



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 (March 27-28, 2015)

Date: March 6, 2015

This memo provides an overview of the materials circulated for our first drafting session, to be held on Friday and Saturday, March 27 and 28, in Washington, DC. It also provides an overview of several major issues for discussion at that meeting.

Please bear in mind that this upcoming meeting will be the first of what is planned to be five in-person drafting sessions. We are scheduled to meet again in Fall 2015, 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 first meetings, the primary goal will be to resolve major questions of policy and statutory structure.

To get us started, accompanying this memo is a first “discussion draft” of the act. In addition, we are circulating four appendices:

(a) a collection, we believe comprehensive, of non-trustee powers provisions drawn from existing state statutes (“Appendix A”);

(b) a schedule of provisions from the Uniform Trust Code and the Restatement (Third) of Trusts that will figure in our discussion (“Appendix B”);

(c) a review of nonuniform amendments to Uniform Trust Code §808 across enacting jurisdictions (“Appendix C”); and

(d) model trust language providing for divided trusteeship, kindly supplied to us by Peter Gordon, one of our observers (“Appendix D”).

Finally, in accordance with the request of several Commissioners in our introductory phone call, we have posted to a trio of DropBox webpages (1) copies of the [existing state statutes](#) (plus a few proposed statutes), (2) copies of a [handful of cases](#), and (3) [selected commentary](#), each hyperlinked within the PDF of this memo. It is not necessary to review any of the posted material. We believe that review of this memo, the discussion draft, and the appendices would be more than adequate preparation.

To clarify the issues and organize our discussion, the discussion draft is organized into five Articles thus:

- Article 1 – General Provisions and Definitions
- Article 2 – Trust Directors
- Article 3 – Directed Trustees
- Article 4 – Co-Trustees
- Article 5 – Miscellaneous Provisions

With the exception of Article 4, each Article contains several sections that are each accompanied by “Discussion Notes.” Article 4, on co-trustees, comprises only a longish discussion note. As the drafting process unfolds, we may decide (or be required by the style rules of the Uniform Law Commission) to collapse the articles and have sequentially numbered sections. In that event, some of the provisions of Article 2 and Article 3 could be combined.

There are at least five major policy questions for which we will be seeking tentative resolution at the meeting. The remainder of this memo discusses each of those questions and how we have addressed them in the accompanying first discussion draft.

1. Enabling versus Off-the-Rack. The existing divided trusteeship statutes can be divided roughly into two categories: “enabling” and “off-the-rack.” The enabling statutes, such as in Delaware (Del. Code tit. 12, § 3313), authorize creation of divided trusteeship by (i) permitting a settlor to give a third party, whom we might call a “non-trustee,” a power over the administration of the trust; (ii) providing a default rule for the allocation of fiduciary duty between the trustee and the non-trustee; and (iii) providing for a mandatory minimum of fiduciary duty. Under this enabling form of statute, the allocation of powers in a divided trusteeship is determined by the terms of the trust. The settlor, and so the settlor’s lawyer, must specify the powers, if any, given to the non-trustee. To put the point otherwise, these statutes authorize divided trusteeship but do

not provide a particular set of powers to a non-trustee by default. They leave specification of the particulars to the terms of the trust.

The off-the-rack statutes, by contrast, provide in effect for one or more statutory forms of divided trusteeship, with particular sets of powers given to a non-trustee by default. For example, the South Dakota statute provides for the appointment of an investment trust advisor (S.D. Codified Laws §55-1B-10), and a distribution trust advisor (S.D. Codified Laws §55-1B-11), each with different default powers. Under this form of statute, a settlor can implement divided trusteeship by invoking one or more “off the rack” kinds of division that are then subject to further tailoring by the terms of the trust.

The discussion draft of our act is of the enabling rather than off-the-rack type. Our rationale for choosing an enabling structure was three-fold. First, such a statute is simpler, and hence is a better vehicle for ventilating the various other policy questions, many of which, such as fiduciary minimums, pertain to both types of statute. Simpler acts also tend to have more enactment success than complicated ones.

Second, an off-the-rack statute will not cover atypical forms of divided trusteeship and will require amendment from time to time to keep up with newly evolved forms. On the other hand, the off-the-rack statutes may provide drafting economies and open the divided trusteeship concept to persons advised by less sophisticated counsel. Not everyone can afford bespoke trusts.

