D R A F T

FOR DISCUSSION ONLY

DIVIDED TRUSTEESHIP ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAW

March 27 – 28, 2015 Drafting Committee Meeting

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March 9, 2015

DIVIDED TRUSTEESHIP ACT

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DIVIDED TRUSTEESHIP ACT

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DIVIDED TRUSTEESHIP ACT

ARTICLE 1

GENERAL PROVISIONS AND DEFINITIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Divided Trusteeship Act.

Discussion Notes

Directed Trusteeship Act? This project was approved for a "divided trusteeship act" with the expectation that we would address all manner of divided trusteeship, including directed trusts, trust protectors, trust advisors, and any other manifestation of the practice of breaking off a function of trusteeship and giving it to a non-trustee or otherwise giving a non-trustee power over the terms or administration of a trust. The question arises, however, whether this phrase, "divided trusteeship," is or would be well understood, and if not, whether the more familiar term "directed trust" would be better. This draft uses the terms "trust director" and "directed trustee" for all forms of divided trusteeship, though the discussion notes to Section 202 raise the possibility of also using the term "trust protector."

To put the point in more general terms, "divided trusteeship" was the title suggested for our project by the study committee that recommended formation of our drafting committee. As the drafting committee, we are permitted to recommend a name change if we think doing so is appropriate.

Multiple Trusteeship Act? The practice of giving one co-trustee a power to direct another co-trustee, or of creating a limited purpose co-trustee, is closely related to our project, and raises a conceptually similar question of mandatory fiduciary floors for persons who have a power over the administration of the trust. The question arises, therefore, whether we should also address co-trusteeship, and if so, whether "multiple trusteeship" should be included in our title (for example, the "Divided and Multiple Trusteeship Act"). The specific question is whether we should reconcile the law governing the fiduciary floor for a co-trustee with the fiduciary floor under this act for a trust director and directed trustee. Article 4 is a placeholder for addressing co-trusteeship issues.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Directed trustee" means a trustee that is subject to direction by a trust director.

(2) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

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

(4) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding, by court order, or by nonjudicial settlement.

(5) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

(6) "Trust director" means a person other than a trustee that is given a power under Section 202 of this [act]. The term excludes a holder of a nonfiduciary power of appointment.

(7) "Trust Fiduciary" means a trustee or trust director.

Discussion Notes

Defined terms, not substance. The style rules of the Uniform Law Commission call for consolidation of definitions for terms that recur throughout an act into a single section early in the act. A definition for a term that appears in only one section should be located in that section. Provisions that state a definition must be definitional only, with the substance pertaining to the term addressed separately.

Terms of a trust. The definition of "terms of a trust" is based on Uniform Trust Code §103(18), except that we have expanded it to recognize expressly modifications by court order and nonjudicial settlement. We understand that both, especially nonjudicial settlement, are commonly used to create or rework a divided trusteeship.[1] Several existing divided trustee statutes make express reference to nonjudicial settlements.[2] We also understand that the draft decanting act will be revised to expand its definition of terms of a trust similarly.

Trust Director and Directed Trustee. This draft uses the term "trust director" for a person who is given a power over the administration or terms of a trust (see Sections 201-202), and "directed trustee" for a trustee who is subject to direction by a trust director (see Section 301). These terms are placeholders to get us started. The existing statutes use a variety of terms, many of which denote or incorporate specific powers and duties. The most common terms are

[1] *See* Todd A. Flubacher & Kenneth F. Hunt, The Non-Judicial Settlement Agreement Wrapper, 152 Tr. & Est. 42, 42–51 (2013).

[2] *See, e.g.,* 760 Ill. Comp. Stat. 5/16.3(j)(2)(B); N.H. Rev. Stat. Ann. §§ 564-B:12-1201(a):12-1204(a); Tenn. Code Ann. § 35-15-710; Va. Code Ann. § 64.2-709(1); Wis. Stat. Ann. § 701.818(a).

"directors," "protectors," and "advisers."[3] Some statutes, like this draft, use a single umbrella term to denote all non-trustee fiduciaries.[4] Other statutes use multiple terms to denote separate categories of non-trustee fiduciaries, triggering different powers and duties depending on the term used.[5] This issue is addressed further in the discussion notes to Section 202 under the headers "enabling versus off-the-rack powers" and "add the term 'trust protector'?"

Two aspects of the definition of trust director require further comment. First, by excluding trustees, we confirm that the new divided trustee rules of our act do not apply to co-trusteeship. Instead, we have left that question open for discussion in connection with Article 4.

Second, by excluding a holder of a nonfiduciary power of appointment, we confirm that our act will not override existing law, such as the Uniform Powers of Appointment Act, that applies to nonfiduciary powers of appointment. What this means is that a person can be given a nonfiduciary power over distribution, but that power will be subject to the law governing powers of appointment. A few states have provisions to similar effect.[6]

Trust Fiduciary. The term "trust fiduciary" simplifies drafting by providing an umbrella term for both a trustee and a trust director for use in circumstances in which we want to refer to both.

Additional Definitions. If the drafting process points to the need for additional definitions, we can look to the existing statutes for models.[7]

SECTION 103. APPLICATION; GOVERNING LAW.

(a) This [act] applies to a trust created before, on, or after [the effective date of this [act]] that has its principal place of administration in this state, including a trust whose principal place of administration has been changed to this state.

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

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[3] The only state that does not use one of these three terms is North Carolina, which uses the term "power holder." N.C. Gen. Stat. Ann. § 36C-8A-1.

