UNIFORM DIRECTED TRUST ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 17-18, 2017 Drafting Committee Meeting

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February 24, 2017
UNIFORM DIRECTED TRUST ACT

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PREFATORY NOTE

Background. The Uniform Directed Trust Act addresses an increasingly common arrangement in contemporary estate planning and asset management known as a directed trust. A directed trust usually involves the naming of a trustee to hold custody of the trust property and another person that is not a trustee to hold a power over the trust, such as a power over the investment, distribution, or administration functions that would otherwise have belonged to the trustee. There is no consistent vocabulary for the nontrustee powerholder in a directed trust. Several terms are common in practice, including “trust protector,” “trust adviser,” and “trust director.” There is much uncertainty about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary responsibility of a trustee with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called a “power of direction.” The holder of a power of direction is called a “trust director.” A trustee that is subject to a power of direction is called a “directed trustee.” The main contribution of the act is to address the many complications created by giving a power of direction to a trust director, including the fiduciary duty of a trust director (Section 8) and the fiduciary duty of a directed trustee (Sections 9 and 11).

Enabling Settlor Autonomy Subject to Fiduciary Minimums. By validating terms of a trust that provide for a trust director with a power of direction, the Uniform Directed Trust Act promotes the settlor’s freedom of disposition. At the same time, the act provides for certain mandatory minimum fiduciary safeguards in accordance with the venerable principle that a trust is a fiduciary relationship. See, e.g., Restatement (Third) of Trusts § 96 cmt. c (Am. Law Inst. 2012) (“[F]or reasons of policy trust fiduciary law imposes limitations on the types and degree of misconduct for which the trustee can be excused from liability.”).

Structure of the Act. The heart of the Uniform Directed Trust Act appears in Sections 5 through 11, which address the powers and duties of a trust director and directed trustee. Sections 5 through 8 address the kinds of powers that the terms of a trust can grant to a trust director and the resulting default and mandatory fiduciary duties of the director. Sections 9 through 11 address the fiduciary duty of a directed trustee, prescribing the ways in which the existence of a power of direction in a trust director changes the trustee’s powers and duties. Section 12 addresses the relationship between a directed trust and a trust with cotrustees. The remaining sections address a variety of important technical issues in the administration of a directed trust, including rules of construction for recurring matters that might be overlooked in the drafting of a directed trust, and in this act’s relationship to existing law.

Fiduciary Duty in a Directed Trust. Under the Uniform Directed Trust Act, a trust director has the same default and mandatory fiduciary duties with respect to a power of direction that would apply to a trustee if a trustee held the same powers (Section 8), and a directed trustee is liable only for the trustee’s own “willful misconduct” (Section 9). The drafting committee reasoned that, as regards a power of direction, the trust director functions much like a trustee in
an undirected trust and thus should have the same duties as a trustee in the exercise or
nonexercise of the director’s power of direction. To facilitate the settlor’s intent that the trust
director be the primary or even sole decisionmaker as regards a power of direction, the fiduciary
duty of the trustee is reduced with respect to issues over which the director holds the power of
direction.

In preserving some minimal fiduciary duty in the directed trustee, the drafting committee
was influenced by the prominent directed trust statute in Delaware, which does likewise. See
that a directed trust statute that preserves a “willful misconduct” safeguard is workable in
directed trust practice. The drafting committee therefore declined the suggestion that the
Uniform Directed Trust Act should eliminate completely the fiduciary duty of a directed trustee.

In summary, under the Uniform Directed Trust Act a beneficiary’s main recourse for
misconduct by a trust director is an action against the director for breach of the director’s
fiduciary duty to the beneficiary. The beneficiary also has recourse against the trustee, but only
to the extent of the trustee’s own willful misconduct. Relative to a non-directed trust, the act
increases the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship
are preserved in the trust director, and in addition the directed trustee also has a duty to avoid
willful misconduct.
UNIFORM DIRECTED TRUST ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Directed Trust Act.

Comment

This act governs an arrangement commonly known as a “directed trust.” In rough terms, a directed trust is a trust in which a person other than a trustee holds a power to direct some aspect of the trust’s administration. Under this act, such a power is called a “power of direction,” the person that holds the power is called a “trust director,” and a trustee that is subject to the power is called a “directed trustee” (see Section 2(2), (4), and (7)). This act covers any arrangement that exhibits the functional features of a directed trust, even if the terms of the trust use other terminology, such as a “trust protector” or a “trust advisor.”

SECTION 2. DEFINITIONS. In this [act]:

(1) “Breach of trust” includes a violation by a trust director or trustee of a duty imposed by the terms of the trust, this [act], or other law or principles of equity of this state pertaining to trusts.

(2) “Directed trustee” means a trustee that is subject to a trust director’s power of direction.

(3) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(4) “Power of direction” means a power over a trust granted by the terms of the trust to a trust director. The term includes a power over the administration of the trust or the investment, management, or distribution of the trust property.

(5) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(6) “Terms of a trust” means:
(A) the manifestation of a settlor’s intent regarding a trust’s provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust’s provisions as determined or amended by:

(i) a trustee or trust director in accord with applicable law; [or]

(ii) court order[; or]

(iii) nonjudicial settlement agreement under [Uniform Trust Code Section 111].

(7) “Trust director” means a person other than a trustee that is granted a power of direction by the terms of a trust whether or not the terms of the trust refer to the person as a trust director, and, subject to Section 5, whether or not the person is a beneficiary or a settlor of the trust.

Legislative Note: A state that has adopted Uniform Trust Code Section 103(18) (2004) or Uniform Trust Decanting Act Section 2(28) (2015), defining “terms of a trust,” should consider updating those definitions to conform with paragraph (6) of this section. A state that has not adopted Uniform Trust Code Section 111 (2000) should replace the bracketed language of subparagraph 6(B)(iii) with a cross reference to the state’s law governing nonjudicial settlement or should omit subparagraph 6(B)(iii) if the state does not have such a law.

Comment

(1) Breach of trust. The definition of “breach of trust” in paragraph (1) clarifies that the term “includes” a breach by a trust director of a duty imposed by the terms of a trust, this act, or other law. Historically, the term has been used to reference a breach of duty by a trustee, as under Uniform Trust Code § 1001(a) (2000) and Restatement (Third) of Trusts § 93 (Am. Law Inst. 2012). By expanding the meaning of the term to include a breach of duty by a trust director, this paragraph resolves any doubt about whether such conduct is also a “breach of trust.” In defining a breach of trust to include a breach of a duty imposed by this act, it is important to recognize that some of the duties imposed by this act are default rules that may be varied by the terms of the trust. The drafting committee contemplated that a trust director or a trustee would not be in breach of trust for conduct that was authorized by the terms of a trust to the extent that those terms are permissible under this act or other law.
(2) Directed trustee. The definition of “directed trustee” in paragraph (2) includes only a trustee that is subject to a trust director’s power of direction. A trustee that is subject to direction by a cotrustee is not for that reason a directed trustee, as paragraph (7) excludes a trustee from the definition of a “trust director.” Because a trustee cannot be a trust director, a trustee that is subject to direction by a cotrustee is not on that basis a directed trustee under paragraph (2). Section 12 addresses the relationship between this act and cotrusteeship.

(3) Person. The definition of “person” in paragraph (3) tracks the current Uniform Law Commission definition.

(4) Power of direction. The definition of “power of direction” in paragraph (4) is expansive. It includes any “power over a trust” held by a trust director. A power of direction may be structured as a power to direct the trustee in the exercise of the trustee’s powers, for example, a power to direct the trustee in the investment or management of the trust property. A power over a trust may also be structured as a power to act independently, for example, by amending the terms of a trust or releasing a trustee from liability. The definition clarifies that a power of direction may include a power over “administration” as well as a power over “investment, management, or distribution of the trust property.” These examples are meant to illustrate the potential scope of a power of direction; they do not limit it. In using the term “administration,” the drafting committee intended a meaning at least as broad as 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 in Uniform Trust Code § 815(a)(2)(b) (2000), which specifies a trustee’s powers. The comment to Section 6 provides further examples of the kinds of specific powers that the drafting committee contemplated would fall within the definition of a power of direction.

