing among existing state statutes. *See infra* Part II.A (trust directors); Part II.B.1 (directed trustees).

broad settlor autonomy permitted with respect to a directed trust. A short conclusion follows.

I. Scope and Exclusions

A. A Capacious Scope

We begin our tour through the UDTA by considering the statute's scope. In accordance with the principle of freedom of disposition,[22] the UDTA promotes settlor autonomy by validating a grant of a power of direction.[23] Accordingly, the scope of the statute depends largely on which powers qualify as a "power of direction." If the terms of a trust are found to include a power of direction, then the statute applies.[24]

1. *Defining a "Power of Direction"*

Section 2(5) of the UDTA 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."[25] The heart of this definition is the broadly worded phrase "power over a trust." Though it consists of a mere four words, this phrase was the subject of intense care and discussion in the drafting process, and it counts as one of the UDTA's many practical innovations.

The phrase is innovative because of its great breadth. It is capacious enough to cover all of the conventional powers of trusteeship, such as a power to invest or distribute the trust property, as well as other powers that may not conventionally belong to a trustee, such as a power to amend or terminate the trust. The phrase is also broad enough to cover every form that such a power might take. The term "power of direction" includes both a power to direct a trustee to act (such as when a director tells a trustee to invest in particular assets) and a power in a director to act on his or her own (such when the terms of a trust permit a director to sign an investment subscription agreement without the trustee's par-

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22 *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 St. Louis L.J. 643 (2014).

23 *See* UDTA, Prefatory Note ("By validating terms of a trust that grant a trust director a power of direction, the Uniform Directed Trust Act promotes settlor autonomy in accordance with the principle of freedom of disposition."). The UDTA defines a "power of direction" in § 2(9).

24 The definition of "terms of a trust" in UDTA § 2(8) accounts for the possibility of changes to those terms owing to court order or nonjudicial settlement agreement. *See* Todd A. Flubacher & Kenneth F. Hunt, *The Non-Judicial Settlement Agreement Wrapper*, 152 Tr. & Est., Dec. 2013, at 1. In 2018, the ULC amended the definition of "terms of a trust" in the Uniform Trust Code accordingly. *See* Unif. Trust Code § 103(18) (Unif. Law Comm'n, amended 2018).

25 UDTA § 2(5).

ticipation). The term 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 only types or kinds of powers over a trust that do not qualify as powers of direction are those covered by the categorical exclusions from the statute prescribed by § 5, to which we turn below.[26]

To avoid any doubt about the capaciousness of the definition of a power of direction, the drafting committee took two further steps to clarify. First, within the blackletter statutory language of the definition of "power of direction," the drafting committee included the further statement that "[t]he term includes a power over the investment, management, or distribution of trust property or other matters of trust administration." The accompanying comment explains that

> 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.[27]

As a second measure for the avoidance of doubt about the UDTA's scope, the drafting committee elsewhere in the comments provided a non-exclusive but detailed list of the types or kinds of specific powers that the committee contemplated would fall within the definition of a power of direction. Those further comments explain that term includes 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;
- select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;

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26 *See infra* Part I.D.

27 UDTA § 2 cmt.

- direct a trustee's or another director's delegation of the trustee's or other director's powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.[28]

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

2. *Excluding a Serving Trustee*

Having broadly equated a "power of direction" with any "power over a trust," the drafting committee took care to ensure that the definition would not swallow the law of trusteeship by transforming the powers over a trust that belong to a trustee into powers of direction. The definition of a "power of direction" in § 2(5) provides that a "power over a trust" is a "power of direction" only "to the extent the power is exercisable while the person" who holds the power "is not serving as a trustee."[30] The comment explains that "[t]he purpose of this limitation is to exclude a person serving as trustee from the definition of a trust di-

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[28] *Id.* § 6 cmt. The comment indicates that this list was meant to be illustrative rather than limiting.

[29] *See* Unif. Law Comm'n, Directed Trust Act, March 2015 Committee Meeting – Appendix A, http://www.uniformlaws.org/shared/docs/divided%20trusteeship/Appendix%20A%20-%20UDTA%20Spring%202015.pdf (last visited Oct. 9, 2018).

[30] UDTA § 2(5).

rector, even though as trustee the person will inevitably have a 'power over a trust.'"[31] The purpose of the UDTA is "to address the complications created by giving a person other than a trustee—that is, a trust director—a power over a trust. A power over a trust held by a trustee is governed by existing trust fiduciary law."[32]

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

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

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

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[31] *Id.* § 2 cmt.

[32] *Id.*

[33] *Id.* § 2(2).

[34] *Id*. § 2(9).

[35] *Id*. § 2(3).

[36] *Id*. § 2(9).

[37] The clarity in the UDTA's definitions represents a significant improvement on the confusing and clumsy definitions in many existing state statutes. In South Dakota, for example, the definition of a "trust protector" is circular: a trust protector is "any person whose appointment as a protector is provided for in the instrument." S.D. CODIFIED LAWS § 55-1B-1(2) (2017). In other words, a trust protector is a trust protector. Elsewhere, the South Dakota statute provides examples of powers that might be granted to a

B. An Enabling Statute

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

1. *Enabling versus Off-the-Rack*

Validating a power of direction, and therefore a directed trust with a trust director and a directed trustee, raises the further question of what exactly such a power entails. As we have just seen, the term "power of direction" is defined capaciously to include *any* power over a trust.[40] But this definition does not answer the question of *which* powers over a particular trust are granted to a particular trust director. The definition identifies the concept of a power of direction generally but does not supply the content of a particular power of direction specifically.

The approaches to this problem in the existing statutes can be divided roughly into two categories: "enabling" and "off-the-rack." The *enabling* statutes, typified by the Delaware statute,[41] validate terms of a trust that grant a power of direction, but they do not prescribe any specific powers by default. A settlor has the freedom to grant a power of direction, but must specify which powers, if any, she will grant to a particular director.

For example, the Delaware statute provides that a person other than a trustee may be "given authority by the terms of a governing in-

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protector. *Id.* § 55-1b-6. But the statute does not say whether granting one of these powers necessarily makes a person into a protector or specify what else might make a person into a protector either.

38 UDTA § 6(a).

39 *See, e.g.*, *In re* Eleanor Pierce (Marshall) Stevens Living Trust, 159 So. 3d 1101, 1106, 1110-11 (La. Ct. App. 2015) (validating terms of a trust creating a trust director even in the absence of specific statutory authorization); *see also* RESTATEMENT (THIRD) OF TRUSTS § 75 (AM. LAW INST. 2007) (recognizing a third party power to control a trustee); RESTATEMENT (SECOND) OF TRUSTS § 185 (AM. LAW INST. 1959) (same).

40 *See* UDTA § 2(5); *supra* Part I.A.

41 *See* DEL. CODE ANN. tit. 12, § 3313 (2018); *see also* ARIZ. REV. STAT. ANN. § 14-10818(A) (2018); COLO. REV. STAT. § 15-16-801 (2016) ("Trust Advisor"); MICH. COMP. LAWS § 700.7809 (2010); MISS. CODE ANN. § 91-8-1201(a) (amended 2016); MO. REV. STAT. § 456.8-808-(2) (2018); MONT. CODE ANN. § 72-38-808 (2017); N.H. REV. STAT. ANN. § 564-B:7-711(a) (2017); N.C. GEN. STAT. § 36C-8A-1 (2017); OHIO REV. CODE ANN. § 5808.08(d) (LexisNexis 2013); TENN. CODE ANN. § 35-15-1201 (2018); VA. CODE ANN. § 64.2-770(E)(1) (2014).

strument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary."[42] Beyond this broad grant of authorization, however, the Delaware statute does not provide further guidance on which powers are included in a particular power of direction in a particular trust.[43] Accordingly, under an enabling statute like Delaware's, the scope of a trust director's power of direction is determined by the terms of the trust. In other words, the content of a power of direction must be supplied by the terms of the trust. The statute provides no standard powers by default.

By contrast, an *off-the-rack* statute provides for one or more standard categories of trust director, with various sets of powers given to each category by default.[44] The South Dakota statute, for example, provides for the appointment of an "investment trust advisor" and a "distribution trust advisor," each with a different set of default powers.[45] An investment trust advisor has powers by default to direct the trustee with respect to the retention, purchase, or sale of trust property and to vote proxies for securities held in trust.[46] Likewise, a distribution trust adviser has the power to "direct the trustee with regard to all discretionary distributions."[47]

In addition to these standard categories, the South Dakota statute also has a general category of director called a "trust protector." The statute defines a protector in circular fashion as "any person whose ap-

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[42] Del. Code Ann. tit. 12, § 3313(a).

[43] The Delaware statute distinguishes between a trust "adviser" and trust "protector," but merely to say that the term "adviser" includes a "protector." *Id.* § 3313(f). The statute specifies a set of powers that a protector may possess, but the statute does not provide any of those powers to a protector by default and does not limit a protector to possessing only those powers. *Id.* The statute similarly identifies an "investment adviser" as a person with various powers related to investment, but does not limit such a person's powers or supply the person with any powers by default. *Id.* § 3313(d). The closest the statute comes to providing default terms for a directed trust is a presumptive definition of the term "investment decision" that applies unless the terms of the trust provides otherwise. *Id.*

[44] *See, e.g.*, S.D. Codified Laws §§ 55-1B-1, 55-1B-4 (2018) (protectors, advisors, investment advisors, distributions advisors); *see also* Alaska Stat. §§ 13.36.370, 13.36.375 (amended 2013) (protectors and advisers); Idaho Code § 15-7-501(1) (2018) (investment advisors, distribution advisors, protectors); 760 Ill. Comp. Stat. 5/16.3(a)-(d) (2018) (investment advisors, distribution advisors, protectors); Nev. Rev. Stat. §§ 163.55533, 163.5537, 163.5543, 163.5545, 163.5547 (2009) (distribution advisers, investment advisers, trust adviser, protectors, custodial account owner); Wis. Stat. §§ 701.0808, 0818 (2014) (directors and protectors); Wyo. Stat. Ann. §§ 4-10-710, 712, 718 (2018) (protectors and advisors).

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

[46] *See id.* § 55-1B-10(1)-(2).

[47] *Id.* § 55-1B-11.

pointment as protector is provided for in the instrument,"[48] and it provides that "the powers and discretions of a trust protector are as provided in the governing instrument."[49] The statute includes a menu of powers that the terms of a trust may grant to a protector, but the statute does not provide any of those powers by default, nor does it limit a trust protector to those powers.[50] The principal substantive difference between a trust protector and the other two categories of directors appears to be that a trust protector is not a fiduciary by default,[51] whereas an investment trust advisor and distribution trust adviser are required to be fiduciaries.[52]

Other states have other systems of categorization for off-the-rack powers. Alaska has separate categories for a "trustee adviser," who may be given the power to direct a trustee's actions, and a "trust protector," who has the power to (among other things) remove a trustee or modify a trust instrument.[53] A trust adviser may be required to be a fiduciary,[54] but a trust protector by default is not.[55] Nevada has four categories: a trust protector, a distribution trust adviser, an investment trust adviser, and a directing trust adviser.[56]

In sum, under an off-the-rack statute, a trust director tends to fall into one or more statutory categories with a predetermined set of default powers and fiduciary duties. A settlor can tailor the powers of a director in the terms of the trust by adding or subtracting powers and adjusting the fiduciary duties as the settlor likes. Under an enabling statute, by contrast, the scope of a trust director's powers and duties is set by the terms of the trust.

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48 *Id.* § 55-1B-1(2). This circular definition leaves open myriad questions, such as what exactly a protector is and whether the category of protector includes a trustee who exercises one of the powers that can be given to a protector.

49 *Id.* § 55-1B-6.

50 *Id.* § 55-1B-6(1)-(18).

51 *Id.* § 55-1B-1(2).