[4] *See, e.g.,* Ariz. Rev. St. Ann. § 14-10818(A) ("Protector"); Colo. Rev. Stat. Ann. § 15-16-801 ("Advisor"); Va. Code Ann. § 64.2-770(E)(1) ("Director").

[5] Alaska, for example, gives "protectors" the power to remove trustees and modify an instrument and "advisers" the power to to direct a trustee's actions. Alaska Stat. §§ 13.36.370–.375.

[6] *See, e.g.,* Va. Code Ann. § 64.2-770(E)(1) ("No person shall be a 'trust director' for purposes of this subsection merely by holding a general or limited power of appointment over the trust assets.").

[7] *See, e.g.,* Colo. Rev. Stat. Ann. § 15-16-801; Idaho Code Ann. § 15-7-501(1); 760 Ill. Comp. Stat. 5/16.3(a); S.D. Codified Laws § 55-1B-1.

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

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

Discussion Notes

Subsection (a) - This subsection, which is a shortened version of the governing law provision of the latest draft of the uniform decanting act (Spring 2015), answers two questions. First, this subsection provides that this act applies to all trusts, whether created before or after the adoption of this act, and without regard to whether the terms of the trust expressly reference this act. For more on this point, see the discussion notes to Section 201 under the header "application to all trusts versus opt-in."

Second, on the assumption that powers and duties in a divided trusteeship are matters of trust administration, this subsection follows the normal conflict of laws rule by linking the application of this act to a trust's "principal place of administration."[8]

Subsection (b) - This provision, which derives verbatim from Uniform Trust Code §108(a), is meant to provide statutory confirmation of certain means (that are not exclusive) of establishing the principal place of administration.

Business trusts. In an earlier conference call a question arose about our project's application to a common law trust with a business rather than donative purpose. The Uniform Trust Code addresses this matter through §102, which provides: "This [Code] applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust." The comment to that section elaborates thus:

> The Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules

[8] *See* Restatement (Second) of Conflict of Laws § 271 cmt. a (1971) ("The term 'administration of a trust' … includes those matters which relate to the management of the trust. Matters of administration include those relating to the duties owed by the trustee to the beneficiaries. They include the powers of a trustee, such as the power to lease, to sell and to pledge, the exercise of discretionary powers, the requirement of unanimity of the trustees in the exercise of powers, and the survival of powers. They include the liabilities which may be incurred by the trustee for breach of trust. They include questions as to what are proper trust investments. They include the trustee's right to compensation. They include the trustee's right to indemnity for expenses incurred by him in the administration of the trust. They include the removal of the trustee and the appointment of successor trustees. They include the terminability of the trust.")

stated in this Code. *See* John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

SECTION 104. PRINCIPLES OF LAW AND EQUITY. Unless displaced by a provision of this [act], the principles of law and equity of this state supplement this [act].

Discussion Notes

This section is based on Uniform Premarital and Marital Agreements Act §5 and is similar to Uniform Trust Code §106. The purpose is to confirm that the law of an enacting state other than this act remains applicable to divided trusteeship except as displaced by this act. For example, other than as provided by Section 103(b), the law of an enacting state by which principal place of administration is determined would continue to apply to a trust with divided trusteeship.

ARTICLE 2

TRUST DIRECTORS

SECTION 201. TRUST DIRECTORS AUTHORIZED. The terms of a trust may provide for one or more trust directors.

Discussion Notes

Court order or nonjudicial settlement. Under Section 102(4), the "terms of a trust" may be established not only by reference to a trust instrument but also by court order or nonjudicial settlement. In consequence, this section validates divisions of trusteeship by a settlor in the terms of a trust and by a judicial or nonjudicial modification.

Application to all trusts versus opt-in. Under Section 103(a), this act applies to all trusts, whether created before or after the effective date of this act, and without regard to whether the terms of the trust expressly reference this act. There are at least two important policy decisions embedded in this formulation. First, existing trusts that in substance provide for a trust director by giving a non-trustee any of the various powers scheduled in Section 202 would fall within the coverage of this act going forward, and this act would supersede any previously applicable statutes or common law to the extent it displaces them. The Illinois statute takes this position expressly.[9] The alternative is to apply this act prospectively to new trusts only (perhaps with a mechanism for existing trusts to opt in).

Second, new trusts that in substance provide for a trust director are governed by this act

[9] *See* 760 Ill. Comp. Stat. 5/16.3(j)(1) ("On and after its effective date, this Section applies to all existing and future trusts that appoint or provide for a directing party, including but not limited to a party granted power or authority effectively comparable in substance to that of a directing party as provided in this Section.").

whether or not they reference this act expressly. The alternative, as under the Virginia statute,[10] is to limit application of this act to new trusts that expressly reference it, preserving prior law for trusts that do not include an express reference

Nomenclature. As flagged in the cover memo and in the discussion notes to Section 102 under the header "Trust Director and Directed Trustee," we have used the term "trust director" to reference any person who has any power over the administration of a trust or its terms under Section 202. However, using multiple defined terms for non-trustees might be more apt if as a matter of substantive policy we decide that different non-trustee powers should be subject to different fiduciary standards of conduct.

Settlor incapacity or death. Existing statutes in several states, including in Nevada and South Dakota, have provisions that validate the extension of a trust director's authority beyond the settlor's death or incapacity. The South Dakota statute, for example, says, "An excluded fiduciary may continue to follow the direction of the trust advisor upon the incapacity or death of the grantor if the instrument so allows."[11] We should discuss the purpose of these provisions and whether the issue should be addressed in our act.