(5) State. The definition of state in paragraph (5) tracks the current Uniform Law Commission definition.

(6) Terms of a trust. The definition of “terms of a trust” in paragraph (6) updates the comparable definition in Uniform Trust Code § 103(18) (2004) to take notice of court orders and nonjudicial settlement agreements, both of which are of growing practical significance, and which may sometimes be employed to vary the terms of a trust from a settlor’s original intent. In so doing, paragraph (6) is consistent with the Restatement, which likewise recognizes the possibility that the terms of a trust may later be varied from the settlor’s initial expression. See Restatement (Third) of Trusts § 76 cmt. b(1) (Am. Law Inst. 2007) (“References … to the terms of the trust … also refer to trust terms as reformed or modified by court decree, and as modified by the settlor or others or by consent of all beneficiaries.”) (internal cross-references omitted). The definition of “terms of a trust” is also consistent with Uniform Trust Decanting Act § 2(28) (2015), which similarly defines the term to include manifestations of a settlor’s intent “as may be established by court order or nonjudicial settlement agreement.”

(7) Trust director. The definition of a “trust director” in paragraph (7) includes any person other than a trustee who is granted a power of direction by the terms of a trust. A person other than a trustee that is granted a power over a trust by the terms of the trust is a trust director even if the terms of the trust or the parties call the person an “adviser” or “protector” or
otherwise purport to disclaim trust director status. A person may also be a trust director even if
the person is a beneficiary or settlor of the trust, though certain powers of a beneficiary and a
settlor are excluded by Section 5. The definition of “trust director” does not include a trustee.
Relations between multiple trustees are governed by the law of cotrusteeship, subject to Section
12, which enables a settlor by the terms of a trust to relieve a cotrustee from liability in a manner
similar to a directed trustee under certain circumstances.

SECTION 3. APPLICATION; PRINCIPAL PLACE OF ADMINISTRATION.

(a) This [act] applies to a trust, whenever created, that has its principal place of
administration in this state, subject to the following rules:

(1) If the trust was created before or on [the effective date of this [act]], this [act]
applies only to decisions or actions occurring after that date.

(2) As to a trust whose principal place of administration is changed to this state on
or after [the effective date of this [act]], this [act] applies only to decisions or actions occurring
after the change.

(b) Without precluding other means to establish a sufficient connection with the
designated jurisdiction, terms of a trust designating the principal place of administration of the
trust are valid and controlling if:

(1) a trustee’s principal place of business is located in or a trustee is a resident of
the designated jurisdiction;

(2) a trust director’s principal place of business is located in or a trust director is a
resident of the designated jurisdiction; or

(3) all or part of the administration occurs in the designated jurisdiction.

Legislative Note: A state that has adopted Uniform Trust Code Section 108(a) (2000) could omit
subsection (b) and instead add subsection (b)(2) to Section 108 of the state’s Uniform Trust
Code.

Comment

Subsection (a). Subsection (a) addresses two matters. First, because powers and duties in
a directed trust are matters of trust administration, see Restatement (Second) of Conflict of Laws
§ 271 cmt. a (Am. Law Inst. 1971), this subsection follows the prevailing conflict of laws rule by linking application of this act to the trust’s principal place of administration. As with other matters of administration, the parties are protected against inconsistent court orders by the common law principle of “primary supervision.” See id. § 267 cmt. e.

Second, this subsection applies this act to a trust administered in an enacting state regardless of whether the trust was in existence on the effective date of this act. However, under subsections (a)(1) and (2), this act applies only with respect to decisions or actions occurring 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 decisions or actions occurring after that change. Because some of the standards of conduct prescribed by this act depart from Uniform Trust Code § 808 (2000) and the common law as codified by Restatement (Third) of Trusts § 75 (Am. Law Inst. 2007), the drafting committee reasoned that the act should apply prospectively, following the model of Uniform Prudent Investor Act § 11 (1994).

Subsection (b). Subsection (b), which derives from Uniform Trust Code § 108(a) (2000), establishes a safe harbor for a settlor’s designation of a trust’s principal place of administration. Such a designation is valid if (1) a trustee is located in the designated jurisdiction, (2) a trust director is located in the designated jurisdiction, or (3) at least some of the trust administration occurs in the designated jurisdiction. Subsections (b)(1) and (b)(3) reproduce without change the safe harbor prescribed by Uniform Trust Code § 108(a) (2000). Subsection (b)(2) expands the safe harbor of Section 108(a) to include the location of a trust director, in addition to the location of a trustee, as a sufficient connection with the designated jurisdiction. Other than this expansion in subsection (b)(2), the drafting committee followed the Uniform Trust Code in “not attempt[ing] to further define principal place of administration.” Uniform Trust Code § 108 cmt.

SECTION 4. LAW AND PRINCIPLES OF EQUITY. The law and principles of equity of this state supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

Comment

This section confirms that the law and principles of equity of an enacting state remain applicable to a directed trust except to the extent modified by this act. For example, other than the safe harbor under Section 3(b) for a term of a trust that designates the trust’s principal place of administration, the law of an enacting state by which principal place of administration is determined would continue to apply to a directed trust. Provisions such as this one are familiar from other uniform acts. See, e.g., Uniform Powers of Appointment Act § 104 (2013); Uniform Trust Code § 106 (2000). This section departs from other uniform acts, however, by referencing the “law,” rather than the “common law.” Given that so much trust law has been codified by statutes such as the Uniform Trust Code (2000), Uniform Trust Decanting Act (2015), Uniform Principal and Income Act (1997), and Uniform Prudent Investor Act (1994), the drafting committee intended the word “law” in this section to reference both common law and statutory law.
SECTION 5. EXCLUSIONS.

(a) In this section, “power of appointment” means a power that enables a person in a nonfiduciary capacity to designate a recipient of an ownership interest in or a power of appointment over trust property.

(b) This [act] does not apply to:

(1) a power of appointment;

(2) a power to appoint or remove a trustee or trust director;

(3) a power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) a power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects only the interest of the beneficiary or another beneficiary represented by the beneficiary under [Uniform Trust Code Sections 301 through 305]; or

(5) a power over a trust to the extent the power must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives under the United States Internal Revenue Code of 1986[, as amended][, and regulations issued thereunder].

(c) Unless the terms of the trust indicate a contrary intent, a power granted to a person other than a trustee to designate a recipient of an ownership interest in or a power of appointment over trust property is a power of appointment and not a power of direction.

Legislative Note: A state that has not adopted Uniform Trust Code Sections 301–305 (2000) should replace the bracketed language with a cross reference to the state’s law governing virtual representation.

A state that does not permit the phrase “as amended” when incorporating federal statutes, or that does not permit reference to “regulations issued thereunder,” should delete the bracketed language in subsection (b)(5).
Comment

This section excludes five categories of powers that the drafting committee concluded should not be covered by this act for reasons of policy, coverage by other law, or both. A power that falls within one of these exclusions is governed by law other than this act.

(1) Power of appointment. Subsection (b)(1) excludes a “power of appointment,” which is defined by subsection (a) to mean “a power that enables a person in a nonfiduciary capacity to designate a recipient of an ownership interest in or a power of appointment over trust property.” This definition of “power of appointment” is based on the definition in Uniform Powers of Appointment Act § 102(13) (2013). The definition is consistent with what Restatement (Third) of Property: Wills and Other Donative Transfers § 17.1 cmt. g (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.”

In consequence of this exclusion, the terms of a trust may grant to a person a nonfiduciary power over distribution of the trust property—that is, a power of appointment—without that person becoming a trust director subject to this act. A nonfiduciary power of appointment, which may be exercised arbitrarily within the scope of the power, is governed by other law such as the Uniform Powers of Appointment Act (2013) and Restatement (Third) of Property: Wills and Other Donative Transfers §§ 17.1–23.1 (Am. Law Inst. 2011).