52 *Id.* § 55-1B-1(6)-(7). The South Dakota statute also includes a definition of the term "family advisor." *Id.* § 55-1B-1(10). The definition declares a family advisor to be "any person whose appointment is provided for in the governing instrument or by court order who is authorized to consult with or advise a fiduciary with regard to fiduciary or nonfiduciary matters and actions, and who may also be authorized by the governing instrument or court order to otherwise act in a nonfiduciary capacity." *Id.* The exact significance of this definition is unclear, because the term "family advisor" never appears again in the statute. One possible interpretation is that a person who holds the powers of a "family advisor"—i.e., a power to "consult with or advise a fiduciary"—is not a fiduciary.

53 Alaska Stat. §§ 13.36.370 (amended 2013) (protector), 13.36.375 (advisor).

54 Nev. Rev. Stat. § 163.5553 (2009) (protector).

55 Alaska Stat. § 13.36.370(d).

56 Nev. Rev. Stat. §§ 163.5536 ("directing trust adviser"); 163.5537 ("distribution trust adviser"); 163.5543 (investment trust adviser"); 163.5547 ("trust protector").

2. *The UDTA is an Enabling Statute*

After carefully considering both models, the UDTA drafting committee opted for an enabling structure. Section 6(a) provides that the terms of a trust may grant a power of direction to a trust director. However, with just one exception to which we will turn below,[57] the UDTA does not prescribe any powers for a trust director by default and does not segregate trust directors into distinct categories. The UDTA treats any power over a trust that is granted to a person other than a serving trustee as a power of direction, with the scope of that power prescribed by the terms of the trust, as under the Delaware statute. As the comment to § 6 explains, the UDTA "does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust."[58]

The drafting committee favored an enabling model for several reasons. To begin with, an enabling model is simpler. Providing for only a single class of trust director with only a single set of governing rules avoids the complexity attendant to the off-the-rack models. Because the categories in the off-the-rack statutes tend to operate by classifying directors rather than by classifying powers, the contents of the categories are people, rather than powers. For example, South Dakota has a category for "trust investment advisers" rather than a category for "trust investment powers." An awkward consequence of fixating on people rather than powers in this way is that a single person can occupy several categories simultaneously—she can be a "trust investment adviser," a "distribution trust advisor," and a "trust protector" all at once, with correspondingly inconsistent and confusing results. The simpler, enabling approach of the UDTA reduces the risk of litigation about categorization. Under the UDTA, there is only one category of trust director, and the only powers of a director are those granted by the terms of the trust.

Another problematic consequence of supplying powers by default, as under the off-the-rack models, is that the powers might come in awkward bundles that frustrate rather than facilitate a settlor's intent. Under the South Dakota statute, for example, multiple powers come bundled together by default, so that an accountant who is granted a power to direct the trustee "as to the value of nonpublicly traded trust investments" would by reason of that express power be classified as an "investment trust adviser." And as an investment trust adviser, the accountant would have several different powers, including the the power to direct the trustee "with respect to the retention, purchase, sale," or

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[57] *See infra* Part I.C.

[58] UDTA § 6 cmt. (Unif. Law Comm'n 2017).

"exchange" of the trust assets.[59] Although some settlors might like this outcome, it seems likely that many would not. True, a settlor could avoid the awkward bundling of the South Dakota statute by drafting around it—but only if the settlor or her lawyer is awake to the issue. Under the UDTA, by contrast, the problem is avoided in all cases by providing that a trust director has only those powers granted by the terms of the trust.

Two further points follow. First, the transaction costs savings of an off-the-rack statute are likely to be illusory. Relative to an enabling statute, an off-the-rack statute could minimize the costs of drafting a directed trust by allowing a drafter to invoke a pre-existing statutory form of directed trust. In practice, however, a directed trust under an off-the-rack statute will almost always require tailoring by the terms of the trust to adapt the statutory form to the particulars of the situation. As the example of the South Dakota accountant shows, a drafter will need to specify both the nondefault powers that a trust director holds and the default powers that the director does not hold. In the meantime, as the directed trust concept becomes more familiar, formbook boilerplate will become readily available, simplifying the process of drafting a directed trust under an enabling statute. In a related vein, an enabling statute will not require periodic amendments to update its categories and default powers within those categories to reflect changes in practice.

Second, an enabling statute is less disruptive for existing trusts, because such a statute would not expand a director's default powers after the fact in a way that a settlor might not have intended or even contemplated. Consider again the South Dakota statute, which like the UDTA applies to all trusts regardless of when they were created.[60] Suppose an existing trust that gives a committee of the settlor's family the power to vote the trust's interest in a family business. Under the South Dakota statute, this power would make the family members into a committee of "investment trust advisors" with all of the default powers of investment trust advisors, even if the terms of the trust did not expressly provide those powers.[61] Thus, in addition to having the power to vote the family shares (as provided by the terms of the trust), the family members would also have the power to sell those shares.[62] The UDTA avoids this

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59 S.D. Codified Laws § 55-1B-10(1), (5) (2014).

60 *See Id.* § 55-1B-1(1); UDTA § 3(a). We discuss UDTA § 3(a) *infra* Part I.E.2.

61 *See* S.D. Codified Laws §§ 55-1B-1(6), 55-1B-10.

62 *Id.* § 55-1B-10. South Dakota and other off-the-rack statutes do not attempt to address this problem. To do so would be immensely difficult and complex. Consider, for example, the recently adopted Uniform Trust Decanting Act (Unif. Law Comm'n 2015). The decanting act is similar to an off-the-rack directed trust statute in that it grants a new power to trustees of existing trusts. By default, the act recognizes in certain trustees a power to decant the trust property even if the terms of the trust do not grant that power

kind of disruption to existing trusts by leaving the content of a director's powers to the terms of the trust.

C. Further Powers

Although the UDTA does not generally supply powers by default, the act does contain one important exception. Section 6(b)(1) provides that, "[u]nless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director" by the terms of a trust.[63] In other words, if the terms of a trust supply an express power, then by default the UDTA supplies further powers as "appropriate" to the exercise or nonexericse of that expressly granted power.

Colloquially speaking, § 6(b)(1) operates as a kind of "necessary and proper" clause, granting additional powers as appropriate to carry out a settlor's intent. Following the Uniform Trust Code, the UDTA uses the term "appropriate" to avoid the narrowing implication sometimes associated with the term "necessary and proper."[64] The comment explains the meaning of appropriateness thus: "Appropriateness should be judged in relation to the purpose for which the power was granted and the function being carried out by the director."[65] The comment elaborates by way of examples:

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

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expressly. In so doing, the decanting act runs the risk of upsetting a settlor's planning objectives just as the South Dakota directed trust statute does for a directed trust.

Unlike the drafters of off-the-rack directed trust statutes, the drafters of the decanting act foresaw this problem and tried to address it. However, doing so required a long list of limits on the newly recognized default decanting power. Section 19 of the act imposes a variety of limits on the decanting power. But this provision is long and complicated (it even has its own definitions subsection), and it runs the risk of being incomplete—no one can be certain whether the decanting act has addressed every possible problem that a default power to decant might create. Off-the-rack directed trust statutes that supply powers by default pose a similar risk of upsetting a settlor's plan, and they do so without any similar saving provisions.

63 UDTA § 6(b)(1).

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

65 *Id.*

> director in the exercise or nonexercise of the director's powers.[66]

Suppose, for example, that the terms of a trust grant a trust director a power to direct investments. If the trustee refuses to comply with the director's exercise of this power, § 6(b)(1) would supply the director with a further power to bring an action to redress the trustee's noncompliance, even if the terms of the trust do not expressly supply the power.[67] Manifestly, such an action would be "appropriate" to the director's exercise of the expressly granted power to direct investments.[68]

The further powers supplied by § 6(b)(1) count as a major practical innovation on existing statutes, including the enabling statutes, which tend not to include such a provision.[69] It also offers yet another motivation for the UDTA's enabling approach, because the further powers in the UDTA accomplish many of the same objectives as the default powers in off-the-rack statutes, but with greater precision. The UDTA's further powers are at once less over-inclusive and less under-inclusive than the default powers in off-the-rack statutes. The UDTA is less over-inclusive, because it includes only those powers "appropriate" to the director's express powers. Thus, unlike the South Dakota statute, the UDTA would not tie a power to sell investments to a power to value investments unless tying the two powers together would be appropriate to a particular settlor's intent.[70]

The UDTA's further powers are also less under-inclusive than the off-the-rack powers under the statutes, because the UDTA's further

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[66] *Id.*

[67] *Id.*

[68] *See id.* The comment explains: "It would normally be 'appropriate,' for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction." UDTA § 6(b)(1) cmt. The UDTA thus resolves the situation that arose in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The comment describes the case and the UDTA's response:

> 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).

UDTA § 6(b)(1) cmt.

[69] *See, e.g.*, DEL. CODE ANN. tit. 12, § 3313 (2018).

[70] *See supra* note 59 and text accompanying.

powers include every power appropriate to a particular trust, and not just the handful of powers bundled in the off-the-rack provision. The South Dakota statute, for example, grants an "investment trust advisor" the power to sell investments by default, but not the power to sue a trustee who refuses to comply with a direction to sell investments.[71]

D. The Exclusions

Because the term "power of direction" is so broad, it might swallow some matters collateral to the emergence of directed trusts, inadvertently disrupting estate planning practices unrelated to directed trusts by subjecting them to the fiduciary and other rules of the UDTA. As we have already seen, every power of trusteeship is literally a "power over a trust,"[72] so the UDTA drafting committee took care to exclude powers in a serving trustee from the scope of the act.[73] In addition to this carve-out for serving trustees, the UDTA includes a carefully thought-out system of five other carve-outs as well.[74] These exclusions count as a major practical innovation of the UDTA, for as we shall see, they correct unacknowledged drafting errors in many existing directed trust statutes, including the Delaware statute, that could disrupt a variety of typical estate planning practices.

1. *Nonfiduciary Powers of Appointment*

The first exclusion is for nonfiduciary powers of appointment, which are an entrenched feature of the background law of trusts that the UDTA does not attempt to change.[75] Under a *power of appointment*, the person who holds the power, commonly known as a donee, may appoint the property to one or more persons known as the objects of the power, in accordance with the power's terms. Consider a typical example: *H* devises property to *X* in trust to distribute the income quarterly to *W* for life, and on *W*'s death to distribute the principal to one or more of *H*'s descendants as *W* shall appoint by will. *H* is the donor of a power of appointment, *W* is the donee, and *H*'s descendants are the objects. By

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[71] *See* S.D. Codified Laws § 55-1B-10 (2014).

[72] *See supra* Part I.A.1.

[73] *See supra* Part I.A.2.

[74] In addition to entirely exempting certain powers from the act's coverage, the UDTA also singles out one particular power for exemption from the fiduciary obligations imposed on trust directors. Section 8(b) provides that if a trust director is a medical professional and acts in that capacity, the director will have no duty or liability under the act. The power otherwise remains subject to the terms of the act, however, including the provisions that diminish the liability of a trustee. *See infra* Part II.A.3.

[75] *See, e.g.*, Unif. Powers of Appointment Act § 102(13) (Unif. Law Comm'n 2013); Restatement (Third) of Prop.: Wills and Other Donative Transfers §§ 17.1, 17.5 (Am. Law Inst. 2011).

this power, which *H* intends *W* to hold in a nonfiduciary capacity, *W* may decide who among *H*'s descendants will take the trust property at her death. In this way, *H* empowers *W* to deal flexibly with changing circumstances in the interim between their deaths, which may span years or even decades.[76]

Powers of appointment provide benefits beyond building flexibility into an estate plan. They are also commonly used for tax planning and asset protection. In the example just given, because *W* cannot appoint the trust property for her own benefit (in the jargon, the power is *nongeneral*), no estate or gift tax will be due upon *W*'s exercise of the power,[77] and no creditor of *W* will have recourse against the property.[78] It would be difficult to overstate the importance of powers of appointment in contemporary estate planning.[79]

Without an exclusion for nonfiduciary powers of appointment, the risk that the UDTA could disrupt countless estate plans is readily apparent. In the example just given, the power granted to *W* would arguably satisfy the UDTA's definition of a power of direction, because it is "a power over a trust granted to [*W*] by the terms of the trust."[80] Without an exclusion, therefore, a court applying the UDTA might treat *W* as a trust director subject to all the fiduciary and other rules applicable to a director, and might treat the trustee as a directed trustee, with a lower standard of fiduciary duty than a non-directed trustee.