SECTION 202. POWERS OF TRUST DIRECTOR.

(a) Subject to Section 204, the terms of a trust may authorize a trust director:

(1) to direct a trust fiduciary in the fiduciary's exercise or nonexercise of any of the fiduciary's powers in the administration of the trust;

(2) to appoint or remove a trust fiduciary;

(3) to enforce the trust;

(4) to ratify the conduct of a trust fiduciary;

(5) to modify the terms of the trust;

(6) to change the principal place of administration, the situs, or the governing law of the trust;

(7) to terminate the trust;

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[10] *See* Va. Code Ann. § 64.2-770 ("The provisions of this subsection shall apply if the settlor incorporates this section into the trust instrument by specific reference. The provisions of this subsection shall also apply if this subsection is incorporated into the trust instrument by a nonjudicial settlement agreement under § 64.2-709 by specific reference.").

[11] S.D. Codified Laws § 55-1B-3. *See also* Colo. Rev. Stat. Ann. § 15-16-808; Idaho Code Ann. § 15-7-501(3); Miss. Code Ann. § 91-8-1201(d); Nev. Rev. Stat. Ann. § 163.555; N.C. Gen. Stat. Ann. § 36C-8A-8; S.D. Codified Laws § 55-1B-3; Tenn. Code Ann. § 35-15-1201(d); Wyo. Stat. Ann. § 4-10-715.

(8) to resolve a disagreement between a trust fiduciary and a beneficiary or among trust fiduciaries or beneficiaries;[12] and

(9) [should we try to come up with a catch-all provision for anything else? Compare Appendix A.]

(b) The terms of a trust may require a trust fiduciary to obtain the consent of a trust director before exercising or not exercising any of the fiduciary's powers.

(c) A trust director may exercise any other power appropriate to exercise the powers given to the trust director by the terms of the trust, including:

(1) to delegate powers and duties;

(2) to incur and direct indemnification of reasonable costs;

(3) to bring an action in [designate] court for instructions, to declare rights, or to enforce the trust;

(4) to intervene in an action against a trust fiduciary by a beneficiary or a third party[; and][.]

[(5) to direct a trustee to issue a Certification of Trust under [Uniform Trust Code §1013][.]

(d) Unless the terms of a trust provide otherwise, trust directors with overlapping powers may act by majority decision.

Discussion Note

Powers versus duties. This Section governs the powers of a trust director. The duties of a trust director in the exercise or nonexercise of a power are governed by Sections 204 and 206.

Enabling versus off-the-rack. As the cover memo explains, the existing divided trusteeship statutes can be divided roughly into two categories: "enabling" and "off-the-rack." This section implements an enabling rather than off-the-rack approach. Instead of creating

[12] *See* Wis. Stat. Ann. § 701.0818(2)(b)(1)(c) ("Resolve disputes between the trustee or a directing party and a beneficiary.").

several categories of non-trustees and giving each one a particular set of default powers, this section authorizes the appointment of a generic "trust director," forcing the settlor (and so the settlor's lawyer) to say expressly in the terms of the trust what powers the director will have. The cover memo explains our rationale for choosing an enabling structure for this discussion draft.

The structure of this section. The structure of this section is as follows:

- *Subsection (a)* provides for the naming of a trust director with a power to direct a trust fiduciary (and so a trustee or another trust director) in the exercise or nonexercise of any of the fiduciary's powers. Subsection (a) also schedules additional powers that may be given to a trust director over the administration of the trust and its terms.

- *Subsection (b)* allows for a requirement that a trust fiduciary (and so a trustee or another trust director) obtain a trust director's consent before exercising any of the fiduciary's powers.

- *Subsection (c)* gives a trust director such additional powers as are appropriate to the director's exercise of her express powers. The several examples given in the blackletter are not meant to be limiting. The term "appropriate" and the structure of the opening clause is based on Uniform Trust Code §815(a)(2)(B).
- *Subsection (d)* provides a default rule of majority action for multiple trust directors with overlapping powers. Majority rule is the modern default for multiple trustees, as under Uniform Trust Code §703(a).

Add the term "trust protector"? We might consider using the term trust director for a person given a power under subsection (a)(1) and the term "trust protector" for a person given a power under subsections (a)(2)-(9) or (b). First, using both terms is consistent with current practice usage, which might make this act more intuitive and better received.

Second, using separate terms would make simpler the process of applying different fiduciary rules to persons who hold a power under subsection (a)(1) versus under subsections (a)(2)-(9) or (b). Several existing statutes draw such a distinction, allowing more room for varying or eliminating fiduciary duty for a holder of "protector"-type powers relative to "director"-type powers. To put the point in more general terms, 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.

The design of subsection (a). Subsection (a)(1) broadly authorizes direction of a trust fiduciary (and so a trustee or another trust director) by a trust director regarding the exercise or nonexercise of any of the fiduciary's powers. As such, it validates direction on investment and distribution, albeit without expressly mentioning those subjects. Subsections (a)(2)-(9) authorize certain powers that are more specific and are not customarily thought of as a power of trusteeship over which a director could be given a power of direction under subsection (a)(1). Overall, the effect is intended to be generic: we are trying to state the broadest possible range of trust director

powers rather than listing every imaginable power in detail. It bears repeating that subsection (a)(1) incorporates the entire field of trustees' powers.