The exclusion of subsection (b)(1) applies only to a nonfiduciary power of appointment. If the terms of a trust indicate that a power over distribution is held in a fiduciary capacity, then the power is not a power of appointment and is not excluded from this act. In the hands of a person other than a trustee, such a fiduciary power of distribution would be a power of direction.

To resolve doubt about whether a power over distribution granted to a person other than a trustee falls within the exclusion of subsection (b)(1), subsection (c) prescribes a rule of construction under which such a power is a power of appointment, and so is not held in a fiduciary capacity, unless the terms of the trust indicate otherwise.

A power in a trustee to designate a recipient of an ownership interest in or a power of appointment over trust property can never be a power of direction, because a trustee can never be a trust director (see Section 2(4) and (7)). Such a power is a fiduciary distributive power or a power of appointment or depending on the intent of the settlor. See, e.g., Restatement (Third) of Trusts § 50 cmt. a (Am. Law Inst. 2003).

(2) Power to appoint or remove. Subsection (b)(2) excludes “a power to appoint or remove a trustee or trust director.” This exclusion addresses the compelling suggestion to the drafting committee that such a power, at least as regards a trustee, is normal and customary in drafting practice and arose separately from the phenomenon of directed trusts. Under prevailing law, the only limit on the exercise of a power to appoint or remove a trustee is that it “must conform to any valid requirements or limitations imposed by the trust terms.” Restatement (Third) of Trusts § 37 cmt. c (Am. Law Inst. 2003). If the terms of the trust do not impose any requirements or limitations on the power to remove, then “it is unnecessary for the holder to
show cause” before exercising the power. Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 11.10.2 (5th ed. 2006).

(3) Revocable trust. Subsection (b)(3) excludes a power of a settlor over a trust to the extent the settlor has a power to revoke the trust.

Because the settlor of a revocable trust may at any time revoke the trust and take back the trust property, under modern law the trustee’s duties run to the settlor rather than to the beneficiaries. See Uniform Trust Code § 603(a) (2004). The trustee must “comply with a direction of the settlor even though the direction is contrary to the terms of the trust or the trustee’s normal fiduciary duties.” Restatement (Third) of Trusts § 74(1)(a)(i) (Am. Law Inst. 2007). Without the exclusion of this subsection, Section 6(b) could have been read to transform all powers retained by a settlor in a revocable trust into fiduciary powers of a trust director and to subject the trustee to the modified fiduciary duties under Sections 9 through 11.

To the extent that a conservator or agent of the settlor may exercise the settlor’s power to revoke, as under Uniform Trust Code § 602(e)–(f) (2001), this subsection would apply to the conservator or agent. A nonfiduciary power in a person other than the settlor to withdraw the trust property is a power of appointment that would fall within subsection (b)(1).

(4) Power of a beneficiary. Paragraph (4) excludes a power of a beneficiary to the extent that the exercise or nonexercise of the power affects only the interest of the beneficiary (or the interest of another beneficiary who is represented by the beneficiary under applicable virtual representation law). This exclusion follows traditional law, under which “[a] power that is for the sole benefit of the person holding the power is not a fiduciary power.” Restatement (Third) of Trusts § 75 cmt. d (Am. Law Inst. 2007).

By contrast, if the exercise or nonexercise of a power held by a beneficiary (other than by virtual representation) affects the interests of another beneficiary, and the power is otherwise a power of direction, then under this act the beneficiary is a trust director subject to the standards of conduct prescribed by this act to the extent of the effect on the other beneficiary’s interests.

For example, a power in a beneficiary to release a trustee from a claim by the beneficiary is excluded from this act. But a power in a beneficiary to release the trustee from a claim by another beneficiary (other than by virtual representation) is a power of direction, and the beneficiary would be a trust director to the extent the beneficiary’s power to release the trustee affects the claims of the other beneficiary.

The same is true if the beneficiary’s power is jointly held. Thus, for example, if the terms of a trust provide that a trustee may be released from liability by a majority of the beneficiaries, and a majority of the beneficiaries grants such a release, then those beneficiaries would be acting as trust directors to the extent the release affected the interests of other beneficiaries not bound by virtual representation. This act would therefore reverse the result in Vena v. Vena, 899 N.E.2d 522 (Ill. App. 2008), which refused to enforce such a provision on the grounds that the minority beneficiaries did not have recourse against the majority for an abusive release. Under this act, by contrast, the minority beneficiaries would have recourse against the majority for breach of
fiduciary duty.

(5) The settlor’s tax objectives. Subsection (b)(5) excludes a power to the extent the power must be held in a nonfiduciary capacity to achieve the settlor’s tax objectives under federal tax law. This exclusion is responsive to multiple suggestions to the drafting committee that certain powers in a person other than a trustee must be nonfiduciary to achieve the settlor’s federal tax objectives. The clearest example is a retained power to substitute assets meant to ensure grantor trust status under Treas. Reg. § 1.675(b)(4). Given 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 was preferable to a prescribed list that would have to be continuously updated and would likely be over- and underinclusive.

SECTION 6. POWERS OF TRUST DIRECTOR.

(a) Subject to Section 7, the terms of a trust may grant a trust director a power of direction.

(b) A power of direction includes only those powers granted by the terms of a trust.

(c) Unless the terms of a trust provide otherwise:

(1) a trust director may exercise any further powers appropriate to the exercise of the director’s power of direction;

(2) the powers of a trust director are not affected by the incapacity or death of the settlor; and

(3) trust directors with joint powers must act by majority decision.

Legislative Note: A state that has adopted Uniform Probate Code Section 2-907(c)(4) (1993) or Uniform Trust Code Sections 408(b) or 409(2) (2000) should revise those provisions to [to be resolved after final approval.]

Comment

Validating a trust director. Subsection (a) validates a provision for a trust director in the terms of a trust. Although the common law would recognize a trust director without statutory authorization, subsection (a) resolves any doubt. See, e.g., In re Eleanor Pierce (Marshall) Stevens Living Trust, 159 So. 3d 1101 (La. App. 2015) (upholding the appointment of a trust protector without specific statutory authorization). A specific trust director may be named by the terms of a trust, by a procedure prescribed by the terms of the trust, or in accordance with Section 16(1).
Background law on trust purposes. Although this section validates terms of a trust that provide for a trust director, it does not override the background law that regulates the formation of trusts, such as the requirements that a trust be lawful, not contrary to public policy, and possible to achieve. See, e.g., Uniform Trust Code § 404 (2000); Restatement (Third) of Trusts §§ 29–30 (Am. Law Inst. 2003).

Breadth of subsection (a). Without limiting the definition of a “power of direction” in Section 2(4), the drafting committee specifically contemplated that subsection (a) would validate terms of a trust that create a power in a trust director to:

- direct investments, including a power to:
  - acquire, dispose of, exchange, or retain any 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 trust-owned business; or
  - select custodians for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee’s or another director’s delegation of the trustee’s or other director’s powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

Exclusions. Like the other provisions of this act, subsection (a) does not apply to matters that are excluded by Section 5. Thus, because Section 5(b)(2) excludes a power “to appoint or remove a trustee or trust director,” this act does not govern such a power. Likewise, because Section 5(b)(1) excludes a power of appointment, a nonfiduciary power of distribution is not governed by this act. The validity and construction of a power excluded by Section 5 is governed by law other than this act.

Subsection (b). Subsection (b) confirms that a trust director has only those powers expressly granted to the director by the terms of the trust. This act does not provide any powers to a trust director by default. Nor does this act generally specify the scope or parameters of any power, which instead must be specified by the terms of a trust.

Subsection (c). Subsection (c) prescribes three rules of construction that apply unless the terms of a trust provide otherwise.
Further appropriate powers. Subsection (c)(1) prescribes a default rule under which a
trust director may exercise any “further” power that is “appropriate” to the director’s exercise of
the director’s express powers under the terms of the trust. The term “appropriate” is drawn from
Uniform Trust Code § 815(a)(2)(B) (2000). Appropriateness should be judged in relation to the
purpose or function being carried out by the director. Examples of further powers that might be
appropriate include a power to: (1) incur reasonable costs and direct indemnification for those
costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a
trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); or (4) prosecute,
defend, or join an action, claim, or judicial proceeding relating to a trust.