This problem is not limited to the UDTA. The same disruptive result would obtain under a literal reading of the Delaware and other enabling directed trust statutes. Under the Delaware statute, arguably *W* was "given authority by the terms of a governing instrument to direct . . . a fiduciary's . . . distribution decisions," with the consequence that under the statute *W* would be a trust adviser presumptively subject to fiduciary duty "when exercising such authority."[81]

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

77 *See id.* at 809–10, 813–15.

78 *See id.* at 815–16.

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

80 UDTA § 2(5).

81 Del. Code Ann. tit. 12, § 3313(a) (2018). Under the Delaware statute, fiduciary status is presumptive rather than mandatory. The statute says that "the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity." *Id.* Thus, in the case posited, *W* could argue that the terms of the trust impliedly granted the power in a nonfiduciary capacity. Putting to the side the question of whether the text of the statute allows for implied waiver of fiduciary status, the broader point is that, owing to the overbreadth of the Delaware statute, the default treatment of

The drafting committee for the UDTA anticipated this problem, providing a categorical exclusion for nonfiduciary powers of appointment in § 5(b)(1). The exclusion works as follows. UDTA § 5(b)(1) provides that the act "does not apply to a . . . power of appointment." Section 5(a) defines a "power of appointment" as "a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property."[82] 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 not be subject to the act. The holder of the power will not be a trust director, and a trustee subject to the power will not be a directed trustee.

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

To resolve doubt about whether a power over distribution is a nonfiduciary power of appointment or a fiduciary power of direction, UDTA § 5(c) prescribes a rule of construction under which a power over distribution in a person not serving as a trustee is presumptively a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust indicate otherwise.[83] This rule of construction codifies the typical expectation that would have informed the drafting of existing trusts. For example, if the terms of a trust give the spouse of the settlor a power to distribute trust property to the settlor's descendants without specifying whether the power is held in a fiduciary capacity, under the rule of construction in UDTA § 5(c) the presumption is that

W as a fiduciary gives rise to litigation risk and potentially disrupts *H*'s plan. Under the UDTA, by contrast, *W*'s nonfiduciary power of appointment is protected by a categorical exclusion.

[82] This definition of "power of appointment" is based on Uniform Powers of Appointment Act § 102(13) (Unif. Law Comm'n 2013) ("UPAA") and is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (Am. Law Inst. 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."

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

the power is a nonfiduciary power of appointment, exempting the spouse and the power from the act. Further, a power in a serving trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because as we have seen, a serving trustee can never be a trust director.[84]

Two other points about this exclusion merit further discussion. First, as a planning matter, the § 5(b)(1) exclusion for a nonfiduciary power of appointment ensures that a settlor may grant to a person or a committee of persons a power over distribution of the trust property in *either* a fiduciary capacity (i.e., a power of direction subject to the UDTA) *or* a nonfiduciary capacity (i.e., a nonfiduciary power of appointment excluded by § 5(b)(1)). The drafting committee reasoned that, whatever the merits of the argument that all powers over distribution should be held in a fiduciary capacity, history has settled the question decisively in favor of allowing a settlor to grant a power over distribution in a nonfiduciary capacity. This settled principle underpins countless estate plans and is central to contemporary trust practice.

Second, the § 5(b)(1) exclusion for a nonfiduciary power of appointment fits tightly with the Uniform Powers of Appointment Act ("UPAA"), which excludes fiduciary powers over distribution and applies only to a nonfiduciary power of appointment.[85] Under the UPAA, the definition of a power of appointment includes only powers that are nonfiduciary, and a trustee or other person who has a fiduciary power over distribution holds a fiduciary power that is distinct from a power of appointment.[86] Accordingly, within the uniform trusts and estates acts,

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[84] *See supra* Part I.A.2. Whether a power over distribution granted to a serving trustee is held in a fiduciary capacity, making it a fiduciary distributive power held in the person's capacity as trustee, or is instead a nonfiduciary power of appointment held by the person individually, is governed by background law. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a (AM. LAW INST. 2003). By way of illustration, *H* might devise a fund in trust to *W*, granting *W* both fiduciary distributive powers in *W*'s capacity as trustee as well as one or more lifetime or testamentary nonfiduciary powers of appointment.

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

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

Id. cmt.

[86] *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a.

the UPAA governs a nonfiduciary power of appointment; the UDTA governs a fiduciary power over distribution in a person not serving as trustee; and the Uniform Trust Code governs a fiduciary power over distribution in a person serving as trustee.

2. *Power to Appoint or Remove a Trustee or Trust Director*

UDTA § 5(b)(2) excludes "a . . . power to appoint or remove a trustee or trust director."[87] The drafting committee intended this exclusion to address the concern that a power to appoint or remove a trustee is a common drafting practice that arose separately from the phenomenon of directed trusts. "Professionally drafted trusts commonly include a provision that overrides the default law of trustee removal by authorizing the beneficiaries or a third party to remove the trustee and appoint a successor (perhaps limited to an independent corporate trustee)."[88] 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. In consequence, a person who holds a power to appoint or remove a trustee is not subject to the fiduciary duties of a trust director.

Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it "must conform to any valid requirements or limitations imposed by the trust terms."[89] 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.[90]

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.[91] 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."[92] In other words, under modern law every revocable trust includes an implied term under which the trustee must comply with

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[87] UDTA § 5(b)(2).

[88] Sitkoff & Dukeminier, *supra* note 76, at 751.

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

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

[91] *See, e.g.*, Unif. Trust Code (hereinafter "UTC") § 603(a) (2010) (Unif. Law Comm'n, amended 2018); David Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 Elder L.J. 1 (2016).

[92] Restatement (Third) of Trusts § 74(1)(a)(i) (Am. Law Inst. 2007); *see also* UTC § 603(a) (amended 2018) ("To the extent a trust is revocable by a settlor, a trustee may follow a direction of the settlor that is contrary to the terms of the trust.").

a direction from the settlor about how to administer the trust. And as a matter of normal and customary drafting practice, this implied term is express in many revocable trusts. A typical professionally drafted revocable trust will provide that the settlor "may direct the trustee to distribute to the settlor so much or all of the income and principal as the settlor wishes and to invest the trust property as the settlor directs."[93]

A revocable trust poses a challenge under the UDTA and other directed trust statutes, because without a specific exclusion, a power to revoke is arguably a power of direction. As we have seen, the UDTA defines a "power of direction" to include any "power over a trust,"[94] and since a power to revoke is a "power over a trust," a power to revoke would also be a power of direction. A revocable trust would therefore become a directed trust, and a settlor would have the fiduciary duties of a trust director while a trustee would have the lightened fiduciary duties of a directed trustee. The drafting committee worried that transforming revocable trusts into directed trusts in this way would upset existing practice by upending the way settlors and trustees in these trusts relate to each other. Accordingly, UDTA § 5(b)(3) excludes "a . . . power of a settlor over a trust to the extent the settlor has a power to revoke the trust."[95]

Conceptually, this exclusion has much in common with the exclusion under § 5(b)(1) for a nonfiduciary power of appointment.[96] A settlor's power to revoke a revocable trust is functionally not very different from a nonfiduciary general power of appointment.[97] Moreover, as with the § 5(b)(1) exclusion for a nonfiduciary power of appointment, the § 5(b)(3) exclusion for a settlor's power over a revocable trust corrects an unacknowledged drafting error in many existing enabling directed trust statutes, including the Delaware statute. Under the Delaware statute, the settlor of a typically drafted revocable trust would be "given authority by the terms of a governing instrument to direct . . . a fiduciary's actual or proposed investment decisions, distribution decisions or

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[93] Feder & Sitkoff, *supra* note 91, at 10 (giving Northern Trust formbook as an example).

[94] UDTA § 2(5); *see also supra* Part I.A.1.

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

[96] *See* UDTA § 5(b)(1); s*upra* Part I.D.1.

[97] *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 74(2) (AM. LAW INST. 2007).

other decision of the fiduciary," with the consequence that under a literal reading of the statute the settlor would be a trust adviser subject by default to fiduciary duty "when exercising such authority."[98]

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."[99] 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 happens also to be a beneficiary. Otherwise, the mandatory fiduciary duties of a trust director under § 8(a)(2), discussed below,[100] could be circumvented by giving the director a peppercorn beneficial interest in the trust.

Including a beneficiary in the definition of a trust director, however, creates the possibility that a beneficiary who holds a power over a trust might be subjected to the fiduciary duties and other obligations of a trust director even if the power does not affect anyone other than the beneficiary. Though it might make sense to treat a beneficiary as a trust director when the beneficiary's powers affect others, it does not make sense to treat a beneficiary as a director when the beneficiary's powers affect only that beneficiary. To resolve this problem, UDTA § 5(b)(4) excludes "a . . . power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of . . . (A) the beneficiary[,] or (B) another beneficiary represented by the beneficiary [under applicable virtual representation law] with respect to the exercise or nonexercise of the power."[101]

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."[102] For example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded by § 5(b)(4)(A). To the extent the power affects another person, however, then it is not for the sole benefit of the person holding the power. Accordingly, a power over a trust held by a beneficiary may be a "power of direction" if it affects the beneficial interest of another beneficiary. For example, a power in a beneficiary to release the trustee from a claim by another beneficiary is not excluded by § 5(b)(4) unless the

98 Del. Code Ann. tit. 12, § 3313(a) (2018).
99 UDTA § 2(9).
100 *See infra* Part II.A.1.
101 UDTA § 5(b)(4).
102 Restatement (Third) of Trusts § 75 cmt. d; *see also* Restatement (Second) of Trusts § 185 cmt. d (Am. Law Inst. 1959) (similar).

power to bind the other beneficiary arises by reason of virtual representation so that subparagraph (B) applies.

The same rules apply if the beneficiary's power is jointly held. For example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release bound other beneficiaries other than by virtual representation. In this respect the UDTA would reverse the result in *Vena v. Vena*,[103] in which the court refused to enforce a provision for release of a trustee by a majority of the beneficiaries on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under UDTA § 8, discussed below, the minority beneficiaries would have recourse against the majority for breach of their fiduciary duty as trust directors.

The carve-out for virtual representation in subparagraph (B) reflects the drafting committee's intent not to impose the fiduciary rules of this act on top of the law of virtual representation, which contains its own limits and safeguards. Without subparagraph (B), the capacious definition of "power of direction" in Section 2 could have been read to transform a beneficiary who represented another beneficiary by virtual representation into a trust director.[104]

Like the exclusions for powers of appointment and revocable trusts,[105] this exclusion for the self-affecting power of a beneficiary represents a practical improvement on existing statutes. Many existing statutes fail to exclude these kinds of powers. In Delaware, for example, any beneficiary who has a power "to direct, consent to or disapprove a fiduciary's actual or proposed . . . decision" is presumed to be a trust advisor, even if the beneficiary's powers affect no one other than the beneficiary and even if the power arises by reason of virtual representation.[106]

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[103] 899 N.E.2d 522 (Ill. App. Ct. 2008).

[104] The comment elaborates:

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

UDTA § 5(b)(4) cmt.

[105] *See supra* Part I.D.1, 3.

[106] DEL. CODE ANN. tit. 12, § 3313(a) (2018).