A fair question is whether the generic approach of this draft is sufficient. Many state statutes have elaborate lists of the various powers that can be given to a trust director. Appendix A is our effort at a comprehensive collection of all the powers that appear specifically across the existing statutes. Is the generic phrasing of subsection (a)(1) plus subsections (a)(2)-(9) and (b) be broad enough to include all of the powers collected in Appendix A?

We should also consider whether it might be useful to supplement subsections (a) and (b) with a more detailed non-exclusive list of specific powers that would fall within subsections (a) and (b), not unlike the list in subsection (c). Another and perhaps more familiar structural analogy is the combination of Uniform Trust Code §815, which is a broad and generic grant of power to trustees, with §816, which is a long and detailed list of specific powers that are not meant to limit the grant of broad power under §815. The benefit of a detailed list is that it avoids interpretive disputes about the meaning of the more generic authorization.

Subsection (a)(4) and ratification by one fiduciary of another fiduciary's conduct. We should discuss in particular the interaction of subsection (a)(4) and the provisions on the fiduciary duties of a trust director (Section 204) and directed trustee (Section 303) as applied to the phenomenon of so-called "silent trusts." Note also the power in the text accompanying footnote 25 in Appendix A ("Review and approve the trustee's reports or accounting.").

Power of appointment. Per the definition of a trust director in Section 102(6), this section does not apply to the holder of a nonfiduciary power of appointment.

SECTION 203. LIMITATIONS ON POWERS OF TRUST DIRECTOR. [No blackletter yet; see discussion notes.]

Discussion Notes

Under the capacious language of Section 202, there is little in the administration or terms of a trust that cannot be subject to the control of a trust director. In at least four states, however, there are specific statutory provisions that cut back on the powers that may be given to a trust director. In general, these limits relate to charitable trusts, tax planning, or special needs trusts. The provisions are excerpted in full below. The question presented is whether we should have a provision with some or all of these rules. Depending on the discussion, we might form a subcommittee to sort out the details.

Mississippi Code Ann. § 91-8-1201(e)

(e) Notwithstanding anything in this section to the contrary, no modification, amendment, or grant of a power of appointment with respect to a trust, all of whose beneficiaries are charitable organizations, may authorize a trust protector or trust advisor to grant a beneficial interest in the trust to any noncharitable interest or purpose.

Missouri V.A.M.S. § 456.8-808(4)

4. Notwithstanding any provision in the trust instrument to the contrary, a trust protector shall have no power to modify a trust to:

(1) Remove a requirement from a trust created to meet the requirements of 42 U.S.C. Section 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary of the trust at the death of that beneficiary; or

(2) Reduce or eliminate an income interest of the income beneficiary of any of the following types of trusts:

(a) A trust for which a marital deduction has been taken for federal tax purposes under Section 2056 or 2523 of the Internal Revenue Code or for state tax purposes under any comparable provision of applicable state law, during the life of the settlor's spouse;

(b) A charitable remainder trust under Section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary;

(c) A grantor retained annuity trust under Section 2702 of the Internal Revenue Code, during any period in which the settlor is a beneficiary; or

(d) A trust for which an election as a qualified Sub-Chapter S Trust under Section 1361(d) of the Internal Revenue Code is currently in place.

Missouri V.A.M.S. § 456.8-808(5)

5. Except to the extent otherwise provided in a trust instrument specifically referring to this subsection, the trust protector shall not exercise a power in a way that would result in a taxable gift for federal gift tax purposes or cause the inclusion of any assets of the trust in the trust protector's gross estate for federal estate tax purposes.

Tennessee Code Ann. § 35-15-1201(e)

(e) Notwithstanding anything in this section to the contrary, no modification, amendment or grant of a power of appointment with respect to a trust all of whose beneficiaries are charitable organizations may authorize a trust protector or trust advisor to grant a beneficial interest in such trust to any non-charitable interest or purpose.

Wisconsin Stat. Ann. §§ 701.0818(6)

(6) Prohibited actions. A trust protector may not exercise a power granted to the trust protector to do any of the following:

(a) Except as provided in sub. (2)(b)3. and 4., create or expand any beneficial interest, power of appointment, right of withdrawal, or right to receive trust property as a result of the exercise of a power of appointment if the creation or expansion would benefit the trust protector, the trust protector's estate, the trust protector's creditors, or creditors of the trust protector's estate.

(b) Modify or amend a trust to do any of the following:

1. Remove a requirement pursuant to 42 USC 1396p(d)(4) to pay back a governmental entity for benefits provided to the permissible beneficiary at the death of that beneficiary.

2. Reduce or eliminate an income interest of an income beneficiary of any of the following trusts:

a. A trust for which a marital deduction has been taken for federal or state

estate tax purposes under section 2056, 2056A, or 2523 of the Internal Revenue Code or any comparable provision of applicable state law, during the life of the settlor's spouse.

b. A charitable remainder trust under section 664 of the Internal Revenue Code, during the life of the noncharitable beneficiary.

c. A trust in which the settlor has a qualified interest under section 2702(b) of the Internal Revenue Code, during any period in which the settlor is a beneficiary.

d. A trust for which an election as a qualified Subchapter S Trust under section 1361(d) of the Internal Revenue Code is in place.

(c) Modify any beneficial interest in a trust that qualified for a marital deduction or charitable deduction from federal or state estate tax in a manner that would have caused the trust not to qualify for the deduction.