Delegation by trust director. In some circumstances, it may be appropriate for a trust
director to delegate the director’s powers, much as it may sometimes be appropriate for a trustee
to do so. Under Section 8, a trust director is subject to the same fiduciary rules regarding the
exercise of a power to delegate as a trustee. In most states, therefore, a trust director would be
required to exercise reasonable care, skill, and caution in selecting, instructing, and monitoring
an agent. A director who did so would not be liable for the action of the agent. In performing that
function, the agent would owe a duty to exercise reasonable care. See, e.g., Uniform Trust Code
§ 807 (2000); Uniform Prudent Investor Act § 9 (1994); Restatement (Third) of Trusts § 80 (Am.
Law. Inst. 2007).

WL 1572767 (D.S.C. Apr. 17, 2014), the court held that a trust director (which the terms of the
trust referred to as a “trust protector”) lacked standing to bring a lawsuit because under Rule
17(a)(1) of the Federal Rules of Civil Procedure the director was neither a real party in interest
nor a party that could pursue a claim if not a real party in interest. However, Rule 17(a)(1) does
allow “a party authorized by statute” to bring litigation. Subsection (c)(1) supplies the requisite
statutory authorization if enabling a trust director to prosecute, defend, or join an action, claim,
or judicial proceeding pertaining to the trust would be “appropriate” under the circumstances in
light of the terms of the trust. For example, 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
direction from the director. Subsection (a) would also provide the requisite statutory
authorization if the terms of the trust expressly confer a power of litigation on the director.

Settlor incapacity or death. Subsection (c)(2) specifies a default rule under which a trust
director’s powers survive the incapacity or death of the settlor. Following the directed trust
statutes in several states, including Nevada and South Dakota, see Nev. Rev. Stat. § 163.555
(2016); S.D. Codified Laws § 55-1B-3 (2016), the drafting committee included this section to
confirm that the common law rule of agency under which an agent’s authority terminates on the
incapacity or death of the principal would not apply to a trust director. See Restatement (Third)

Majority decision. Subsection (c)(3) provides a default rule of majority action for
multiple trust directors with “joint powers,” such as a three-person committee with a power of
direction over investment or distribution. Majority action is the prevailing default for multiple
trustees. See Uniform Trust Code § 703(a) (2000); Restatement (Third) of Trusts § 39 (Am. Law
Inst. 2003). In the event of a deadlock among trust directors with joint powers, by analogy to a
deadlock among cotrustees, a court could “direct exercise of the [joint] power or take other action to break the deadlock.” Id. cmt. e. The duty and liability of a trust director for jointly held powers is governed by Section 8, which absorbs the existing fiduciary duty and liability of trusteeship for a trust director. Thus, in a state that protects a dissenting cotrustee from liability, as under Uniform Trust Code § 703(h) (2000), so too would a dissenting trust director with a jointly held power be protected.

SECTION 7. LIMITATIONS ON POWERS OF TRUST DIRECTOR. A trust director may not:

(1) remove from a trust created to meet the requirements of 42 U.S.C. Section 1396p(d)(4) [as amended][, and regulations issued thereunder] a requirement to pay back a governmental entity for benefits provided to a beneficiary at the death of that beneficiary;

(2) in a trust for which all of the beneficiaries are charitable organizations, grant a beneficial interest to a person that is not a charitable organization or use the trust assets for a noncharitable purpose; or

(3) reduce or eliminate the charitable interest in a charitable remainder trust under 26 U.S.C. Section 664[, as amended][, and regulations issued thereunder].

Legislative Note: A state that does not permit the phrase “as amended” when incorporating federal statutes, or that does not permit reference to “regulations issued thereunder,” should delete the bracketed language in paragraphs (1) and (3) accordingly.

Comment

The capacious language of Section 6 permits a broad array of powers to be given to a trust director. Following the directed trust legislation in a handful of states, this section imposes three public policy limits on the scope of such powers. Paragraph (1) protects the integrity of the pay back obligation in a special needs trust. Paragraphs (2) and (3) protect the integrity of a charitable trust from the later insertion of a noncharitable interest or the reduction of a charitable interest.

SECTION 8. DUTY AND LIABILITY OF TRUST DIRECTOR.

(a) Subject to subsection (b), with respect to a power of direction or a further power under Section 6(c)(1):
(1) a trust director is subject to the same fiduciary duty and liability as:

   (A) a sole trustee if the power is held individually; or

   (B) a cotrustee if the power is held jointly with a trustee or another trust director; and

(2) the director’s duty or liability may be varied by the terms of the trust to the same extent that the terms of the trust could vary the duty or liability of a trustee.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of the director’s business or practice of a profession, and the director acts in that capacity, the director is not subject to duty or liability under this [act].

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this [act].

Comment

Subsection (a). Subsection (a) imposes the same fiduciary duties on a trust director that would apply to a similarly situated trustee. A trust director with a power to make or direct investments, for example, has the same duties that a trustee would have in making investments to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries. See, e.g., Restatement (Third) of Trusts §§ 77–79, 90–92 (Am. Law Inst. 2007). The theory behind subsection (a) is that if a trust director exercises a power, the director is the most appropriate person to bear the duty associated with the exercise or nonexercise of that power. Put differently, in a directed trust, a trust director functions much like a trustee in a non-directed trust, and thus should have the same duties as a trustee.

Accordingly, subsection (a)(1) sets the default duties of a trust director by absorbing the duties that would ordinarily apply to a similarly situated trustee. Subsection (a)(2) sets the mandatory minimum duties of such a director by absorbing the mandatory minimum duties that a settlor cannot waive for a similarly situated trustee. In making a trust director a fiduciary, subsection (a) follows the great majority of the existing state directed trust statutes. Subsection (a) is more specific than many state statutes, however, as the existing statutes tend to say only that a trust director is a “fiduciary,” without specifying the duties that apply. Subsection (a) provides greater specificity by specifically absorbing the fiduciary duty and liability of a trustee.

Absorption of existing trust fiduciary law. Subsection (a) operates by absorbing existing
state law rather than inventing a new body of law. Incorporating existing trust fiduciary law in this manner offers several advantages. First, it avoids the need to spell out the entirety of trust fiduciary law. That is, it avoids the need to replicate something like Article 8 of the Uniform Trust Code for trust directors. Second, absorbing the trust fiduciary law of each enacting state accommodates diversity across the states in the particulars of a trustee’s default and mandatory fiduciary duties, such as the duties to diversify and to give information to the beneficiaries, both of which have become increasingly differentiated across the states. Third, absorption allows for changes to the law of a trustee’s fiduciary duties to be absorbed automatically into the duties of a trust director without need for periodic conforming revisions to this act.

Absorption and circumstances of trust directors. In applying the law of trustee fiduciary duties to a trust director, a court must make use of the flexibility built into trust fiduciary law. Courts have long applied the duties of loyalty and prudence across a wide array of circumstances, including many different kinds of trusts as well as other fiduciary relationships, such as corporations and agencies. Trust fiduciary principles are thus amenable to application in a contextual manner that is sensitive to the particular circumstances and structure of each directed trust. In assessing the actions of a director that holds a power to modify a trust, for example, a court should apply the standards of loyalty and prudence in a manner that is appropriate to the particular context, including the trust’s terms and purposes and the director’s particular powers.

The trust director’s duty of disclosure. Under subsection (a), a trust director is subject to the same duties of disclosure as a trustee would be. Thus, for example, if a trust director intended to direct a nonroutine transaction, to change “investment … strategies,” or to take “significant actions … involving hard-to-value assets or special sensitivity to beneficiaries,” the director might be under a duty of affirmative advance disclosure. Restatement (Third) of Trusts § 82 cmt. d (Am. Law Inst. 2007); see also Allard v. Pacific Nat’l Bank, 663 P.2d 104, 110 (Wash. 1983) (‘The trustee must inform beneficiaries, however, of all material facts in connection with a nonroutine transaction which significantly affects the trust estate and the interests of the beneficiaries prior to the transaction taking place.’).

