



MEMORANDUM

From: Robert H. Sitkoff, Chair
Turney Berry, Vice-Chair
John D. Morley, Reporter

To: Members, Advisors, and Observers
Drafting Committee for an Act on Divided Trusteeship

Re: First Meeting (October 23-24, 2015)

Date: October 2, 2015

This memo provides an overview of the materials circulated for our second drafting session, to be held on Friday and Saturday, October 23-24, 2015, in Washington, DC. It also provides a brief overview of important changes to the “discussion draft” of our act since the last meeting and several further issues for discussion.

This meeting will be the second of what is planned to be five in-person drafting sessions. We are scheduled to meet again in Spring 2016, Fall 2016, and Spring 2017. After the Spring 2016 meeting, we will read the then-current draft of our act at the Annual Meeting of the Uniform Law Commission in Summer 2016. After the Spring 2017 meeting, we will read the proposed final version at the Annual Meeting in Summer 2017, at which the Commissioners will be asked to approve the act. We have the option of scheduling conference calls between in-person meetings if we think such a call would be efficacious to work on a discrete issue or otherwise. Particularly at our earlier meetings, the primary goal will be to resolve core questions of policy and statutory structure.

Accompanying this memo is a second “discussion draft” of our act. In addition, we are circulating two appendices:

(a) a collection, we believe comprehensive, of non-trustee powers provisions drawn from existing state statutes (“Appendix A”), a repeat of the same appendix from the materials circulated for the prior meeting; and

(b) a schedule of provisions from existing divided trusteeship statutes that limit the powers that may be given to a trust director (“Appendix B”), which will figure in our discussion of Section 6.

The discussion draft again contains both blackletter text and extensive discussion notes, the latter in lieu of comments at this early stage, although quite a few of the discussion notes read like comments and will be easily adaptable for that purpose. With this draft we now have blackletter for every section, reflecting the need to transition in this meeting and the next from discussion of policy and statutory design to specific implementation with concrete statutory language. Section 12 includes two alternate formulations (“Alternative A” and “Alternative B”). All provisions are “on the table” for discussion at the upcoming meeting, and the discussion may include reversals of previous policy decisions.

The remainder of this memo augments the discussion notes embedded within the draft by flagging several of the most important issues as well as a few issues that did not lend themselves to treatment by discussion note.

1. *Sequential section numbers; collapsed articles.* To bring the major policy issues into sharper relief and for overall didactic clarity, the discussion draft for the prior meeting was organized across five separate articles. In this draft, we have collapsed those separate articles so that the text of the statute now spans sequential section numbers from Section 1 through Section 20. Putting to the side the strong style preference within the Uniform Law Commission for sequential section numbers rather than articles, this reorganization allowed us to collapse several related and overlapping provisions, resulting in a simplified overall product. In general, simpler acts have more enactment success than more complicated ones. To facilitate comparison with the prior draft, the discussion note to each section opens with a pointer to the corresponding section in the prior draft.

2. *Powers of trust protector.* In accordance with the consensus at the prior meeting, this draft continues to follow an “enabling” rather than “off-the-rack” design. It allows settlors to name a trust director, but does not specify much about what exactly a director can do. The enabling nature of this draft is most evident in Section 5, which provides a schedule of the kinds of powers that may be given to a trust director. Under Section 5, a trust director has only those powers that are expressly granted to the director (Subsection (a)) plus such further powers as are “appropriate” to the exercise of the director’s expressly granted powers (Subsection (b)). The settlor’s autonomy in giving a trust director powers over the trust or its administration is limited, however, by Section 6, which restricts the permissible powers of a trust director as they relate to charitable trusts, certain tax planning objectives, and special needs trusts. The suitability of these limits and whether the act should prescribe them at all are open questions for discussion. So too is the key question of whether there are additional kinds or types of powers that a settlor might want to give a trust director that are not encompassed by Section 5.

3. *Categorization of powers.* A major innovation in this draft, following the rough consensus at the prior meeting, is to categorize the types of powers that may be given to a trust director as falling into one of three categories: (i) powers of direction, (ii) powers of protection, and (iii) powers of consent. The rationale is functional. Categorization allows us to prescribe different rules by category of power for the duties of the trust director (see Section 8), and for the powers and duties of a directed trustee (see Sections 7 and

9). An important issue for discussion, therefore, is whether this categorization strategy is viable, and if so, whether the categorization in the current draft is suitable or requires further refinement. Several existing state statutes use similar categories, but they do so by classifying types of directors, rather than types of powers, and they tend to bundle powers together by default as part of an off-the-rack design. We believe that our approach is simpler and clearer. This issue is flagged for further discussion in the notes to Section 5.