SECTION 204. DUTIES OF TRUST DIRECTOR.

(a) Subject to subsections (b)-(c), a trust director must act in accordance with a direction from another trust director that is within the other director's powers under Section 202.

(b) Except as otherwise provided in subsection (c), a trust director is subject to the same fiduciary duties in the exercise or nonexercise of a power under Section 202 as a [?sole?] trustee would be in the exercise or nonexercise of the same power under the same circumstances.

(c) The terms of a trust may vary or eliminate the fiduciary duties of a trust director:

(1) to the same extent that the terms of the trust could vary or eliminate the fiduciary duties of a sole trustee under the same circumstances; or

(2) to the extent that the terms of the trust vary Section 303 to impose upon a directed trustee, with respect to the director's exercise or nonexercise of the director's powers, the duty of the director that is varied or eliminated.

Discussion Notes

Subsection (a) - Subsection (a) imposes on a trust director a duty of obedience to an authorized direction from another trust director. Many of the existing statutes provide similarly. For example, the Illinois statute provides that "[t]he excluded fiduciary shall act in accordance with the governing instrument and comply with the directing party's exercise of the powers granted to the directing party by the governing instrument."[13] (Many statutes use the concept of

[13] 760 ILCS §5/16.3(f).

an "excluded fiduciary" to relieve a directed trustee or directed trust director of fiduciary duties. These statutes define a trustee or trust director to be an "excluded fiduciary" with respect to powers exercised by a trust director and then relieve the excluded fiduciary from fiduciary obligations.[14])

Subsection (b) - In giving strong default fiduciary duties to a trust director, subsection (b) follows the great majority of the existing state statutes.[15] However, many of the statutes merely designate a trust director as a fiduciary without elaborating what that designation means. The statutes tend not to spell out the nature or extent of a trust director's fiduciary duties.

To implement the fiduciary policy of the great majority of states, but without the ambiguity of the existing statutes, subsection (b) generally absorbs the duties of trusteeship and applies them by default to a trust director. As such, subsection (b) applies by default to a trust director the core trust fiduciary duties of loyalty and prudence as well as the more granular fiduciary duties of trusteeship pertaining to diversification, protecting trust property, keeping records, enforcing and defending claims, collecting trust property, informing beneficiaries, and so on.

There are three main benefits to absorbing existing trust fiduciary law rather than reinventing it for a trust director. First, we avoid the need to spell out each fiduciary duty, that is, we avoid the need to replicate something like Article 8 of the Uniform Trust Code (see Appendix B). Second, absorbing the trust fiduciary law of each enacting state allows for diversity across the states in the particulars of a trustee's fiduciary duties, such as on the scope of the duty to give information and to diversify. Third, absorption allows for changes to the law of a trustee's fiduciary duties to be absorbed automatically without need for periodic conforming revision to this act.

The term "sole" is bracketed with question marks, as it raises an important question for discussion. If there are multiple trust directors with overlapping powers, should they have cross-monitoring duties resembling those of co-trustees?

Subsection (c) - This subsection resolves the extent to which the fiduciary duties absorbed by subsection (b) may be varied or eliminated by the terms of a trust.

Under subsection (c)(1) a trust director's duties may be varied or eliminated to the extent of the mandatory minimum allowed by the state for variation or elimination of the fiduciary duties of a trustee such as under Uniform Trust Code §105. The reason to absorb rather than

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[14] N.H. Rev. Stat. Ann. § 564-B:7-711(b), for example, provides that "A trustee is an excluded fiduciary to the extent that the trustee must follow the direction of a trust advisor, trust protector, cotrustee, or other person." The statute then says, "An excluded fiduciary is not liable for (i) any loss resulting from any action or inaction of a trustee, trust advisor, or trust protector." N.H. Rev. Stat. Ann. § 564-B:12-1205. *See also* Alaska Stat. Ann. § 13.36.072(c); Colo. Rev. Stat. Ann. § 15-16-807; 760 Ill. Comp. Stat. 5/16.3(e); Miss. Code Ann. § 91-8-710; Wyo. Stat. Ann. §§ 4-10-717, -718.

[15] A majority of states treat at least some types of trust directors as fiduciaries by default. These include, Alaska, Colorado, Delaware, Idaho, Illinois, Maryland, Michigan, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Utah, Virginia, Wisconsin and Wyoming. A minority of states exempts trust protectors (as distinct from other types of directors) from fiduciary duties by default. These include Alaska, Arizona, Idaho, and Wisconsin.

specify is the same as before. We need not, for example, take a position on whether the duty to diversify or to give information to a beneficiary may be waived. Instead, we absorb the position of each enacting state on these and other such questions.

Subsection (c)(2) allows the terms of a trust to vary or eliminate a director's duties even below the mandatory minimum for varying or waiving a trustee's duties provided that the terms of the trust override Section 303 to impose the varied or waived duties on the directed trustee. In this way, the state's policy on the mandatory core of trust fiduciary law is protected. Either the mandatory minimum is borne by the trust director under subsection (c)(1), and the trustee is relieved of its duties to the extent allowed by Section 303, or under subsection (c)(2) the director is relieved of duty and the mandatory minimum remains with the trustee notwithstanding Section 303.

The principle behind subsection (c)(2), although easy to state, can be difficult to implement in a statutory provision. Some examples:

- A nonfiduciary power to direct a distribution is permissible because it would qualify as a nonfiduciary power of appointment, and the holder of such a power is excluded from the definition of a trust director.