Joint and sole powers. Under subsection (a), a trust director has the same fiduciary duties as a sole trustee for a power of direction held individually and as a cotrustee for a power of direction held jointly. Thus, a trust director that holds a power of direction individually does not have the duties of a cotrustee as regards other trust directors or trustees. A trust director that individually holds a power to amend the trust, for example, does not have the duty of a cotrustee to monitor the actions of the trustee concerning investments or the actions of another trust director concerning the determination of a beneficiary’s capacity. A trust director that holds a power of direction jointly with a trustee or another trust director, however, has the duty of a cotrustee as regards the actions of that trustee or other trust director that are within the scope of the jointly held power. Thus, a trust director that jointly exercises a power to direct investments with other trust directors has the same fiduciary duty and liability regarding the actions of itself and the other trust directors as a cotrustee.

A trust director that holds a power of direction jointly with a trustee or other trust director does not have the duties of a cotrustee as regards another power of direction that the director
holds individually or any power that the trustee or other director holds individually. Thus, if a
trust director holds a power to direct investments with another trust director jointly and the other
director also holds a power to amend the trust individually, the first director has the duty of a
cotrustee only as regards the joint power to direct investments and not the other director’s
individual power to amend the trust.

*Springing powers without a duty to monitor.* The drafting committee contemplated that a
settlor could construct a director’s power to be springing such that they do not create a
continuous obligation to monitor the administration of the trust. For example, a settlor could
grant a trust director a power to direct a distribution, but only if the director was requested to do
so by a beneficiary. A director holding such a power would not be under a duty to act unless
requested to do so by a beneficiary. Moreover, because under subsection (a)(2) a settlor can vary
the fiduciary duties of a trust director to the same extent that the settlor could vary the fiduciary
duties of a trustee, under Uniform Trust Code § 105(b)(2) (2004) the settlor could waive all of
the director’s otherwise applicable duties other than the duty “to act in good faith and in
accordance with the terms and purposes of the trust and the interests of the beneficiaries.” The
director would be subject to this mandatory duty in the director’s response to the beneficiary’s
request for a distribution.

*Extended discretion and exculpation or exoneration.* Under the framework of subsection
(a), the terms of a trust could give a trust director extended discretion, such as in the form of
“sole,” “absolute,” or “uncontrolled” discretion, with the same effect as those terms would have
on the discretion of a trustee. Under prevailing law, “words such as ‘absolute’ or ‘unlimited’ or
‘sole and uncontrolled’ are not interpreted literally. Even under the broadest grant of fiduciary
discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus,
the court will not permit the trustee to act in bad faith or for some purpose or motive other than
to accomplish the purposes of the discretionary power.” Restatement (Third) of Trusts § 50 cmt.
c (Am. Law Inst. 2003); see also Uniform Trust Code § 814(a) (2004). Under subsection (a)(2),
the same rules would apply to a grant of extended discretion to a trust director.

A trust director is likewise subject to the same rules as a trustee with regard to an
exculpation or exoneration clause. Under prevailing law, such as Uniform Trust Code § 1008
(2000) and Restatement (Third) of Trusts § 96 (Am. Law Inst. 2012), an exculpation or
exoneration clause cannot protect a trustee against liability for acting in bad faith or with reckless
indifference. Under subsection (a)(2), the same rules would apply to an exculpation or
exoneration clause for a trust director.

*Subsection (b)—health-care professionals.* Subsection (b) refers to a trust director who is
“licensed, certified, or otherwise authorized or permitted by law to provide health care in the
ordinary course of the director’s business or practice of a profession.” This phrasing is based on
the definition of “health-care provider” in Uniform Health-Care Decisions Act § 1(8) (1993). To
the extent that a trust director acts in the director’s business or practice of a profession to provide
health care, the director is relieved from duty or liability under this act unless the terms of the
trust provide otherwise.

This subsection, which applies unless the terms of the trust provide otherwise, addresses
the concern that a health-care professional might refuse appointment as a trust director if such service would expose the provider to fiduciary duty under this act. For example, a trust might call for a health-care professional to determine the capacity or sobriety of a beneficiary or the capacity of the settlor. In making such a determination, under subsection (b) the health-care professional would not be subject to duty or liability under this act. However, the professional would remain subject to any rules and regulations otherwise applicable to the professional.

Subsection (c)—no ceiling on duties. Subsection (c) confirms that the duties prescribed by this section are defaults and minimums, not ceilings. The terms of a trust can impose further duties in addition to those prescribed by this section.

SECTION 9. DUTY AND LIABILITY OF DIRECTED TRUSTEE.

(a) Subject to subsection (b), a directed trustee must take reasonable action to comply with a power of direction or a further power of a trust director under Section 6(c)(1) and is not liable for so acting.

(b) A directed trustee must not comply with a power of direction to the extent that by complying the trustee would engage in willful misconduct.

(c) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if:

(1) the breach involved the trustee’s or the other director’s own 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 of the material facts relating to the breach.

(d) A directed trustee that has reasonable doubt about its duty under this section may satisfy that duty by timely petitioning the court for instructions or presenting the issue in a pending proceeding.

(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to
the duties and liabilities prescribed by this [act].

Legislative Note: A state that has adopted Uniform Trust Code Section 808 (2000) [pending final resolution to 808]. The term “court” in subsection (d) should be revised as needed to refer to the appropriate court having jurisdiction over trust matters.

Comment

Duties of a directed trustee. This section addresses the duty and liability of a directed trustee. It should be read in conjunction with Section 10 (governing information sharing among directed trustees and trust directors) and Section 11 (eliminating certain duties to monitor, inform, or advise). The drafting committee contemplated that this section, along with Sections 10 and 11, would prescribe the mandatory minimum fiduciary duties of a directed trustee, displacing any contrary mandatory minimum such as under Uniform Trust Code § 105 (2005).

Subsection (a)—duty of compliance and reasonable action; nonliability other than under subsection (b). Subject to subsection (b), subsection (a) requires a directed trustee to take reasonable action to comply with a power of direction or a further power of a trust director under Section 6(c)(1) and provides that the trustee is not liable for so acting.

A power of direction may impose a variety of obligations on a directed trustee. Such a power may require a trustee to follow the express directions of a trust director, for example, if the power allows the director to direct the trustee in the investment management of the trust property. A power of direction may also require a trustee to request permission from a director before acting, to refrain from acting if the director so directs, or to act independently in the absence of a contrary direction. Thus, for example, a power of direction might provide that a trustee may not sell certain property without the approval of the trust director. A power of direction may also allow a director to modify the trust or to impose particular administrative procedures. The duty “to comply with a power of direction” imposed by subsection (a) requires a trustee to comply with all such powers of direction, subject to subsection (b).

A directed trustee should not comply with a direction by a trust director that is outside of the director’s power of direction and beyond the director’s further powers under Section 6(c)(1). To do so would violate the trustee’s duty to comply with the terms of the power of direction and the trustee’s broader background duty to act in accordance with the terms of a trust. See, e.g., Uniform Trust Code § 105(b)(2) (amended 2005) (making mandatory “the duty of a trustee to act … in accordance with 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.”). For example, a direction rendered 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 of direction.

Subject to subsection (b), subsection (a) requires that a directed trustee take “reasonable action” to comply with a power of direction or a trust director’s further powers under Section 6(c)(1). The trustee is not liable for so acting. If a trust director with a power to direct investments directs the trustee to purchase a particular security, for example, the trustee must take reasonable care and must refrain from self-dealing and conflicts of interest in selecting a
broker or executing the trade.

The duty to act reasonably in complying with the terms of a power of direction does not, however, impose a duty to ensure that the substance of a direction is reasonable. In executing a direction to purchase a security, for example, a trustee must take reasonable care to ensure that the security is purchased with reasonable promptness and at reasonable cost, but the trustee is not required to assess whether the purchase of that security would be prudent in relation to the trust’s investment portfolio. Instead, subject to the “willful misconduct” standard prescribed by subsection (b), a trustee that takes reasonable action to comply with a power of direction or a further power of a trust director under Section 6(c)(1) is not liable for so acting.