5. *The Settlor's Tax Objectives*

The final exclusion in UDTA § 5 protects against disruption of normal and customary tax planning. UDTA § 5(b)(5) excludes "a . . . power over a trust if . . . the terms of the trust provide that the power is held in a nonfiduciary capacity . . . and the power must be held in a nonfiduciary capacity to achieve the settlor's [federal] tax objectives."[107] 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.[108]

Perhaps the most salient example is a power to substitute assets meant to ensure grantor trust tax status. To ensure that a trust is a grantor trust for federal income tax purposes, planners commonly include in the terms of the trust a provision that allows the settlor to substitute assets of the trust for assets of an equivalent value, exercisable in a nonfiduciary capacity.[109] The power to substitute assets must be held in a nonfiduciary capacity to ensure grantor trust status. If the power is exercisable in a fiduciary capacity, the power will not cause the trust to be a grantor trust.

The problem is that, as we shall see below, UDTA § 8 mandates that all trust directors are fiduciaries.[110] Without the exclusion under § 5(b)(5), therefore, the common drafting practice of a nonfiduciary power to substitute assets would be impossible. The tax status of existing trusts with such a provision would be thrown into disarray. The exclusion 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

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[107] UDTA § 5(b)(5) (bracketed text in original).

[108] *See* UDTA § 5(b)(5) cmt. The comment explains why the limitation covers only federal tax objectives and not state tax objectives:

> 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.

[109] *See, e.g.*, David R. York & Eric B. Whiting, *Basis Basics and Beyond: Strategies for Estate Planners*, 44 EST. PLAN. 14, 19 (2017) ("In most IDGTs [i.e., intentionally defective grantor trusts], the grantor retains the ability to substitute assets of equivalent value.").

[110] UDTA § 8(a); *infra* Part II.A.1.

achieve the settlor's federal tax objectives will remain nonfiduciary even after adoption of the UDTA.

In light of the evolving nature of tax planning, the frequency of amendments to the tax law, and the potential for disagreement about which powers must be nonfiduciary to achieve the settlor's federal tax objectives, the drafting committee reasoned that a standard referring broadly to a settlor's federal tax objectives was preferable to a prescribed list of sections of the tax code.[111]

This exclusion is also a significant practical innovation on existing statutes. None of the leading directed trust jurisdictions—Alaska, Delaware, Nevada, New Hampshire, or South Dakota—has an exclusion for a power that would upset a settlor's tax planning. Some states, such as Missouri, have tried to solve tax problems by prohibiting a trust director from exercising certain powers.[112] But a statutory list may not be complete and can swiftly be rendered stale by changes in the tax law.

E. Choice of Law and Prospective Application

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

1. *Choice of Law*

On the reasoning that powers and duties in a directed trust are matters of trust administration,[113] UDTA § 3(a) follows the prevailing conflict of laws rule by linking application of the UDTA to a trust's principal place of administration.[114] If a trust's principal place of administration is in state *X* and state *X* has enacted the UDTA, then the UDTA as enacted in *X* applies to the trust. But how is a trust's principal place of administration to be determined?

Under UDTA § 3(b), terms of a directed trust that "designate the principal place of administration of the trust are valid and controlling" if (1) a trustee is located in the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust administration occurs in the designated jurisdiction. This provision establishes a safe harbor for a settlor's designation of the principal place of administration for a directed trust. Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of

111 *See* UDTA § 5(b)(5) cmt.

112 *See* MO. REV. STAT. § 456.8-808(4), (5) (2018).

113 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 271 cmt. a (AM. LAW INST. 1971).

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

§ 108(a) to add the presence of a trust director as a sufficient connection with the designated jurisdiction.

Other than the expansion in UDTA § 3(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."[115] Accordingly, for a directed trust in a state that enacts the UDTA, just as for all trusts in a Uniform Trust Code state, if the safe harbor does not apply, the question of a trust's principal place of administration will be governed by the state's existing law on principal place of administration.[116]

2. *Prospective Application*

UDTA § 3(a) applies the act to all trusts administered in an enacting state regardless of whether the trust was in existence on the effective date of this act. However, under § 3(a)(1)-(2), the act applies only with respect to a decision or action occurring on or after the effective date or, if the trust's principal place of administration was changed to the enacting state after the effective date, only with respect to a decision or action occurring on or after that change. As we will see, some of the standards of conduct prescribed by the UDTA depart from the common law as reflected in the Restatements of Trusts and from the standards prescribed by the Uniform Trust Code.[117] The drafting committee therefore reasoned in accordance with due process norms that the act should not apply to actions undertaken in reliance on prior law.[118]

II. Allocating Fiduciary Responsibility in a Directed Trust

The core of the UDTA's contribution appears in §§ 8 through 11 of the Act, which allocate fiduciary responsibility among trust directors and directed trustees. The UDTA's basic approach is to place the primary fiduciary responsibility for a power on the person who holds the power. If a power belongs to a trust director, then the primary fiduciary responsibility for that power belongs to the director, rather than the directed trustee who merely facilitates the director's exercise of the

[115] UTC § 108 cmt.

[116] *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 271–72, 279 (Am. Law Inst. 1971).

[117] *See, e.g.*, *infra* Part II.A–B.

[118] In this respect the UDTA follows Unif. Prudent Inv'r Act § 11 (Unif. Law Comm'n 1994). The UDTA also minimizes disturbance of existing trusts by not creating new powers by default, as we have seen. *See supra* Part I.B.2.

power. The UDTA thus relieves a directed trustee from the full fiduciary duties of a unitary trusteeship, and leaves a directed trustee with only a reduced duty to avoid "willful misconduct" in deciding whether to comply with a director's directions.

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

In its overarching concept and the details of its execution, the UDTA represents a dramatic improvement on the fiduciary rules of the existing directed trust statutes. The UDTA is both more complete and more precise in its fiduciary regime than Delaware or any other state. The UDTA's fiduciary regime is also adaptable to every state. Although the UDTA follows the Delaware model of applying a standard of "willful misconduct" to a directed trustee, the provision that applies the willful misconduct standard could be altered to meet the policy desires of states that prefer no fiduciary duty for a directed trustee, such as South Dakota, New Hampshire, and Nevada. Similarly, states that want to eliminate the mandatory minimum duties of a trust director can do so. Regardless of its preferences on the allocation of fiduciary duties, any state can achieve its preferences with a few modifications while still enjoying the many practical innovations of the UDTA.

A. Trust Directors (UDTA § 8)

The first issue the drafting committee took up in the UDTA was the fiduciary duty of a trust director. Should a trust director's duty in the exercise or nonexercise of its powers be the same as a trustee? Some different level or form of duty? Or perhaps no duty at all? In answering these questions, the drafting committee was deeply influenced by a survey of the existing directed trust statues, which showed a remarkable unanimity on these questions. The great majority of state directed trust statutes treat a trust director as a fiduciary of some kind.[119]

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[119] Many states treat a trust director as a fiduciary by mandate, while others only impose fiduciary status by default. Still others impose fiduciary duties on some categories of directors by default and on other categories of directors by mandate. For states that impose fiduciary duties by mandate, *see, e.g.*, 760 ILL. COMP. STAT. 5/16.3(e) (2015) ("A directing party is a fiduciary of the trust subject to the same duties and standards applicable to a trustee of a trust as provided by applicable law unless the governing instrument

Treating a trust director as a fiduciary makes sense, because a trust director is, by definition, a person with a power over a trust. Power and duty are deeply connected in trust fiduciary law,[120] and it seems self-evident that the person who has a power over a trust is in the best position to bear the primary fiduciary responsibility for that power. Accordingly, the UDTA's basic approach is to treat a trust director like a trustee with respect to the director's powers. A trust director bears the

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provides otherwise, but the governing instrument may not, however, relieve or exonerate a directing party from the duty to act or withhold acting as the directing party in good faith reasonably believes is in the best interests of the trust."); N.H. REV. STAT. ANN. § 564-B:12-1202(a) (2014) ("Notwithstanding the breadth of discretion granted to a trust advisor or trust protector under the terms of the trust, including the use of such terms as 'absolute,' 'sole,' or 'uncontrolled,' a trust advisor or trust protector must exercise a discretionary power and otherwise act in good faith and in accordance with the terms of the trust, the purposes of the trust, and the interests of the beneficiaries."); VA. CODE ANN. § 64.2-770(E)(1) (2014) ("Notwithstanding anything in the trust instrument to the contrary, the trust director shall be deemed a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries.").

Other states impose fiduciary duties on trust directors only by default. Delaware, for example, makes a trust director a fiduciary by default, but also permits a "governing instrument [to] provide that any such [director] shall act in a nonfiduciary capacity." DEL. CODE ANN. tit. 12, § 3313(a) (2018); *see also In re* Ronald J. Mount, 2012 Irrev. Dynasty Tr. U/A/D Dec. 5, 2012, No. CV 12892-VCS, 2017 WL 4082886 (Del. Ch. Sept. 7, 2017) (dismissing a complaint against a trust director after finding that the terms of the trust provided that the director acted in a nonfiduciary capacity). One strange (and possibly unintended) consequence of making a director's duties a default is that the terms of a trust can give a trust director even less fiduciary duty than it can give the directed trustee who carries out the director's directions. Under a literal reading of Delaware's statute, a trust director can be freed from fiduciary duty entirely, but a directed trustee is subject to a mandatory minimum duty to avoid "wilful misconduct" even when the directed trustee is merely complying with the director's directions. DEL. CODE ANN. tit. 12, § 3313(b), (c); *see also* DEL. CODE ANN. tit. 12, § 3303(a) (prohibiting exculpation or indemnification for "wilful misconduct").

Some states impose fiduciary duties by default on some directors and by mandate on others. *See, e.g.*, S.D. CODIFIED LAWS §§ 55-1B-1(2), (6), (7) (2018) (imposing no fiduciary duties on a "trust protector" by default while imposing fiduciary duties on an "investment trust advisor" and "distribution trust advisor" by mandate).

[120] The Restatement characterizes this as "a basic principle of trust administration," namely, that "a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee's fiduciary obligations." RESTATEMENT (THIRD) OF TRUSTS § 70 cmt. a (AM. LAW INST. 2007). Thus, "even a power expressly conferred by the trust instrument, or by statute, is subject to the fundamental duties of prudence, loyalty, and impartiality, to a duty to adhere to the terms of the trust, and to the other fiduciary duties of trusteeship." *Id.*; *see also* UTC § 815(b) ("The exercise of a power is subject to the fiduciary duties prescribed by this [article].").

same default and mandatory fiduciary duties as a trustee in a like position and under similar circumstances.

1. *Absorption of Trustee Duties*

The UDTA implements the policy that a trust director is a fiduciary in § 8. The basic rule of § 8(a) is that "a trust director has the same fiduciary duty and liability" as a "trustee in a like position and under similar circumstances."[121] If the director holds the power individually, then the director bears the fiduciary duty of a sole trustee.[122] If the director holds the power jointly with a trustee or another director, the director bears the fiduciary duty of a cotrustee.[123]

With respect to the default or mandatory character of a trust director's duties, 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."[124] In other words, duties that are default for a trustee are default for a similarly situated trust director, and duties that are mandatory for a trustee are mandatory for a similarly situated trust director. If the terms of a trust include an exoneration clause or grant of extended discretion, those terms would have the same effect on the duty and liability of the director as they would for a trustee. If they go too far, they would be ineffective.[125]

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

In absorbing the fiduciary law of trusteeship, the UDTA offers a practical improvement on the existing statutes. Although almost all states treat a trust director as a fiduciary (at least by default), they neglect to specify which kind of fiduciary a trust director is supposed to be. They tend to say that a trust director is a "fiduciary" without saying whether a trust director bears specifically the fiduciary duties of a trus-

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121 UDTA § 8(a)(1).

122 *Id.* § 8(a)(1)(A).

123 *Id.* § 8(a)(1)(B).

124 *Id.* § 8(a)(2).