- Could a trust director be given a nonfiduciary power to remove a trustee? What does it mean to say the trustee must bear the fiduciary duties connected with the director's power to remove the trustee?

- Is there more to a trustee's duty under subsection (c)(2) than merely resisting a direction that is not in the best interests of the beneficiaries? If not, should subsection (c)(2) allow for elimination of a director's duties provided that the trustee's duty of obedience under Section 303(a) is qualified by a duty not to obey a direction to the extent that it is not in the best interests of the beneficiaries? What about the states in which the mandatory core is less than this?

Per the discussion notes to Section 202, several existing statutes allow more room for varying or eliminating fiduciary duty for a holder of "protector"-type powers relative to "director"-type powers. If as a matter of substantive policy we decide that different non-trustee powers should be subject to different default fiduciary standards of conduct or different fiduciary floors (or perhaps not subject to fiduciary duties at all), then using different terms for the holders of those kinds of powers would be apt.

SECTION 205. LIMITATION OF AND DEFENSES TO ACTION AGAINST TRUST DIRECTOR. In a proceeding against a trust director, the same limitations and defenses apply as if the trust director were a sole trustee in the same circumstances.

Discussion Notes

Following the same basic absorption strategy as in Section 204, this Section absorbs an enacting state's law governing limitations and defenses for a trustee in an action against the trustee and extends that law to an action against a trust director (e.g., a breach of duty under Section 204 or 206). This Section is similar in scope and function to the comparable provision in Virginia, though it is expressed in different (and broader) terms.[16]

The term "limitations" is meant to absorb an enacting state's law governing any limitation period and the extinguishing of claims by way of reports and accountings, both as under Uniform Trust Code §1005. Some states address this question by way of elaborated specific provision.[17]

The term "defenses" is meant to absorb an enacting state's law governing exculpation (as under Uniform Trust Code §1008); beneficiary release, consent, or ratification (as under Uniform Trust Code §1009); reasonable reliance on the terms of the trust (as under Uniform Trust Code §1006); reasonable care to ascertain the happening of a conditional event (as under Uniform Trust Code §1007), and the like.

Section 202(c)(2) empowers a trust director to incur reasonable costs, which should include litigation expenses if reasonable under the circumstances.

The schedule of Uniform Trust Code and Restatement (Third) of Trusts provisions of interest in Appendix B includes various rules on limitations and defenses.

SECTION 206. INFORMING OTHER TRUST FIDUCIARIES.

(a) A trust director must reasonably inform other trust fiduciaries of the trust director's exercise or nonexercise of the director's powers to the extent that such information is reasonably related to the other trust fiduciaries' powers or duties.

(b) A trust director must provide to another trust fiduciary such information as the other trust fiduciary reasonably requests and is reasonably related to the other trust fiduciary's powers or duties.

Discussion Notes

This Section facilitates smooth operation in a divided trusteeship by imposing upon a

[16] *See* Va. Code Ann. § 64.2-770(E)(1) ("Unless the governing instrument provides otherwise, the trust director may assert defenses to liability on the same basis as a trustee serving under the governing instrument, other than defenses provided to the trustee under this subsection.").

[17] *See, e.g.,* N.H. Rev. Stat. Ann. § 564-B:12-1206.

trust director a duty to give another trust fiduciary information reasonably related to the other fiduciary's powers or duties.[18] Subsection (a) imposes an affirmative duty to give such information. Subsection (b) imposes a duty to respond to a reasonable request for such information. We should discuss whether both are necessary or whether to make one or both default. In all events, the purpose is to validate only reasonable requests for information, and to tie reasonability to the scope of the requesting fiduciary's powers and duties. Another possible formulation for the phrases "reasonably requests" and "reasonably related" is "reasonable under the circumstances" as under Uniform Trust Code §813(a).

The language of this section is parallel in scope and function to Section 305, which imposes a similar duty on a directed trustee. Indeed, if reworded to apply to "a trust fiduciary," this Section and Section 305 could be collapsed into a single section, as would be apt if we decide or are required to collapse the articles structure of this draft. The duty of a trust director to give information to a beneficiary is governed by Section 204, which absorbs an enacting state's law governing the duty of a trustee to give information to a beneficiary.

SECTION 207. OFFICE OF TRUST DIRECTOR. A trust director is subject to the same rules as would be a sole trustee in the same circumstances with respect to the following:

(1) accepting or declining appointment;

(2) bond;

(3) vacancy and appointment of a successor;

(4) resignation;

(5) removal;

(6) compensation and indemnification;

(7) and [can we come up with a catch-all general provision?].

[18] *See, e.g.,* 760 Ill. Comp. Stat. Ann. § 5/16.3(h) ("Each directing party shall keep the excluded fiduciary and any other directing party reasonably informed regarding the administration of the trust with respect to any specific duty or function being performed by the directing party to the extent that the duty or function would normally be performed by the excluded fiduciary or to the extent that providing such information to the excluded fiduciary or other directing party is reasonably necessary for the excluded fiduciary or other directing party to perform its duties, and the directing party shall provide such information as reasonably requested by the excluded fiduciary or other directing party. Neither the performance nor the failure to perform of a directing party's duty to inform as provided in this subsection affects whatsoever the limitation on the liability of the excluded fiduciary as provided in this Section.")