Powers jointly held with a trust director. A trustee may hold a power of direction jointly with a trust director. For example, the terms of a trust may confer a power to determine the capacity of a beneficiary upon a committee of people, and the committee may include both the trustee and the beneficiary’s son, the latter of whom is a trust director. When a trustee holds a power jointly with a trust director, the trustee continues to have the normal duties of a trustee as regards its own exercise or nonexercise of the joint power. Subsection (a), in other words, does not relieve the trustee from the trustee’s normal duties as to the trustee’s own powers, including powers held jointly with a trust director. In deciding how to vote as a member of the committee to determine a beneficiary’s capacity, for instance, the trustee has the same duties that it would have if it held its power jointly with another trustee instead of with another trust director.

A trustee’s participation in joint decisionmaking with a trust director, however, must be distinguished from the trustee’s execution of those joint decisions. Although the trustee is subject to the normal fiduciary duties of trusteeship in making a decision jointly with a trust director, the trustee is subject to the reduced duty of subsections (a) and (b) in executing such a decision. Thus, returning to the example given in the prior paragraph, if the committee to determine a beneficiary’s capacity exercises its power by deciding that the beneficiary lacks capacity, the trustee has a duty to take reasonable action to comply with the decision (even if the trustee did not agree with it) and is not liable for such action except as provided in subsection (b).

Subsection (b)—willful misconduct. Subsection (b) provides an exception to the duty of compliance prescribed by subsection (a). Under subsection (b), a trustee must not comply with a power of direction or a further power of a trust director under Section 6(c)(1) to the extent that by complying the trustee would engage in “willful misconduct.” The drafting committee settled upon the “willful misconduct” standard after a review of the existing directed trust statutes.

Roughly speaking, the existing directed trust statutes fall into two groups. In one group, which constitutes a majority, are the statutes that fully relieve a directed trustee from duty or liability for complying with an action of a trust director. This group includes the statutes in Alaska, New Hampshire, Nevada, and South Dakota. The policy rationale for these statutes is that duty should follow power. A director who possesses a power of direction should be the exclusive bearer of fiduciary duty in the exercise or nonexercise of that power. Moreover, the settlor of a directed trust could have made the trust director the sole trustee instead. Thus, on greater-includes-the-less reasoning, the settlor should also be able to eliminate a directed trustee’s duty and liability for complying with an action of a trust director. Under these statutes, a
beneficiary’s only recourse for misconduct by the trust director is an action against the director for breach of the director’s fiduciary duty to the beneficiary.

In the other group, which includes Delaware, Illinois, Colorado, North Carolina, Texas, and Virginia, are the statutes under which a directed trustee is not liable for complying with a direction of a trust director, unless by so doing the directed trustee would personally engage in “willful” or “intentional” misconduct. The policy rationale for these statutes is that, because a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is directed. Although the settlor could have made the trust director the sole trustee, the settlor did not actually do so—and under traditional understandings of trust law, a trustee must always be accountable to a beneficiary in some way. See, e.g., Restatement (Third) of Trusts § 96 cmt. c (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.”).

The states in the second group also recognize, however, that to facilitate the settlor’s intent that the trust director rather than the directed trustee be the primary or even sole decisionmaker, it is appropriate to reduce the trustee’s duty and liability below the usual level with respect to a matter subject to a power of direction. Accordingly, under these statutes a beneficiary’s main recourse for misconduct by the trust director is an action against the director for breach of the director’s fiduciary duty to the beneficiary. The beneficiary also has recourse against the trustee, but only if the trustee’s compliance with the terms of the power of direction amounted to “willful misconduct” by the trustee. Relative to a non-directed trust, this second approach has the effect of increasing the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, but in addition the directed trustee also has a duty to avoid willful misconduct.

After extensive deliberation and debate, the drafting committee opted to follow the second group of statutes, which includes the prominent Delaware act, on the grounds that this model does more to protect a beneficiary and is more consistent with traditional fiduciary policy. The popularity of directed trusts in Delaware establishes that a directed trust regime that preserves a “willful misconduct” safeguard is workable and that a total elimination of duty in a directed trustee is unnecessary to satisfy the needs of directed trust practice.

The willful misconduct standard prescribed by this subsection changes the policy of Uniform Trust Code § 808 (2000), which provides the current uniform law treatment of directed trusts and is similar in substance to Restatement (Third) of Trusts § 75 (Am. Law Inst. 2007). Section 808(b) provides: “If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” In deciding to change this standard, the drafting committee was deeply influenced by the fact that a growing number of states that had previously adopted Section 808 have since abandoned it or modified it to follow one of the two other models discussed above. The drafting committee was
also strongly influenced by the fact that a review of every existing specialized state statute on
directed trusts showed that no state that has legislated specifically on the issue of directed trustee
fiduciary duties has chosen to follow Section 808.

The willful misconduct standard in subsection (b) is to be distinguished from the duty to
take reasonable action in subsection (a). The reasonable action rule of subsection (a) applies to
the manner by which a trustee complies with a power of direction. The willful misconduct
standard of subsection (b) applies to the decision of whether to comply with a power of direction.

Powers to veto or approve. The terms of a trust may give a trust director a power to veto
or approve the actions of a trustee. The trustee, for example, may have the power to invest trust
property, subject to the power of a trust director to review and override the trustee’s decision e.
A trustee that operates under this kind of veto or approval power has the normal duties of a
trustee as regards the trustee’s exercise of its own powers, but has only the duties of a directed
trustee as regards the trust director’s exercise of its power to veto or approve. The trustee would
be subject to the normal duty of prudence in deciding which investments to propose to a director,
for example, but then would be subject only to the willful misconduct rule for a directed trustee
under this section in choosing whether to comply with the director’s veto or disapproval.

Subsection (c)—release by trust director. The terms of a trust may empower a trust
director to release a trustee or another trust director from liability for breach of trust. If the
director grants such a release, the trustee or other director is not liable to the extent of the release.
The terms of a trust may enable such a release to be given at any time, whether before or after
the trustee or other director acts.

Subsection (c) provides three additional safeguards for a release by a trust director of a
trustee or other director from liability. First, consistent with the policy of subsection (b), a trustee
or other director cannot be released for a breach that involves the trustee’s or the other director’s
own willful misconduct. Second, consistent with prevailing law governing a release of a trustee
by a beneficiary, a release by a trust director is not enforceable if it was procured by the
improper conduct of the trustee or other director. Third, again consistent with prevailing law
governing a release of a trustee by a beneficiary, a release by a trust director is not enforceable if
at the time of the release the director did not know of the material facts relating to the breach.
The drafting committee based the second and third of these safeguards on Uniform Trust Code §
1009 (2001), which is similar in substance to Restatement (Third) of Trusts § 97 (Am. Law Inst.
2012).

Subsection (d)—petition for instructions. Subsection (d) provides that a directed trustee
may satisfy its duty under this section by petitioning for instructions. The protection of this
subsection is bounded by two limits: a trustee must have “reasonable doubt” about its duty, and
the trustee’s petition for instructions must be “timely.” The requirement of “reasonable doubt”
follows from Restatement (Third) of Trusts § 71 (Am. Law Inst. 2007), which provides: “A
trustee or beneficiary may apply to an appropriate court for instructions regarding the
administration or distribution of the trust if there is reasonable doubt about the powers or duties
of the trusteeship or about the proper interpretation of the trust provisions.”
The safe harbor of this subsection is permissive rather than mandatory. Though a trustee may satisfy its duties by petitioning for instructions, this subsection does not, by itself, require a trustee to petition.

Subsection (d)—no ceiling on duties. Subsection (d) confirms that the duties prescribed by this section are merely defaults and minimums, not ceilings. The terms of a trust can impose further duties in addition to those prescribed by this section.

SECTION 10. DUTY TO PROVIDE INFORMATION TO TRUSTEE OR TRUST DIRECTOR.