Third, an enabling statute forces drafters to spell out the form of divided trusteeship they mean to implement, which has a salutary notice function. To the extent that a settlor cares to read her trust instrument, she will be put on notice of its division of trusteeship, and not merely of the appointment of, say, a distribution advisor without further disclosure of what such an appointment means.

The enabling structure of the discussion draft is most evident in Section 202, which gives a permissive list of powers that may be given to a trust director. Whether to name a trust director, and which of the many possible powers scheduled in Section 202 the director will be given, are to be resolved by the terms of the trust.

2. *Nomenclature.* The discussion draft uses the term “trust director” (see Section 102(6)) for a non-trustee who is given a power over the administration of the trust (see Section 201) and “directed trustee” (see Section 102(1)) for a trustee who is subject to direction by a trust director (see Section 301). There is nothing special about these terms. We had to choose some terms as a starting point, and we thought that these were intuitive and clear. There are, however, many other terms in the existing statutes for a non-trustee with a power over the administration of the trust, such as advisor, protector, and power holder (see the discussion note to Section 102).

The discussion notes to Section 202 raise the possibility of preserving the enabling design of the act but using also the term “trust protector” in addition to “trust director” to describe non-trustees with particular kinds of powers. Among other things, this alternative would facilitate different fiduciary standards for holders of “director”-type powers relative to “protector”-type powers. In other words, even within an enabling structure, multiple categories of non-trustees might be apt if as a matter of substantive policy we decide that different non-trustee powers should be subject to different fiduciary standards of conduct.

3. *Allocation of Fiduciary Duty and Fiduciary Floors.* Under the header of fiduciary duties, we must answer overlapping questions. As regards the trust director, we must confront at least three questions:

- *What are the default fiduciary duties of a trust director?* Section 204(b) answers this question by absorbing the fiduciary duties that would apply if the trust director were a trustee under the same circumstances.
- *What are the mandatory fiduciary duties of a trust director?* Section 204(c)(1) answers this question by allowing the terms of a trust to vary or eliminate a trust director’s fiduciary duties to the same extent that a trustee’s duties could be varied or eliminated under the same circumstances.
- *What about a trust director without fiduciary duty if the directed trustee retains its normal duties as if it weren’t directed?* Section 204(c)(2) allows for even further variation or waiver of the duties of a trust director on the condition that the directed trustee retain those duties on top of the reduced duties prescribed by Section 303.

As regards a directed trustee, we must confront several different questions, the most pressing of which is presented by Section 303(c):

- To what extent, if any, is a directed trustee subject to fiduciary duties if the trust director is also subject to fiduciary duties under Section 204(b)-(c)?

4. *Absorbing Existing State Law.* The heart of our charge is to produce an act on divided trusteeship. It is not within our purview to try to resolve other disputed policy issues such as the extent to which the duty to diversify or the duty to give information to a beneficiary may be varied by the terms of a trust. By pointing in Section 204 to state law otherwise applicable to a trustee to supply the fiduciary duties of a trust director, we absorb each enacting state’s answer to these and other such questions. To put the point more generally, our strategy in this draft was to provide for divided trusteeship within the context of each state’s sometimes differing trust fiduciary law.

We employ a similar absorption solution to providing default rules for a variety of other mechanical issues that might not be addressed in the terms of a trust and that the existing statutes overlook to varying degrees. For example, Section 205 provides that in a proceeding against a trust director, the same limitations and defenses apply as if the trust director were a trustee in the same circumstances. Likewise, Section 207 provides that the same rules applicable to a trustee for accepting and declining appointment, bond, vacancy and succession, resignation and removal, compensation and indemnification, and so on apply to a trust director.

5. *Reconciling the Law of Co-Trusteeship.* Subject to the committee's deliberations on Sections 204, 303, and 304, it appears reasonably likely that we will authorize the creation of what is in function (though not in name) a co-trusteeship with a limited purpose co-trustee and something less than the normal minimal oversight duties among the co-trustees. The question thus arises, should we harmonize the law of co-trustees accordingly? This is the issue flagged by placeholder Article 4.