Discussion Notes

This section answers questions such as:

- What rules govern a trust director's accepting or declining appointment?
- What happens if there is a vacancy in the office of trust director?
- What if a trust director resigns?
- Can a trust director be removed?
- Is a trust director entitled to compensation?

A well-drafted instrument would address these questions, but not all instruments are well drafted, and even those that are sometimes have gaps and ambiguities as applied to particular circumstances. Because this act authorizes the appointment of a trust director, the act should supply default rules to resolve various questions that are reasonably likely to arise as a result of this new position. We looked to Article 7 of the Uniform Trust Code, which governs the office of trustee (see Appendix B), for a starting point.

Having identified various questions that are reasonably likely to arise, this section absorbs the answers supplied by the law of the state applicable to a trustee in similar circumstances. Absorption has the dual benefits of drawing on well-established principles while avoiding the need to pick and choose among particular versions of these rules to the extent that there is diversity on them across the states.

A few state statutes address one or another of these questions with specific rules.[19] But those specific rules are not materially different from the general rules applicable to a trustee. And none of the existing statutes are comprehensive. For example, even when the statutes address specific issues like acceptance of appointment, they tend to leave out other issues like resignation, removal, and bond. By absorbing the law applicable to trustees in a wide array of areas, this section provides a more comprehensive set of rules.

SECTION 208. 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.

[19] *See, e.g.,* N.C. Gen. Stat. Ann. § 36C-8A-5 (compensation); N.H. Rev. Stat. Ann. § 564-B:7-712 (vacancy, resignation and removal); Miss. Code Ann. § 91-8-702 (bond requirement); Tenn. Code Ann. § 35-15-711 (acceptance of appointment).

Discussion Notes

Many state divided trusteeship statutes include a provision similar to this one that subjects a trust director to jurisdiction of the courts of the state.[20] The specific language used in this draft is derived from Uniform Trust Code § 202(a) and (c). Under section 103(a), a trust is subject to this act if it has its principal place of administration in the state.

Most of the jurisdiction provisions in the existing state statutes expressly make jurisdiction over a trust director mandatory.[21]

ARTICLE 3

DIRECTED TRUSTEES

SECTION 301. DIRECTED TRUSTEES AUTHORIZED. The terms of a trust may provide for a directed trustee.

Discussion Notes

This section is parallel in scope and function to Section 201, which authorizes provision in the terms of a trust for a trust director. Indeed, if reworded slightly, this section and Section 201 could be collapsed into a single section, for example if we decide or are required to collapse the articles structure of this draft.

As flagged in the discussion notes to Section 201, because Section 102(4) brings court orders and nonjudicial settlements into the definition of "terms of a trust," division of trusteeship may be implemented by the settlor's original design or by a judicial or nonjudicial modification.

As flagged in the cover memo and in the discussion notes to Section 102 under the header "Trust Director and Directed Trustee," we have used the term "directed trustee" to reference a trustee that is subject to direction by a trust director in the administration of the trust.

[20] *See, e.g.,* Colo. Rev. Stat. Ann. § 15-16-809; Idaho Code Ann. § 15-7-501(7); 760 Ill. Comp. Stat. 5/16.3(g); Mich. Comp. Laws Ann. § 700.7809(7); Miss. Code Ann. § 91-8-1203; Mo. Ann. Stat. § 456.8-808(11); Nev. Rev. Stat. Ann. § 163.5555; N.H. Rev. Stat. Ann. § 564-B:12-1203; N.C. Gen. Stat. Ann. § 36C-8A-6; S.D. Codified Laws § 55-1B-7; Tenn. Code Ann. § 35-15-1203; Wis. Stat. Ann. §§ 701.0808(9), 0818(12); Wyo. Stat. Ann. § 4-10-714.

[21] 760 Ill. Comp. Stat. 5/16.3(g) is typical ("By accepting an appointment to serve as a directing party of a trust that is subject to the laws of this State, the directing party submits to the jurisdiction of the courts of this State even if investment advisory agreements or other related agreements provide otherwise, and the directing party may be made a party to any action or proceeding if issues relate to a decision or action of the directing party.").

SECTION 302. POWERS OF DIRECTED TRUSTEE.

(a) [No blackletter yet - There are at least two possibilities for the powers of a directed trustee that is subject to a direction by a trust director under Section 202(a)(1) or (c):

(1) Provide that, subject to subsection (d), the trustee has no power to act in any area in which the trustee is subject to direction under Section 202(a)(1) or (c) but the terms of the trust could provide otherwise.

(2) Provide that, in the absence of a direction, the trustee has concurrent power to act in any area in which the trustee is subject to direction under Section 202(a)(1) or (c), but the terms of the trust could provide otherwise, that is, provide that the trustee may not act without direction (subject to subsection (d)).]

(b) A directed trustee may exercise any power appropriate to comply with a direction given to the trustee by a trust director.

(c) A directed trustee may bring an action in [designate] court for instructions, to declare rights, or to enforce the trust with respect to any power or duty of a trust director.

(d) [Provision on powers in the absence of direction or consent. No blackletter yet; see discussion notes.]

(e) [Query whether we should include a provision confirming that a directed trustee's powers are unaffected outside any area in which the directed trustee is subject to direction or required to obtain consent. No blackletter yet; see discussion notes.]

Discussion Notes

Powers versus duties. This Section governs the powers of a directed trustee. The duties of a directed trustee are governed by Sections 303 and 305.