4. Fiduciary governance for divided trusteeship. This draft implements a simple but principled model of powers and duties (i.e., fiduciary governance) in a divided trusteeship. Fiduciary duty, and so fiduciary liability exposure, follows power. Thus, if a trust director has the relevant power (Section 5), and the trustee is disempowered (Section 7), then the director bears the corresponding fiduciary obligation to the beneficiaries (Section 8), and the trustee is exonerated (Section 9). Likewise, if a trustee has the relevant power (through Section 7 or the background law of trusts, which is imported by Section 4), then the trustee bears the corresponding fiduciary obligation to the beneficiaries (through Section 9 or the background law of trusts through Section 4). This structure of power and duty in a divided trusteeship is functional in nature and is consistent with the sample instruments provided to us before and after the last meeting. More fundamentally, it is an adaptation for divided trusteeship of the “basic principle of trust administration” that “a trustee presumptively has comprehensive powers to manage the trust estate and otherwise to carry out the terms and purpose of the trust, but that all powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee’s fiduciary obligations.” Restatement (Third) of Trusts §70 cmt. a (2007).

5. Implementation particulars. Beneath the foregoing neat statement of the act’s fiduciary governance structure rests a host of difficult questions and problems in implementation. For example, what should be the powers and duties of a directed trustee in the event of a vacancy in the trust directorship? The current draft tackles that question in Sections 2(7), 7, and 9. The discussion notes throughout the draft remark upon this and many other such questions and problems.

6. No duty in a directed trustee to evaluate a trust director’s compliance with the director’s duties. Among the implementation issues, we call to your attention in particular the rule under Section 9 that a trustee is generally not liable for complying with an instruction from a trust director that is within the director’s powers whether or not the instruction is consistent with the director’s duties. For example, if a trust director gives an instruction that is within its power of direction, the trustee is obligated to “act in accordance with the direction” but “is not liable for so acting.” Under this draft, as under a substantial number of existing statutes, the locus of beneficiary safeguard against an imprudent or disloyal direction is the duties of the trust director under Section 8 rather than the duties of the trustee.

7. Further specification in mechanical provisions. The prior draft included two short sections that absorbed existing state law applicable to a trustee to provide rules for limitations periods and defenses in an action against a trust director as well as for ac-

ceptance, bond, compensation, resignation, removal, and vacancy. This strategy of simple absorption was criticized at the last meeting as being insufficiently detailed and therefore difficult to apply in individual cases. This draft supplies more details in Sections 12-13 and 15-16.

8. *Cotrustee as trust director; cotrustee as directed trustee.* In accordance with the consensus at the last meeting, we have assimilated cotrustees into the design of this act. Under this draft, if a settlor gives a cotrustee a power of direction, power of protection, or power of consent over another cotrustee, then the cotrustee holding the power is a “trust director” and the cotrustee that is subject to the power is a “directed trustee.” In such circumstances, the rules of this act apply rather than the more restrictive rules of existing law such as under Uniform Trust Code §703(g) (2000) and Restatement (Third) of Trusts §81 (2007).

9. *Cotrustees included by definition.* The foregoing result for cotrustees follows from our reworking of the relevant definitions in Section 2. First, because in Section 2(6) “trustee” is defined to include a cotrustee, and because in Section 2(1) the definition of a “directed trustee” uses the term “trustee,” a cotrustee may be a directed trustee. Second, because the definition of a “trust director” in Section 2(5) no longer excludes a trustee (“whether or not the person is also a trustee”), one cotrustee can be subject to another cotrustee’s power of direction, power of protection, or power of consent under Section 5. Assimilation of cotrustees in this manner obviates the need for a separate provision on the matter.

10. *Presumptive application to cotrustees in the event of a power of direction, power of protection, or power of consent?* An important issue for discussion, not otherwise flagged in the discussion notes because there is no section on cotrustees in particular, is whether our method of assimilating cotrustees is consistent with the typical settlor’s intent. Under this draft, the rules prescribed by this act for a trust director and a directed trustee apply by default to cotrustees if the settlor subjects a cotrustee to what under Section 5 is a power of direction, power of consent, or power of protection in another cotrustee. The conjecture underpinning this design is that, by subjecting a cotrustee to such a power in another cotrustee, the settlor probably intended an allocation of powers and duties more in line with this act than the common law of cotrusteeship. This conjecture is contestable, however, especially as regards older trusts drafted long ago. An alternative solution would be to subject cotrustees to this act only if the settlor subjects a cotrustee to a power of direction, power of consent, or power of protection in another cotrustee and expressly invokes the act (contra Section 3(a)).

11. *Clarifying the default or mandatory character of each provision.* In scattered discussion notes we have a remark that a particular provision is mandatory or states a default rule that is subject to override by the settlor in the terms of the trust. In some instances, the default or mandatory character of the provision is evident from the text (such as Section 14(a)). In other instances, the characterization in the discussion note might not follow inexorably from the statutory text, hence might be aspirational in nature. As we transition from discussion of policy and statutory design to specific implementation

with concrete statutory language, we should bear in mind the question of whether a given provision is default or mandatory, whether language to that effect is necessary in the provision, and whether we should include a provision akin to Uniform Trust Code §105 (amended 2005) clarifying the default or mandatory character of all provisions across the act.