125 On extended discretion, see UTC § 814(a) (amended 2004); RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c (AM. LAW INST. 2003). On exoneration, see UTC § 1008 (amended 2010); RESTATEMENT (THIRD) OF TRUSTS § 96 (AM. LAW INST. 2012). Of course, the UDTA allows the terms of a trust to impose additional duties on a trust director. *See* UDTA § 8(c).

tee.[126] Most states thus leave open the question of what the fiduciary duties of a trust director will entail and how a settlor, trust director, directed trustee, or judge might discern them.

The UDTA solves these problems by expressly analogizing a trust director to a trustee.[127] The duty of a trust director is the duty of a trustee in a like position and under similar circumstances. The fiduciary duties of trusteeship apply to a trust director, provided that they would apply to a trustee with similar powers under similar circumstances.

Specifically absorbing the fiduciary duties of a trustee offers several advantages. The first is certainty. Under the UDTA, courts and the parties to a trust will not have to guess about which fiduciary law applies to a directed trustee, because the statute expressly absorbs the fiduciary duties of trusteeship. A closely related advantage is that absorbing the fiduciary duties of trusteeship avoids the need to spell out an entire fiduciary law for trust directors in complete detail. By drawing on the fiduciary duties of trusteeship, the UDTA avoids the need to duplicate for trust directors something like Article 8 of the Uniform Trust Code.

Another advantage of absorbing the fiduciary law of trusteeship is to accommodate variation across the states in the particulars of a trustee's default and mandatory fiduciary duties, such as the duties to diversify and to give information to beneficiaries, both of which have become increasingly differentiated across the states.[128] Thus, in a state that allows the terms of a trust to negate a trustee's duty to give information to a beneficiary, the terms of a trust could likewise negate that duty for a trust director.[129] Absorption also allows for changes to the duties of a trustee to be applied automatically into the duties of a trust director. State legislatures will face no need for regular conforming revisions to the UDTA.

2. *Sensitivity to Context*

Although the UDTA absorbs the fiduciary duties of a trustee, those duties apply to a trust director as they would to a trustee "in a like position and under similar circumstances."[130] Rather than treating all trust directors identically, therefore, a court must be sensitive to the peculiar circumstances of each. In some circumstances, applying the fiduciary law

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126 *See, e.g.*, MISS. CODE ANN. § 91-8-1202(a) (1972 annotated) ("A trust advisor or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to the trust advisor or trust protector.").

127 UDTA § 8.

128 *See* SITKOFF & DUKEMINIER, *supra* note 76, at 653–54 (diversification), 681–82 (information).

129 This result obtains under UDTA § 8(a)(2).

130 *Id.* § 8(a)(1).

of trusteeship will require sensitivity to the position of a director who may be required by the terms of a trust to act differently from a conventional trustee. The comment to § 8 gives this guidance: "In assessing the actions of a director that holds a power to modify a trust, . . . a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust's terms and purposes and the director's particular powers."[131] The comment elaborates:

> Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Fiduciary principles are thus amenable to application in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust.[132]

As part of this flexibility and sensitivity to context, the drafting committee contemplated that a settlor could construct a trust director's power to be springing. That is, a trust director's duties could arise at a particular moment, rather than applying continuously, such that the director would not be under a constant obligation to monitor the administration of a trust. By way of example, the comment to § 8 explains that "a settlor could grant a trust director a power to direct a distribution, but only if the director was requested to do so by a beneficiary. A director holding such a power would not be under a duty to act unless requested to do so by a beneficiary."[133]

3. *Exclusions*

Recall that UDTA § 5 excludes certain powers from the scope of the act: a power of appointment, a power to remove a trustee or trust director, a power in a settlor in a revocable trust, a power in a beneficiary that affects only that beneficiary's interest, and a power that must be held in a nonfiduciary capacity to achieve a settlor's federal tax objectives.[134] Because the UDTA does not apply to these powers, the holder of such a power is not a trust director subject under § 8 to the fiduciary duties of a similarly situated trustee.

In addition to these categorical exclusions, UDTA § 8(b) carves out from fiduciary duty and liability under the act a trust director who is a

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[131] *Id.* cmt.

[132] *Id.*

[133] *Id.*

[134] *See supra* Part I.D.

medical professional acting in the professional's capacity as such.[135] For example, a power in a physician to determine a settlor's mental capacity or a beneficiary's sobriety is a power of direction, and the physician is a trust director, but the physician would have "no duty or liability under" the UDTA in exercising this power.

This exclusion should offer significant comfort to doctors and other medical professionals who might be asked by a settlor to exercise a power over a trust and might otherwise "refuse appointment as a trust director if such service would expose the professional to fiduciary duty under this act."[136] Crucially, however, "the professional would remain subject to any rules otherwise applicable to the professional, such as the rules of medical ethics. . . . Moreover, a trustee subject to a direction by a health-care professional is still subject to the duties under § 9 to take reasonable action to comply with the professional's direction and to avoid willful misconduct in doing so."[137]

The exclusion for a medical professional from duty or liability under the UDTA is yet another of the UDTA's many practical innovations. Many existing state statutes have unwittingly created liability risk for family physicians and other actors unintentionally swept into the definition of trust director.[138] The UDTA avoids such overbreadth.

4. *Rules for Charitable and Supplemental Needs Trusts*

The UDTA also addresses "a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law" as well as "a charitable interest in the trust." For these matters, § 7 imposes all the same "rules" that would apply to "a trustee in a like position and under similar circumstances."[139]

This provision counts as yet another practical refinement of the UDTA, one that protects against avoidance of state-level policy limits on trustee action in such a trust. For example, many states require a trustee to give notice to the Attorney General before taking certain ac-

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135 The relevant provision is as follows:

> 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].

UDTA § 8(b).

136 *Id.* § 8 cmt.

137 *Id.*

138 *See, e.g.*, Feder & Sitkoff, *supra* note 91, at 31–32 (noting the typicality of trust provisions naming a physician to determine capacity, quoting Northern Trust formbook as an example).

139 UDTA § 7.

tions with respect to a charitable interest in a trust. Some states also disempower a trustee from taking certain actions with respect to a payback provision in a trust meant to comply with the reimbursement requirements of Medicaid law.

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

5. *Potential for Adaptation*

Although the UDTA makes the duties of a trust director mandatory, the mandatory character of those duties is not central to the UDTA's architecture. The broader structure of the UDTA is also consistent with the desire of some states to make the duty of a trust director into a default.[140] A state that wishes to make the duty of a trust director into a default rule could adapt the UDTA with just a few small modifications.

Modifying the UDTA in this way might be appealing because it would allow a state to benefit from the many practical innovations in the UDTA without compromising on the state's basic policy preferences. There is little else about the UDTA that should be controversial besides the fiduciary liability of a trust director and directed trustee. The many innovations canvassed in Part I in the scope and exclusions of the UDTA, for example, are beneficial no matter how a state wishes to structure the duty of a directed trustee.

B. Directed Trustees (UDTA § 9)

In a directed trust, the trust director is not the only fiduciary at work. A directed trust also includes a directed trustee—and the fiduciary duty of a directed trustee is perhaps the most controversial issue in the law of directed trusts. The duty of a directed trustee has attracted immense debate, because the appropriate level of duty is not obvious.[141] On the one hand, the authority to exercise a power of direction belongs to a trust director, not a trustee. On the other hand, the actions that

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140 *See* UDTA § 8 cmt.; *supra* note 119 and text accompanying.
141 *See supra* note 5 and text accompanying.

make the power of direction effective must often be taken by the trustee. If a director decides to sell trust property, for example, typically it is the trustee, as legal title holder, who must execute the transaction. The question thus arises, what is the fiduciary responsibility, if any, of a directed trustee in taking a directed action?

1. *Existing Standards*

When the drafting committee surveyed the approaches of existing directed trust statutes, a few trends emerged. The first was that the approach of Uniform Trust Code § 808, which has since been withdrawn as superseded by the UDTA, had failed.[142] UTC § 808(b) provided,

> 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.[143]

The failure of this provision, which was an effort to weaken somewhat the common law duties of a directed trustee,[144] is evident in its profound

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142 In April of 2018, the ULC amended the UTC to delete § 808(b) and replace it with a legislative note pointing to the UDTA. *See* UTC § 808 (amended 2018).

143 UTC § 808(b) (amended 2010).

144 On the common law, see Restatement (Third) of Trusts § 75 (Am. Law Inst. 2007) ("[I]f the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries."); Restatement (Second) of Trusts § 185 (Am. Law Inst. 1959) ("If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.").

The prevailing view in practice is that the common law as typified by the Restatements "is not comforting to directed trustees because they must devote resources to ensure that the directing person is not violating the terms of the trust or a fiduciary duty." Nenno, *supra* note 9, at 46 (emphasis removed). Under the common law, "the trustee has a duty to police the actions of the holder of a power in a fiduciary capacity. . . . The trustee has a duty to investigate whether the adviser is violating his duty or breaching the trust. Thus, a trustee should not adopt an attitude of complaisance and patient waiting." Peter J. Brennan, *Trustee and Investment Adviser: Some Dangers and Alternatives in Relationship*, Tr. & Est., Mar. 1961, at 243.

unpopularity. Although § 808(b) remains in force in various states that adopted it as part of a wholesale enactment of the Uniform Trust Code,[145] the UDTA drafting committee found that no state that had undertaken to legislate specifically on the topic of directed trusts had adopted the § 808(b) standard, and many states that had adopted the UTC had altered § 808(b) to provide for a different standard.[146] In other words, every state that had legislated specifically on the duty of a directed trustee had chosen a standard other than that prescribed by UTC § 808(b).

The UTC § 808(b) standard was therefore not a serious contender for the UDTA. Instead, the debate within the UDTA drafting committee centered on two possibilities that had clearly emerged as the main alternatives in the state directed trust statutes.

One alternative provides that a directed trustee has no duty or liability for complying with an exercise of a power of direction. If we read this kind of statute literally, 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 this.[147] For example, if a trust director has a power to sell certain trust property and the director orders the trustee to sell the property to the director's spouse at a bargain price in breach of the director's duty, then under a literal reading of the statutes that impose no duty on a directed trustee, the trustee faces no liability for deeding the property to the director's spouse, even if the trustee knows that the sale is a breach of the director's duty. The states that adopt this no-duty form of statute include Alaska, New Hampshire, Nevada, and South Dakota.[148]

The policy rationale for this first group of statutes is that duty should follow power. If a director has the exclusive authority to exercise

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The drafters of UTC § 808(b) qualified the common law as reflected in the Restatements by adding the terms "manifestly" and "serious." UTC § 808(b) (amended 2010). The official comment to UTC § 808 explains that it was meant to impose "only minimal oversight responsibility on the trustee." *Id.* § 808 cmt. Nevertheless, as received in practice, this provision—specifically the added qualifiers of "manifestly" and "serious"—were feared to offer only illusory protection. "For the most part, UTC § 808(b) . . . is no more helpful to directed trustees than [the] Restatement." Nenno, *supra* note 9, at 46 (emphasis removed).

[145] *See, e.g.*, OR. REV. STAT. § 130.685 (2017); 20 PA. CONS. STAT. § 7778 (2006); TEX. PROP. CODE. ANN. § 114.003 (West 2018).

[146] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10808 (2018); MO. REV. STAT. § 456.8-808(8 (2018); UTAH CODE. ANN. § 75-7-906 (LexisNexis 2018).

[147] There is reason to doubt that courts will read such a statute literally. *See infra* notes 153-154 and accompanying text.

[148] ALASKA STAT. § 13.36.375(c) (2013); NEV. REV. STAT. § 163.5549 (2009); N.H. REV. STAT. ANN. § 564-B:8-808 (2008); S.D. CODIFIED LAWS § 55-1B-2 (2018).