(a) Subject to Section 11, a trustee shall provide information to a trust director to the extent the information is reasonably related to:

(1) the powers or duties of the trustee; and

(2) the powers or duties of the director.

(b) A trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related to:

(1) the powers or duties of the director; and

(2) the powers or duties of the trustee or other director.

Comment

Duty to provide information. This section imposes a duty on a trustee and a trust director to provide information to each other. Subsection (a) imposes this duty on a directed trustee, and subsection (b) imposes this duty on a trust director.

Disclosure to beneficiaries. This section governs disclosure of information to trustees and trust directors rather than to beneficiaries. The duty of a trust director to disclose information to a beneficiary is governed by Section 8, which prescribes the fiduciary duties of a trust director. The duty of a trustee to disclose information to a beneficiary is governed by the background law of an enacting state under Section 4 as modified by Section 11, which limits a directed trustee’s duty to inform a beneficiary about the actions of a trust director.

Reasonableness. This section relies heavily on the concept of reasonableness. Information must be disclosed only if it is reasonably related both to the powers or duties of the person making the disclosure and to the powers or duties of the person receiving the disclosure. The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The
information must also be reasonably related to the powers or duties of the person receiving the
disclosure, because otherwise that person would not need the information. Examples of matters
that might require disclosure under this section include modifications to the terms of a trust,
changes to investment policy or strategy, distributions, changes in accounting procedure or
valuations, and removal or appointment of trustees and trust directors.

An affirmative and a responsive duty to inform. This section imposes an affirmative duty
to provide information even in the absence of a request for that information 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 trustees and
other trust directors whose powers or duties are reasonably related to the amendment whether or
not the trustees or other trust directors inquired about it. Similarly, the director would have a
responsive duty to provide information about the amendment upon a request by a trustee or
another trust director whose powers or duties were reasonably related to the amendment.

Interaction with Section 11. The duty in subsection (a) of a trustee to disclose information
is subject to the limitations on a directed trustee’s duty in Section 11. Section 11 provides that “a
trustee does not have a duty to monitor a trust director or inform or give advice to a settlor,
beneficiary, trustee, or trust director concerning instances in which the trustee might have
exercised or not exercised the director’s powers differently.”

Thus, a trustee has a duty under this section to disclose information about the actions of a
trust director only if the information is related to both the duties of the trustee and the duties of
the director to whom disclosure is provided. A trustee does not, however, have a duty to inform
or give advice to a trust director concerning instances in which the trustee would have exercised
another trust director’s powers differently. If, for example, one trust director has a power to
direct investments and another trust director has a power to allocate between principal and
income, the trustee would have a duty under this section to disclose the contents of the trust’s
investment portfolio to both directors, but would not have a duty to advise the director with the
power over principal and income that the other director has exercised its power over investments
unwisely.

Shelton v. Tamposi. In Shelton v. Tamposi, 62 A.3d 741 (N.H. 2013), the terms of the
trust left distribution in the hands of the trustee, but shifted power over investment to a trust
director (the “investment director”). In consequence, the trustee could not raise the cash
necessary to fund a distribution to one of the beneficiaries. Under subsection (b), the trust
director would have been under a duty to give the trustee information about the effects of the
director’s investment program on the trust’s cash position, and the trustee would have been under
a duty to give the director information about the cash requirements of the trustee’s distribution
program. Moreover, in making and implementing the investment program, under Section 8(a) the
trust director would be subject to the same duties as a similarly situated trustee, in parallel to the
trustee’s duties in making and implementing the distribution program.

Mandatory floor, not ceiling. This section imposes a mandatory floor on a directed
trustee’s and a trust director’s duty to share information, rather than a ceiling. The terms of a
trust may specify more extensive duties of information sharing among directed trustees and trust
SECTION 11. NO DUTY TO MONITOR, INFORM, OR ADVISE. Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have exercised or not exercised the director’s powers differently; and

(2) if a trustee monitors, informs, or gives advice about the actions of a trust director, the trustee does not thereby assume the duty described in paragraph (1).

Comment

Following the weight of existing statute law. This section provides that a directed trustee does not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances in which the trustee might have exercised or not exercised the director’s powers differently. Many existing state statutes have provisions to similar effect, though the language in this section is simpler and more direct.

The existing provisions on which this section is based were meant to reverse the result in Rollins v. Branch Banking & Trust Company of Virginia, 56 Va. Cir. 147 (2002), in which the court considered the liability of a trustee that was subject to direction in investment. The court declined to hold the trustee liable for the investment director’s failure to direct diversification of the trust’s investments, but the court nevertheless held the trustee liable for failing to advise the beneficiaries about the risks of the investment director’s actions.

Survival of trustee’s general duty of disclosure. Although this section confirms that a directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have exercised or not exercised the trust director’s powers differently, this section does not relieve a trustee of its ordinary duties to disclose and report under otherwise applicable law such as under Uniform Trust Code § 813 (2004) or Restatement (Third) of Trusts § 82 (Am. Law Inst. 2007). For example, if a trust director has a power to direct investments, this section would relieve a directed trustee of any duty to advise a beneficiary about the risks of a concentration in the investment portfolio. The trustee would remain under a duty, however, to make periodic reports or accountings to the beneficiary and to answer reasonable inquiries by the beneficiary about the administration of the trust to the extent required by otherwise applicable law. The trustee would also remain under the duty imposed by Section 10 to provide any trust directors with information reasonably related to their powers or duties.

No assumption of duty. In addition to waiving a directed trustee’s duty to monitor,
inform, or give advice as under paragraph (1) of this section, many state statutes go further and
also provide that if a trustee for some reason chooses to monitor, inform, or give advice, these
activities will be deemed to be “administrative actions.” See, e.g., Del. Code Ann. Tit. 12, §
3313(e) (2016). The purpose of these provisions is to ensure that if a directed trustee chooses for
some reason to inform, monitor, or give advice, the trustee does not assume a continuing
obligation to do so or concede a prior duty to have done so. This section dispenses with the
opacity of an administrative classification and achieves the intended result more directly in
paragraph (2) by providing that if a trustee monitors, informs, or gives advice about the actions
of a trust director on one occasion, the trustee does not thereby assume a duty to monitor, inform,
or give advice on another occasion.

SECTION 12. APPLICATION TO COTRUSTEE. The terms of a trust may relieve a
cotrustee from duty and liability with respect to a power of another cotrustee to the same extent
the terms of a trust may relieve a directed trustee from duty and liability with respect to a trust
director’s power of direction under Sections 9 through 11.

Legislative Note: A state that has adopted Uniform Trust Code Section 703(c), (f), and (g)
(2000) should revise those sections by [to be resolved].

Comment

Cotrusteeship by default. Under this section the default rule is that, if a settlor names
cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed
trusteeship will only apply if the terms of the trust so provide.

Settlor autonomy. Under traditional law governing cotrustees, each cotrustee “has a duty
to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach
of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2) (Am. Law Inst. 2007).
This rule applies even if the settlor limits the role or function of one of the cotrustees. “Even in
matters for which a trustee is relieved of responsibility, … if the trustee knows that a co-trustee is
committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable
steps to prevent the fiduciary misconduct.” Id. cmt. b. Moreover, “even in the absence of any
duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable
information regarding an aspect of trust administration in which the trustee is not required to
participate.” Id. These rules for cotrusteeship contrast with the less demanding fiduciary rules
for a directed trusteeship under Sections 9, 10, and 11 of this act.

This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the
traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. There
seems little reason to prevent the settlor from applying the fiduciary rules of this act to an
arrangement that uses the labeling of cotrusteeship given that a settlor could choose the more
permissive rules for a directed trusteeship by labeling one of the cotrustees as a trust director and
another as a directed trustee.
Mechanics of choosing directed trustee duties. Whether this section applies to a given trust is a question of construction of the terms of the trust. This section does not impose a requirement of express reference to this section or to this act. Under Section 3(a), this section applies to a trust created before the effective date of this act, but only as to decisions or actions after that date.