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

In the second group of statutes, a directed trustee is not liable for complying with a direction of a trust director unless by doing so the directed trustee would personally engage in "willful" or "intentional" misconduct. Whether a trustee is liable for selling trust property at a bargain price to a director's spouse, for example, depends on whether the sale would count as "willful misconduct" on the part of the directed trustee. The group of states with a willful misconduct or similar standard includes Delaware, Illinois, Texas, and Virginia.[149]

The policy rationale for the willful misconduct statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a trust director. Although a settlor could have made a trust director the sole trustee, the settlor of a directed trust did not actually do so—and under traditional understandings of trust fiduciary law, a trustee must always be accountable to a beneficiary in some way.[150]

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 decision-maker regarding a power of direction, it is appropriate to reduce the level of a directed trustee's duty below the level that would usually apply to a non-directed trustee to the extent the directed trustee acts subject to a power of direction. Accordingly, under the "willful misconduct" statutes, a beneficiary's main recourse for misconduct by a trust director is an action against the director. But the beneficiary also has recourse against the trustee to the extent that the trustee's compliance with the director's exercise of his powers amounted to "willful misconduct" by the trustee.

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149 Del. Code Ann. tit. 12, § 3313 (2018); 760 Ill. Comp. Stat. 5/16.3(f) (2015); Tex. Prop. Code. Ann. § 114.003; Va. Code Ann. § 64.2-770 (2014).

150 *See, e.g.*, Restatement (Third) of Trusts § 96 cmt. c (Am. Law Inst. 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.").

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

2. *The UDTA's Willful Misconduct Standard*

After extensive debate, the drafting committee opted to follow the second group of statutes. 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).[151] 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."[152] 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. The willful misconduct standard preserves a minimum of duty for a trustee and thus maintains the traditional notion that a trustee is a fiduciary.

The committee also feared that the promise of the no duty statutes might ultimately prove false. Even if a statute provides no fiduciary duty for a directed trustee, a court can almost always find some source of duty otherwise, as judges may resist the notion that a trustee can have zero responsibility with respect to some matter of trust administration. In *Rollins v. Branch Banking & Trust Company of Virginia,* for example, the court found no breach of a duty for a directed trustee's failure to question an investment director's concentration of the trust's portfolio, but the court still held the directed trustee liable for failing to inform the trust's beneficiaries of the risks of the director's concentration.[153] Like many other directed trust statutes, the UDTA specifically disavows the

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[151] UDTA § 9(a).

[152] *Id.* § 9(b).

[153] 56 Va. Cir. 147 (2002); *see also* Jo Ann Howard & Assoc., P.C. v. Cassity, 868 F.3d 637, 647 (8th Cir. 2017) (holding that, although applicable statute contained language that purported to "relieve[ ]" trustee of "all liability regarding investment decisions" by investment advisor, a "trustee always has a duty to ensure that trust assets are invested prudently, whether the trustee is investing the assets himself or monitoring the investment decisions of an investment advisor").

Rollins duty to inform.[154] But the court's resistence to a trustee without fiduciary duty is telling. The committee thus decided that the more honest approach, and possibly the more protective of a directed trustee, was to mandate a willful misconduct standard, rather than inviting judges to search for substitute kinds of duties ad hoc.

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

In adopting a "willful misconduct" standard, the UDTA drafting committee made the further decision not to define the standard. The UDTA therefore does not provide a definition of what "willful misconduct" means. In this regard, the UDTA stands in contrast to Delaware, which provides that "wilful misconduct shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness and 'wrongdoing' means malicious conduct or conduct designed to defraud or seek an unconscionable advantage."[155]

The UDTA drafting committee chose not to define the standard for two main reasons. First, the committee took notice of the great variation in definitions of "willful misconduct" across the states and across legal contexts. Second, the committee concluded that, given that directed trusts vary widely and trust directors' real-world exercises of their powers may vary even more widely, the fleshing out of the meaning of "willful conduct" should be left open for the courts. The drafting committee thus decided to preserve room for judges to elaborate the willful misconduct standard in application—perhaps (but not necessarily) by defining it the same way as Delaware. In choosing not to include an express definition of willful misconduct, the UDTA keeps company with most of the existing state statutes that provide for a willful misconduct or similar standard, which likewise do not provide an express definition.[156] Even Delaware did not define willful misconduct when it first adopted the standard, adding it later and applying it to the use of that standard across its trust code.[157]

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[154] UDTA § 11; *see infra* Part II.D.1.

[155] Del. Code Ann. tit. 12, § 3301(g) (2018).

[156] *E.g.*, Colo. Rev. Stat. § 15-16-807(1) (2015); Utah Code Ann. § 75-7-906(4), 5(b) (LexisNexis 2004); Va. Code Ann. § 64.2-770(E)(2) (2014); Wis. Stat. § 701.0808 (2014).

[157] Delaware adopted the willful misconduct standard for directed trusts in 1994, 69 Del. Laws 279 (1994), and the definition for all uses of the term across its trust code in 2010. 77 Del. Laws 330 (2010).

The UDTA also provides a safe harbor for a directed trustee that is uncertain how the willful misconduct standard applies in a particular situation. In accordance with traditional trust law,[158] § 9(d) provides that "[a] directed trustee that has reasonable doubt about its duty under this section may petition the [court] for instructions."[159] The availability of such relief is limited by the requirement that the trustee's doubt about its duty must be "reasonable"—a trustee cannot petition when its duty is obvious—but the express recognition of a safe harbor for a proper petition for instructions should provide comfort to directed trustees. In providing this safe harbor, the UDTA again innovates on existing state statutes. Delaware, for example, makes no express provision for the right to petition,[160] leaving the matter to background law.

3. *Potential for Adaptation*

The UDTA's fiduciary standard for a directed trustee could be modified in the same way as its standard for a trust director.[161] Although the UDTA adopts a willful misconduct standard, the architecture of the UDTA can be adapted to some other standard of duty, including no duty. Thus, South Dakota, New Hampshire, Nevada or another state that desires no duty for a directed trustee could adapt the UDTA by passing the act as it now stands, with the one alteration of eliminating the willful misconduct standard and replacing it with language that waives a directed trustee's liability entirely.[162]

4. *Reasonable Action*

Although the willful misconduct standard is perhaps the most salient of the UDTA provisions governing the fiduciary duty of a directed trustee, § 9 also contains other important provisions. 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 Section 6(b)(1) and the trustee is not liable for the action."[163] In other words, unless complying with a direction would cause

158 *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 71 (AM. LAW INST. 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.").

159 UDTA § 9(d).

160 DEL. CODE ANN. tit. 12, § 3313.

161 *See infra* Part II.A.5.

162 To clarify, the willful misconduct standard would need to be changed to no duty in both UDTA § 9 and § 10. We discuss § 10 *infra* Part II.C.

163 UDTA § 9(a).

a trustee to engage in willful misconduct, the trustee has an affirmative duty to comply.

This duty to comply depends on context and requires compliance with the terms of the trust. 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 on the trustee a duty to take reasonable action to facilitate the amendment and then comply with its terms.

A trustee's duty to comply is also limited by the scope of the trust director's power of direction. A directed trustee does not have to comply with a direction that is outside of the director's power of direction. Indeed, under § 9(a), the trustee has a duty not to comply, since doing so would breach the trustee's duty to act in accordance with the terms of the trust.[164] For example, a trustee should not follow a direction to make a distribution given by a trust director with a power only over investment. Likewise, an attempt by a director to exercise a power of direction in a form contrary to that required by the terms of the trust, such as an oral direction if the terms of the trust require a writing, is not within the trust director's power and does not require compliance by a trustee.

In addition to imposing a duty to comply with a trust director's valid exercise or nonexercise of the director's powers, UDTA § 9(a) provides a standard for assessing a trustee's compliance. A trustee must "take *reasonable* action" to comply.[165] If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take care to ensure that he or she purchases the security within a reasonable time and at reasonable cost and must refrain from self-dealing and conflicts of interest in doing so.

The duty to take reasonable action thus preserves the conventional duties of trusteeship regarding the execution of a trust director's orders. The duty to take reasonable action does not, however, impose a duty to ensure that the substance of a direction is reasonable. To the contrary, subject to the willful misconduct rule of UDTA § 9(b), a trustee that takes reasonable action to comply with a power of direction is not liable for so acting even if the substance of the direction is unreasonable. In other words, subject to the willful misconduct rule, a trustee is liable only for its own breach of trust in the ministerial execution of a direc-

[164] *See, e.g.*, UTC § 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 (AM. LAW INST. 2007) ("The trustee has a duty to administer the trust . . . in accordance with the terms of the trust.").

[165] UDTA § 9(a) (emphasis added).

tion, 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 (i) to exercise reasonable care in discerning whether the direction to purchase the security was within the director's power, and (ii) to employ reasonable care in executing the purchase at a reasonable price, time, and manner, unless by doing so the trustee would engage in willful misconduct.

The affirmative duty to comply and the reasonability standard for execution in compliance both count as major practical innovations in the UDTA that improve substantially on existing statutes. The Delaware statute, for example, neglects to impose an affirmative duty of compliance, leaving some doubt about whether a trustee even has a duty to comply with a director's direction.[166] More worrisome, a literal reading of the Delaware statute would suggest that a directed trustee does not have to act reasonably even when it chooses to comply. Under the Delaware statute, a trustee might not face any liability for its own negligence in executing a direction, so long as the negligence does not rise to willful misconduct. A trustee who unreasonably delays in executing a trust director's order to sell property, for example, would arguably not be liable so long as the delay was merely negligent or imprudent, rather than willful.[167] The UDTA's solution of requiring a trustee to take reasonable action is thus intent-implementing. Manifestly, a settlor would not want an appropriately exercised power of direction to be undermined by a trustee's sloppy execution.

5. *Limits on a Power to Release a Trustee From Liability*

The UDTA offers yet another practical innovation in the form of the limits it imposes on a trust director's power to release a trustee from liability. Because a power of direction can include any "power over a

166 *See* DEL. CODE ANN. tit. 12, § 3313 (2018). The duty to comply would have to be found in the background rule of trust law that a trustee must administer the trust in accordance with its terms. *See supra* note 164 and text accompanying.

167 Delaware provides that "If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act." DEL. CODE ANN. tit. 12, § 3313(b). One could arguably read a duty of reasonable action into the phrase "in accordance with such a direction," by saying that a trustee who executes a direction negligently is not acting "in accordance" with the direction. But this puts considerable pressure on vague statutory language that was probably not designed to bear it.

trust,"[168] one possible form of a power of direction is to empower a director to release a trustee or another director from liability for acts done in the past or the future. Such a power, although apt in some circumstances, is nevertheless vulnerable to manipulation and abuse. Suppose, for example, a trustee lies to a trust director to induce the director to release the trustee from liability. Should such a release be effective?

To address these problems, UDTA § 9(c) provides that a power to release a trustee or another trust director from liability for breach of trust is not effective under three circumstances: "(1) the breach involved the trustee's or other director's willful misconduct; (2) the release was induced by improper conduct of the trustee or other director in procuring the release; or (3) at the time of the release, the director did not know the material facts relating to the breach." The drafting committee based the second and third of these safeguards on Uniform Trust Code § 1009.[169] These two provisions thus apply to a release given by a trust director the same safeguards applicable to a release given by a beneficiary. The first limit is an innovation of the UDTA. Consistent with the mandatory minimum duty of a directed trustee under § 9(b) to avoid willful misconduct, § 9(c)(1) prohibits release by a trust director of a trustee or other director for willful misconduct.

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

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

Most existing directed trust statutes ignore this problem, making it a source of litigation.[170] Although many states have provisions that gov-

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[168] UDTA § 2(5).

[169] UTC § 1009 is consistent with prevailing common law and similar in substance to RESTATEMENT (THIRD) OF TRUSTS § 97 (AM. LAW INST. 2012).

[170] In *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013), for example, a trustee with authority to make distributions sued to force directors with authority over investments to

ern communications between a directed trustee and a beneficiary, few states make any provision for communications between a trustee and a trust director.[171] Delaware and South Dakota, for example, are silent on the issue, leaving courts and parties to guess at what a director's and a trustee's duties to share information might be—or else to assume that a director and a trustee have no duties to share information. Illinois provides that a director has a duty to communicate with a trustee, but not that a trustee has a duty to communicate with a director.[172]

Silence on the issue of trustee-trust director communication is not a workable solution, because background trust fiduciary law does not solve the problem. The generic declaration in many statutes that a trust director is a fiduciary is insufficient, because these statutes say nothing about what exactly a trust director's fiduciary duty entails. There is no precedent that would read a duty to share information into the broad declaration that a trust director is a "fiduciary." Additionally, even if these statutes imply something about the duty of a trust director, they say nothing about the duty of a trustee. The law of trusts has not traditionally imposed a duty on a trustee to share information with a fiduciary other than a cotrustee, so in the absence of a statute, it is not obvious whether a trustee even has such a duty. The UDTA's strategy in § 8 of applying the duties of a similarly situated trustee to a trust director does not solve the problem either, because as just noted the duties of a trustee did not historically include a duty to communicate with a fiduciary other than a cotrustee.

1. *The UDTA Solution*

The problem of trustee-trust director communication thus requires a special rule. UDTA § 10(b) provides that a trust director "shall provide information to a trustee or another trust director to the extent the information is reasonably related both to: (1) the powers or duties of the director; and (2) the powers or duties of the trustee or other director."[173] Section 10(a) imposes a similar duty on a directed trustee to share information with a trust director.

These mirror-image duties to share information mandate the sharing of just enough information, balancing each fiduciary's need for infor-

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liquidate investments to raise cash for distribution. The dispute involved, among other things, questions over how much information the investment directors had to share with the trustee.

171 The Colorado statute is an exception. It requires a trustee and trust director to share information with each other under certain circumstances. *See* Colo. Rev. Stat. § 15-16-806(1)-(2) (2014).

172 *See* 760 Ill. Comp. Stat. 5/16.3(h) (2015).

173 UDTA § 10(b).

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

2. *Affirmative and Responsive Duties to Inform*

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

3. *Safe Harbor for Reliance on Information*

UDTA § 10 also provides safe harbors for trust directors and trustees who act in reliance on information provided to them by another trust fiduciary under that section.[174] The safe harbors only apply, however, if the trustee or trust director who relies on the information is not engaged in willful misconduct. For example, § 10(c) protects a trustee if the trustee acts in reliance on a trust director's valuation of an asset, unless by accepting the valuation the trustee would engage in willful misconduct. As in § 9, the rationale for the safe harbor and willful misconduct limit is to implement a settlor's division of labor between a trustee and director, subject to a mandatory fiduciary minimum.

174 *Id.* § 10(c)–(d).

4. *Duty to Inform Beneficiaries*

The duty in UDTA § 10 governs disclosure of information among trustees and trust directors. It does not govern disclosure to a beneficiary by a trustee or a trust director. The duty of a directed trustee to inform a beneficiary is governed principally by the background trust fiduciary law of an enacting state.[175] The duty of a trust director to inform a beneficiary is governed principally by UDTA § 8, which as we have seen prescribes the fiduciary duties of a trust director. However, the duties of both a trustee and a trust director to inform a beneficiary are limited by UDTA § 11, to which we turn next.

D. Cross-Monitoring (UDTA § 11)

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

1. *No Duties to Monitor, Inform, or Advise*

As discussed above, in *Rollins v. Branch Banking & Trust Company of Virginia*,[176] the court considered the fiduciary liability of a trustee who was subject to direction in investment. The court declined to hold the trustee liable for the investment director's failure to direct diversification of the trust's investments. But the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director's failure. As *Rollins* illustrates, a directed trustee might discover a director's misconduct before a beneficiary does. If a trustee has a duty to share this information with the beneficiary—to inform a beneficiary that the trustee disagrees with a director's choices—that duty could become a backdoor for undoing the limitation on a directed trustee's fiduciary responsibility under UDTA § 9.

After *Rollins*, many states enacted fixes to their directed trust statutes to relieve a directed trustee from liability for a *Rollins*-like failure to warn a beneficiary. Following these statutes, the UDTA offers its own form of relief. UDTA § 11(a) provides that "a trustee does not have a duty to . . . monitor a trust director . . . or . . . inform or give advice to a

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[175] *See, e.g.*, UTC § 813(a) (amended 2004); Restatement (Third) of Trusts § 82 (Am. Law Inst. 2007). Such law is expressly preserved by UDTA § 4.

[176] 56 Va. Cir. 147 (2002); *see supra* note 153 and text accompanying.

settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director."[177] Section 11(b) provides a mirror-image rule for a trust director, relieving a director of a duty to monitor, inform, or give advice to others about the conduct of a trustee or other trust director.

This provision offers significant practical improvements on similar provisions in the existing directed statutes. Unlike many existing statutes, UDTA § 11 covers both trustees and trust directors. Many statutes relieve a trustee of a duty to monitor a trust director, but say nothing about whether a director has a duty to monitor a trustee. Additionally, the language in UDTA § 11 is clearer and more concise than many state statutes, cutting through unnecessary and imprecise verbiage to state the point directly.[178]

2. *Survival of General Duty of Disclosure*

Although UDTA § 11 confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director, § 11 does not relieve a trustee of its ordinary duties to disclose, report, or account under otherwise applicable law.[179] The same is true for a trust director, on whom UDTA § 8(a) imposes the fiduciary duties of a similarly situated trustee.

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[177] UDTA § 11(a).

[178] The Alaska statute, for example, provides that "the trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of a power of the trustee if the exercise of the power complies with the directions given to the trustee." ALASKA STAT. § 13.36.375 (2017). Taken literally, this language fails to relieve a trustee from liability for actions of a trust director that do not require action by a trustee. If, for example, a trust director exercises a power to amend a trust, the statute would not relieve the trustee for failing to advise the beneficiaries about the amendment, because by its terms the statute only covers "the exercise of a power of the trustee" and not the exercise of an independent power of the director that requires no action by the trustee. The Alaska statute also fails to cover nonexercises (as distinct from exercises) of the powers of a director or trustee, with the result that it would not have covered even the *Rollins* case.

Similarly, the Nevada statute provides,

> A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser.

NEV. REV. STAT. § 163.5549(2) (2015). This language covers only investments, with the result that it does not relieve a trustee from liability for failing to inform beneficiaries about the myriad other powers a director might hold, such as the power to direct distributions or to value trust property.

[179] *See, e.g.*, UTC § 813 (amended 2004); RESTATEMENT (THIRD) OF TRUSTS § 82 (AM. LAW INST. 2007).

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

3. *No Assumption of Duty*

In addition to waiving a directed trustee's duty to monitor, inform, or give advice as under UDTA § 11, many state directed trust statutes go further and also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these activities will be deemed to be "administrative actions."[180] 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 eschewing the opacity of the term "administrative actions" in favor of an express provision that if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume a duty to do so. Section 11(b)(2) applies the same rule to a trust director.

III. Adapting the Subsidiary Rules of Trusteeship

In addition to addressing fiduciary duty, the UDTA also addresses a variety of subsidiary, non-fiduciary matters. In so doing, the UDTA sigificantly improves on existing statutes. Although almost all existing directed trusts pay some attention to fiduciary duties, none provides a comprehensive treatment of the many subsidiary matters that can arise in a directed trusteeship. The appointment, succession, and vacancy of a trust director, as well as the defenses available to the director and applicable limitations period for litigation against the director, are generally not addressed. Other important matters such as compensation of the director likewise receive no mention.

The UDTA, by contrast, foresees these problems and addresses them. It provides a comprehensive system of rules to address for a trust director all of the same matters that the subsidiary rules of trusteeship address for a trustee. The UDTA achieves this comprehensive treatment by employing the same concept it employs in providing fiduciary duties: it adopts the law of trusteeship. In a wide variety of subsidiary areas,

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180 *See, e.g.*, Del. Code Ann. tit. 12, § 3313(e) (2018).

like acceptance, compensation, succession and defenses, the UDTA applies to a trust director the same rules that would apply to a trustee in a like position and similar circumstances. At the same time, the UDTA takes care to adopt the law of trusteeship in a manner sensitive to the distinctive needs of trust directors.

A. Rule of Decision for Jointly Held Powers of Direction

The first important subsidiary matter involves a rule of decision when a trust director holds its powers jointly with another trust director. Following the prevailing rule of majority action for cotrustees,[181] UDTA § 6(b)(2) provides a default rule of majority action for "trust directors with joint powers."[182] Thus, for example, a three-person committee with a power of direction over investment or distribution would act by majority decision unless the terms of the trust provided otherwise.[183]

B. Office of Trust Director

UDTA § 16 applies to the office of trust director, as it were, a wide variety of rules that apply to the office of trustee. The UDTA, in other words, systematically adopts for a trust director the many mechanical rules for a trustee that appear in Article VII of the Uniform Trust Code, including acceptance,[184] bond,[185] reasonable compensation,[186] resignation,[187] removal,[188] and vacancy.[189] Section 16 provides that regarding each of these matters, "[u]nless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director."[190]

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181 *See* UTC § 703(a) (2010); Restatement (Third) of Trusts § 39. The comment to UDTA § 6(b)(2) clarifies that the drafting committee assumed that in the event of a deadlock among trust directors with joint powers, by analogy to a deadlock among cotrustees, a court could "direct exercise of the [joint] power or take other action to break the deadlock." Restatement (Third) of Trusts § 39 cmt. e.

182 UDTA § 6(b)(2).

183 The duty and liability of a trust director is governed by UDTA § 8, which applies the fiduciary duty of trusteeship to a trust director. Under UDTA § 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.

184 *See, e.g.*, UTC § 701(a)–(b); Restatement (Third) of Trusts § 35.

185 *See, e.g.*, UTC § 702(a)–(b); Restatement (Third) of Trusts § 34(3) (Am. Law Inst. 2003).

186 *See, e.g.*, UTC § 708; Restatement (Third) of Trusts § 38 cmt. i.

187 *See, e.g.*, UTC § 705 (amended 2001); Restatement (Third) of Trusts § 36.

188 *See, e.g.*, UTC § 706; Restatement (Third) of Trusts § 37 cmt. e.

189 *See*, e.g., UTC § 704 (amended 2004); Restatement (Third) of Trusts § 31 cmt. a.

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

The UDTA drafting committee, however, took note that a trust director and a trustee can sometimes differ in important ways. As a practical matter, therefore, a court will have to be thoughtful about extending the rules of trusteeship to a trust director, because the circumstances of a trust director are often (though not always) different from the circumstances of a trustee.

For example, UDTA § 16(1) adopts for a trust director the same law that applies to a trustee regarding acceptance of appointment. Whether a trust director has accepted an appointment is thus determined by the same principles that determine whether a trustee has accepted appointment. A trustee, however, is expected to participate actively in the administration of the trust. At a minimum, a trustee must hold title to trust assets, which often forces the trustee to take some sort of action almost immediately. A trustee is therefore usually capable of signaling acceptance by conduct.[191] Even if the trustee has not expressly accepted appointment, the trustee may signal acceptance by actions alone.

The challenge in applying UDTA § 16(1), therefore, is that not every trust director may take action quickly like a trustee. Some trust directors may not take any action for long stretches of time, if ever. A director with a power to determine a settlor's competence may not act for years or even decades. When a trust director delays acting in this way, perceiving acceptance by conduct may become difficult.[192] A court must therefore apply the law of trustee acceptance sensitively, discerning what would be appropriate given the circumstances. Another example of the divide between a trustee and a trust director is a bond to secure performance under § 16(2). In the usual case, a trust director would not have custody of the trust property, making a bond typically inappropriate for a trust director.

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

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[191] *See, e.g.*, UTC § 701(a)(2); RESTATEMENT (THIRD) OF TRUSTS § 35(1) (AM. LAW INST. 2003).

[192] UDTA § 16(1) cmt.

eral 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.