Cotrustees as directed trustees and trust directors. The terms of a trust can place a cotrustee in a position of either giving direction, like a trust director, or taking direction, like a directed trustee. This section only applies to a cotrustee who takes direction. This section does not address the duties of a cotrustee that gives direction because under Section 8, the duties of a trust director are the duties of a trustee. The drafting committee intended that the language “with respect to a power of another cotrustee” would exclude a power held jointly with the directed cotrustee.

No third-party effects. Although this section changes the degree to which the terms of a trust may reduce a cotrustee’s duties to a beneficiary, it does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee. The principal difference between cotrusteeship and directed trusteeship is that every cotrustee holds title to the trust property. In a directed trust, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee’s capacity as such.

SECTION 13. LIMITATION OF ACTION AGAINST TRUST DIRECTOR.

(a) An action against a trust director for breach of trust must be commenced within the same limitations period as an action against a trustee for a similar breach of trust[ as prescribed by Uniform Trust Code Section 1005].

(b) A report or accounting has the same effect on the limitations period for an action against the director that the report or accounting would have if the director were a trustee[ as prescribed by Uniform Trust Code Section 1005].

Legislative Note: A state that has adopted Uniform Trust Code Section 1005 (2000) should update the bracketed language to refer to that enactment. A state that has adopted a statute other than Uniform Trust Code Section 1005 to govern limitation of an action against a trustee should replace the bracketed language with a cross reference to that statute. A state that has not adopted a statutory limitation should delete the bracketed language.
This section absorbs an enacting state’s law governing limitations on an action against a trustee for application to an action against a trust director. The default or mandatory character of such law as applied to a trustee governs whether the law is default or mandatory as applied to a trust director.

Subsection (a) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state by way of a statutory limitations period, such as under Uniform Trust Code § 1005(c) (2000). The limitations period absorbed by subsection (a) applies to all claims against a trust director for breach of trust, whether by a beneficiary, a trustee, another trust director, or some other party.

Subsection (b) extends to a trust director the same limits on liability that a trustee enjoys under the law of an enacting state arising from the making of a report or accounting, such as under Uniform Trust Code § 1005(a)–(b) (2000), except that the rule of subsection (b) applies regardless of whether the report or accounting was made by the trust director. A trust director may therefore be protected by a report or accounting made by a trustee or another trust director even though the director did not make the report or accounting, so long as the report or accounting fairly discloses the relevant facts of the director’s conduct.

Laches, which strictly speaking is an equitable defense rather than a limitations period, is made applicable to an action against a trust director by Section 14.

SECTION 14. DEFENSES IN ACTION AGAINST TRUST DIRECTOR. In an action against a trust director for breach of trust, the director may assert the same defenses a trustee could assert in an action against the trustee for a similar breach of trust.

Absorption. This section applies to an action for breach of trust against a trust director the law of an enacting state governing defenses available to a trustee in a comparable action. A trust director can assert any defense that would be available to a trustee in a comparable action for breach of trust under existing state law, including:

- laches or estoppel (see Restatement (Third) of Trusts § 98 (Am Law. Inst. 2012));
- beneficiary consent, release, or ratification (see Uniform Trust Code § 1009 (2001); Restatement (Third) of Trusts § 97(b)–(c) (Am. Law Inst. 2012));
- reasonable reliance on the terms of a trust (see Uniform Trust Code § 1006 (2000); Uniform Prudent Investor Act § 1(b) (1994)); and
- reasonable care in ascertaining the happening of an event affecting administration or distribution (see Uniform Trust Code § 1007 (2000); Restatement (Third) of Trusts § 76 cmt. f (Am. Law Inst. 2007)).
Exculpation or exoneration. The comments to Section 8 address the effect of an exculpation or exoneration clause on the duty and liability of a trust director.

Attorney’s fees and indemnification. Attorney’s fees and indemnification for a trust director are governed by Section 6(c)(1), which establishes a default rule that allows a trust director to exercise “any further power appropriate to the exercise of the director’s power of direction.” By default, therefore, a trust director has a power to incur attorney’s fees and other expenses and to direct indemnification for them if “appropriate” to the exercise of the director’s express powers.

SECTION 15. JURISDICTION OVER TRUST DIRECTOR.

(a) By accepting appointment as trust director of a trust subject to this [act], the director submits personally to the jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

Comment

Under subsection (a), by accepting appointment as trust director of a trust subject to this act, the director submits to the personal jurisdiction of the courts of the state. This rule is mandatory. The terms of a trust or an agreement among the trust director and other parties cannot negate a court’s personal jurisdiction over a trust director under this section. However, this section does not preclude a court from declining to exercise jurisdiction under the doctrine of forum non conveniens.

Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of obtaining jurisdiction over a trust director.

SECTION 16. OFFICE OF TRUST DIRECTOR. Unless the terms of a trust provide otherwise, the rules applicable to a trusteeship regarding the following matters apply to a trust directorship:

(1) appointment[ as prescribed by Uniform Trust Code Section 704];

(2) acceptance[ as prescribed by Uniform Trust Code Section 701];

(3) giving of bond to secure performance[ as prescribed by Uniform Trust Code Section
(4) compensation[ as prescribed by Uniform Trust Code Section 708];

(5) resignation[ as prescribed by Uniform Trust Code Section 705];

(6) removal[ as prescribed by Uniform Trust Code Section 706]; and

(7) vacancy[ as prescribed by Uniform Trust Code Section 704].

**Legislative Note:** A state that has adopted the Uniform Trust Code sections cited in this section should update the bracketed language to refer to the appropriate portions of that enactment. A state that has adopted relevant statutory provisions other than the sections of the Uniform Trust Code cited in this section should replace the bracketed language with cross references to those provisions. A state that has not adopted relevant statutory provisions should delete the bracketed language accordingly.

**Comments**

This section applies the law of trusteeship to a trust directorship with regard to seven subjects. The default or mandatory character of the law as applied to a trusteeship governs whether the law is default or mandatory as applied to a trust directorship.

**Paragraph (1)—appointment.** This paragraph absorbs an enacting state’s law governing trustee appointment, such as under Uniform Trust Code § 704(c) and (e) (2004) and Restatement (Third) of Trusts § 34 (2003), for application to appointment of a trust director.

**Paragraph (2)—acceptance.** This paragraph absorbs an enacting state’s law governing acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or Restatement (Third) of Trusts § 35 (Am. Law Inst. 2003), for application to acceptance of a trust directorship.

**Paragraph (3)—bond.** This paragraph absorbs an enacting state’s law governing bond to secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and Restatement (Third) of Trusts § 34(3) (Am. Law Inst. 2003), for application to bond by a trust director.

**Paragraph (4)—compensation.** This paragraph absorbs an enacting state’s law governing compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement (Third) of Trusts § 38 cmt. i (Am. Law Inst. 2003), for application to compensation of a trust director. The drafting committee contemplated that, just as in total “the reasonable fees for multiple trustees may be higher than for a single trustee,” *id.*, so too the total reasonable fees for a trust with a directed trustee and a trust director may be higher than for a single trustee.

On the other hand, the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to “render services expected or normally to be performed by the trustee.” Restatement (Third) of
Paragraph (5)—resignation. This paragraph absorbs an enacting state’s law governing resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and Restatement (Third) of Trusts § 36 (Am. Law Inst. 2003), for application to resignation by a trust director.

Paragraph (6)—removal. This subsection absorbs an enacting state’s law governing removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of Trusts § 37 cmt. e (Am. Law Inst. 2003), for application to removal of a trust director.

Paragraph (7)—vacancy. This section absorbs an enacting state’s law applicable to a vacancy in a trusteeship, such as under Uniform Trust Code § 704 (2004), for application to a vacancy in a trust directorship.

Costs and indemnification. The power of a trust director to incur reasonable costs and direct indemnification for expenses would in most cases be covered by Section 6(c)(1).

SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.

SECTION 19. REPEALS; CONFORMING AMENDMENTS.
SECTION 20. EFFECTIVE DATE. This [act] takes effect . . . .