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 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 and continuously in the administration of the trust. At the same time, the state might take the occasion of enacting the UDTA to abandon statutory commissions for trustees too, as the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed.[193]

C. Litigation Issues

As we have seen, the UDTA imposes on a trust director the fiduciary duties of a trustee "in a like position and under similar circumstances."[194] The drafting committee thus contemplated that a breach of those duties by a trust director would be a breach of trust,[195] and that existing law governing standing to enforce a trust would resolve the

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193 An apt analogy is to a trustee that hires others to "render services expected or normally to be performed by the trustee." The compensation of such a trustee ordinarily declines in proportion to the trustee's diminished responsibilities. RESTATEMENT (THIRD) OF TRUSTS § 38 cmt. c(1); *see also* UNIF. PRUDENT INV'R ACT § 9 cmt. (UNIF. LAW COMM'N 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.").

194 UDTA § 8, discussed *supra* Part II.A.

195 UDTA § 2(1) confirms expressly in blackletter that the term "'breach of trust' includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this [act], or law of this state other than this [act] pertaining to trusts." Furthermore, UDTA § 15 confirms that "by accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director." Several existing state directed trust statutes contain a similar provision, *see, e.g.,* COLO. REV. STAT. § 15-1-1105; GA. CODE. ANN. § 53-12-345 (2010); IDAHO CODE § 15-7-501(1) (2007); 760 ILL. COMP. STAT. 5/16.3(g) (2015); MICH. COMP. LAWS § 700.7809 (2010); MINN. STAT. § 501C.0808 (2016); MO. REV. STAT. § 456.8-808(11) (2018); NEV. REV. STAT. § 163.5555 (2009); N.H. REV. STAT. ANN. § 564-B:12-1203 (2017); WIS. STAT. § 701.0202 (2014), which is familiar from law of trusteeship, *see, e.g.*, UTC § 202(a).

question of who could bring an action for redress against the director.[196] But what of limitation periods and defenses? The UDTA's answers to these questions counts as another practical improvement on most existing directed trust statutes.

With respect to limitation periods, UDTA § 13 absorbs the rules that would apply to a trustee in a like position and under similar circumstances. Thus, subsection (a) applies to a trust director any statutory limitation rule enjoyed by a trustee, and subsection (b) applies to a trust director any rule of repose or limitation arising from a report or accounting to the beneficiaries.[197] However, subsection (b) is phrased so that it applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of the director's conduct.

With respect to defenses in an action for breach of trust, UDTA § 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 to § 14 confirms that such defenses could include laches or estoppel;[198] consent, release, or ratification by a beneficiary;[199] reasonable reliance on the terms of a trust;[200] and reasonable care in ascertaining the happening of an event affecting administration or distribution.[201]

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

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196 *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 94 (AM. LAW INST. 2012).

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

198 *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 98 (AM. LAW INST. 2012).

199 *See, e.g.*, UTC § 1009 (amended 2001); RESTATEMENT (THIRD) OF TRUSTS § 97(b)–(c).

200 *See, e.g.*, UTC § 1006; UNIF. PRUDENT INV'R ACT § 1(b) (UNIF. LAW COMM'N 1994).

201 *See, e.g.*, UTC § 1007; RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. f. As observed above, *see supra* note 125 and text accompanying, the UDTA also separately absorbs the law governing a trustee's exoneration and exculpation. Section 8(a) 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." UDTA § 8(a).

the exercise or nonexercise of a power of direction granted to the director."[202] By default, therefore, a trust director would have a power to incur and be indemnified for attorney's fees and other expenses "appropriate" to the exercise of the director's expressly granted powers. Such a direction would normally be appropriate if a trustee in a like position and under similar circumstances would be entitled to indemnification of costs and expenses.

IV. Reconciling Cotrusteeship

The final stop on our tour through the UDTA is the reconciliation in § 12 of the law of cotrusteeship with the broad settlor autonomy recognized by the UDTA for a directed trust.

A. Traditional Law

The traditional understanding of cotrusteeship is that it is a safeguard imposed by the settlor. The beneficiaries are protected against trustee misconduct by the presence of multiple trustees. As one Scots judge put the point in 1897,

> It is, of course, disagreeable to take a cotrustee by the throat, but if a man undertakes to act as trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs, in letting things slide and losing money rather than create ill feeling.[203]

A complex web of default and mandatory rules, much of which persists in today's law, reflects this understanding of cotrusteeship as a beneficiary safeguard. On the powers side, under traditional law the default rule was that cotrustees were required to act unanimously.[204] Under modern law, the default rule is that multiple trustees may act by majority, unless there are only two, in which case they may act unanimously.[205] Under both rules of construction, a single trustee does not have the power alone to transfer or otherwise deal with the trust property.[206]

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[202] UDTA § 6(c)(1), discussed *supra* Part I.C.

[203] Sitkoff & Dukeminier, *supra* note 76, 611 n.37 (quoting Miller's Trustees v. Polson, (1897) SC 1038, 1043 (Scot.)).

[204] *See* Sitkoff & Dukeminier, *supra* note 76, at 610–11.

[205] *See, e.g.*, UTC § 703(a) (amended 2001); Restatement (Third) of Trusts § 39 (Am. Law Inst. 2012).

[206] *See* Sitkoff & Dukeminier, *supra* note 76, at 610–11.

On the duties side, the default rule is that each cotrustee is under a duty to participate actively in the administration of the trust.[207] Each cotrustee has the right to receive information about the administration of the trust.[208] And the modern authorities are uniform in recognizing a duty in each cotrustee "to use reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress."[209] This duty to prevent or seek redress for a cotrustee's breach of trust applies even if the settlor limits the role or function of one of the cotrustees. The Restatement (Third) of Trusts explains: "Even in matters for which a trustee is relieved of responsibility, . . . if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct."[210] 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."[211]

B. Cotrusteeship Under the UDTA

The foregoing 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 gave considerable attention to reconciling the law of cotrusteeship with the new law of directed trusts. The committee's aim was to avoid disrupting existing trust practice while bringing to cotrusteeship the broad settlor autonomy recognized by the UDTA for a directed trust.

1. *Law of Cotrusteeship by Default*

The UDTA preserves the distinction between a directed trust and a cotrusteeship. Under the UDTA, a "power of direction" cannot be held by a person while the person is serving as a trustee, nor can a person be

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207 *See, e.g.*, UTC § 703(c); Restatement (Third) of Trusts § 81(1) cmt. c.

208 Restatement (Third) of Trusts § 81 cmt. b.

209 *Id.* § 81(2); *see also* UTC § 703(g).

210 Restatement (Third) of Trusts § 81 cmt. b. The duty to take reasonable steps to prevent or redress a breach of trust by a cotrustee in UTC § 703(g) is not expressly made mandatory by UTC § 105(b). However, § 105(b) does make mandatory a cotrustee's duty "to act in good faith." And in most cases, good faith would require a cotrustee to take reasonable steps to prevent or redress another cotrustee's breach of trust even if the terms of the trust limit the cotrusee's sphere of responsibility. This construction of §§ 105 and 703 is supported by the framing of UDTA § 12 as enabling a weakening of a cotrustee's cross-monitoring duty, and by the subsequent 2018 amendment to § 703(g) to make it "[s]ubject to" UDTA § 12. UTC § 703(g) (amended 2018).

211 Restatement (Third) of Trusts § 81 cmt. b (Am. Law Inst. 2007).

a "trust director" while the person is serving as a trustee.[212] In consequence, a cotrustee with a power to direct another cotrustee is not a trust director, and the other cotrustee is not a directed trustee. Instead, relations between multiple trustees remain subject by default to the law of cotrusteeship.

2. *Authorizing Opt Out from Traditional Cotrusteeship Law*

Under the UDTA, however, a settlor may opt out of the default law of cotrusteeship, and instead subject cotrustees to the more permissive fiduciary rules of a directed trusteeship as prescribed by §§ 9, 10, and 11. The drafting committee reasoned that, because a "settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee," there was little reason not to allow the settlor to apply "the fiduciary rules of [a directed trust] to a cotrusteeship."[213] To this end, UDTA § 12 provides,

> The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under Sections 9 through 11.[214]

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

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212 UDTA § 2(5), (9).

213 *Id.* cmt. The drafting committee also took note of similar provisions in Alaska, Florida, and North Carolina. ALASKA STAT. § 13.36.072(c) (2013); FLA. STAT. § 736.0703(9) (2014); N.C. GEN STAT. § 36C-7-703(g1) (2005). After Section 12 was in draft form, Delaware and New Hampshire adopted similar provisions. DEL. CODE ANN. tit. 12, § 3313A (2018); N.H. REV. STAT. ANN. § 564-B:7-711(c) (2017).

214 UDTA § 12. The legislative note gives instructions for revising UTC § 703 to conform with this provision, and the Uniform Law Commission has since revised UTC § 703 to make it subject to the UDTA. *See supra* note 210. The comment to UDTA § 12 also explains that it applies only "to a cotrustee that takes direction," akin to a directed trustee, and not the duties of a cotrustee that gives direction, akin to a trust director, because under UDTA § 8 the duties of a trust director are those of a similarly situated trustee.

manding rules for a directed trustee under § 10 for information sharing and § 11 for cross-monitoring.

3. *A Question of Construction*

Whether the traditional law of cotrusteeship or the more permissive rules of a directed trust apply to a particular cotrusteeship is a question of construction.[215] The default rule is that the traditional law of cotrusteeship applies. But if the terms of the trust manifest a contrary intent, under § 12 the reduced fiduciary duties of a directed trusteeship will apply instead.

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

Under traditional law, in spite of such a provision, the cotrustee who does not exercise a controlling power would remain under a duty to take reasonable steps to prevent a breach by the controlling cotrustee. Under the UDTA, by contrast, the noncontrolling cotrustee would be liable only for its own willful misconduct, and would not be otherwise responsible for the actions of the controlling cotrustee.[216] In other words, the controlling cotrustee would be treated like a trust director, and the noncontrolling cotrustee would be treated like a directed trustee.

4. *Title Holding and Third Party Rights*

The change in the law of cotrusteeship effected by the UDTA pertains only to fiduciary governance within the trust. The UDTA "does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee."[217] The official comment elaborates thus:

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[215] Nothing in UDTA § 12 requires an express reference to that provision to invoke the rule prescribed by it. UDTA § 12 cmt.

[216] Recall, however, that under UDTA § 3(a) the act applies to a trust created before the effective date of the act, but only as to a decision or action occurring on or after that date.

[217] UDTA § 12 cmt.

> 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.[218]

Instead, the UDTA changes only "the degree to which the terms of a trust may reduce a cotrustee's duty and liability."[219]

Conclusion

The UDTA addresses the key difficulties in a directed trust more comprehensively, more effectively, and more simply than existing directed trust statutes. The UDTA draws the scope of its application with care and precision and offers sensitive and thorough rules to govern the fiduciary duties of both a trust director and a directed trustee. The UDTA offers the first comprehensive treatment of the many matters of trust administration in a directed trust that go beyond fiduciary duties, such as acceptance, compensation and defenses. And the UDTA provides a simple update to the traditional law of cotrusteeship by permitting a settlor to apply to cotrustees the same flexible scheme of fiduciary duties that applies to a trust director and a directed trustee.

Although some state legislatures might disagree with some of the policy choices in the UDTA—especially with regard to the fiduciary duties of a directed trustee and trust director—the UDTA is nevertheless appropriate for enactment in every state. The UDTA offers many practical innovations that could benefit every state, and the small elements of policy disagreement between the UDTA and enacting states can easily be addressed by appropriate modifications to the UDTA. Practitioners drafting trusts not governed by the UDTA might benefit from the UDTA by consulting it as a source of model provisions and as a guide to the key issues posed by a directed trust.

Many centuries of legal development have placed the trustee at the center of a trust and its administration. Then came directed trusts. With the promulgation of the UDTA, the law of trusts is catching up to the rise of flexible, multi-party trust administration by trustees in concert with trust directors.

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218 *Id.*
219 *Id.*