Subsection (a) - This subsection is meant to be the counterpart for a directed trustee to the provision in Section 202(a)(1) and (c) that authorizes empowerment of a trust director. This subsection is thus meant to answer the question of the default powers of a directed trustee in an

area in which the trustee is subject to direction. The text suggests two alternatives, which we should discuss at the meeting.

Subsection (b) - This subsection gives a directed trustee such additional powers as are appropriate to the trustee's compliance with a direction from a trust director. As with its counterpart provision for a trust director in Section 202(c), the term "appropriate" and the structure of this subsection is based on Uniform Trust Code §815(a)(2)(B).

Subsection (c) - This section confirms application to divided trusteeship of the familiar rule under which a trustee may petition for instructions. *See* Restatement (Third) of Trusts §71 (2007). The language is based in part on Uniform Trust Code §201(c). Whether a directed trustee is under a duty to bring such a petition is a question of fiduciary duty and hence is governed by Section 303.

Subsection (d) - We should discuss whether to have a provision that resolves the question of whether a directed trustee is empowered to act in the absence of a direction (subsection (a) [version (1) or version (2) with an opt out in the terms of the trust]) or the absence of consent (subsection (c)) to protect the interests of the beneficiaries in circumstances in which the trust director fails to give a direction or consent or the office of trust director is vacant and there is not enough time to petition for instructions under subsection (d). This is a question of power. Whether in a given case such a power must be exercised, meaning that it would be a breach of trust not to do so, is a question of fiduciary duty, hence is governed by Section 303.

We should also discuss whether to draw a distinction between an affirmative refusal to give a direction or to give consent, which is a decision by the director that is or should have been within the contemplation of the settlor, and an unresponsive or unavailable director. The possibility of the latter gives rise to the question posed here, that is, whether to provide for a statutory failsafe for circumstances in which the settlor's design breaks down under the facts. It bears repeating that this is a powers question. The duties of a directed trustee in the exercise or nonexercise of any power granted by this subsection is governed by Section 303.

Subsection (e) - The question presented by the placeholder for this subsection is whether we should confirm by express statutory warrant that, outside of any area of direction, a directed trustee's powers are unaffected.

SECTION 303. DUTIES OF DIRECTED TRUSTEE.

(a) Subject to subsections (c) and (d), a directed trustee must act in accordance with a direction from a trust director that is within the director's powers under Section 202.

(b) Subject to subsections (c) and (d), a directed trustee that must obtain the consent of a trust director under Section 202(b) before exercising [?or not exercising?] any of the trustee's powers in the administration of the trust must not exercise any such power without the consent of

the trust director.

(c) [No blackletter yet - The existing statutory provisions on the fiduciary duties of a directed trustee in an area in which the trustee is subject to direction can be sorted roughly into three categories:

(1) No duties (the Nevada/South Dakota/New Hampshire rule): "An excluded fiduciary is not liable, individually or as a fiduciary for any loss which results from: … [c]omplying with a direction of a trust adviser, custodial account owner or authorized designee of a custodial account owner; … [a] failure to take any action proposed by an excluded fiduciary which requires prior authorization of the trust adviser if the excluded fiduciary timely sought but failed to obtain such authorization; or … [a]ny action taken at the direction of a trust protector."[22]

(2) Moderate duties (the Delaware rule): "If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act."[23]

(3) Traditional duties (the UTC rule): "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."[24]]

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[22] Nev. Rev. Stat. Ann. § 163.5549(1); *see also* N.H. Rev. Stat. Ann. § 564-B:12-1205; S.D. Codified Laws §§ 55-1B-2, -5.

[23] Del. Code Ann. tit. 12, § 3313(b).

[24] Unif. Trust Code § 808(b).

(d) [No blackletter yet - Provision on a directed trustee's duties in the circumstances governed by Section 302(d). See the discussion notes to that subsection and the further discussion notes below.]

(e) [No blackletter yet - Query whether we should include a provision confirming that a directed trustee's duties are unaffected outside any area in which the directed trustee is subject to direction or required to obtain consent.]

Discussion Notes

Duties versus powers. This section states the fiduciary duties of a directed trustee that, in conjunction with Section 304, apply to the exercise or nonexercise of the trustee's powers under Section 302.

Subsection (a) - This subsection imposes on a directed trustee a duty of obedience to direction from a trust director. The phrase "that is within the director's powers under Section 202" limits this duty of obedience to permissible directions that are in accordance with the terms of the trust both in form and in substance. For example, the terms of a trust could impose a formal requirement that a direction be given in writing.

Many of the existing statutes have provisions that are to similar effect. For example, the Illinois statute provides that:

> The excluded fiduciary shall act in accordance with the governing instrument and comply with the directing party's exercise of the powers granted to the directing party by the governing instrument.[25]

Recall that, per the discussion notes to Section 204(a), many states use the term "excluded fiduciary" to refer to a trust fiduciary that is subject to direction.

Because this subsection is subject to subsections (c) and (d), the duties imposed on a directed trustee by those subsections supersede the duty of obedience imposed by this subsection. In consequence, a directed trustee is under a duty not to follow a direction if doing so would violate the trustee's duties under subsections (c) or (d).

Subsection (b) - This subsection imposes on a directed trustee a duty not to act without the consent of a trust director if such consent is required by the terms of the trust. Because this subsection is subject to subsections (c) and (d), in some circumstances compliance with those subsections might require a trustee to act in the absence of consent nonetheless.

[25] 760 Ill. Comp. Stat. Ann. §5/16.3(f).

Subsection (c) - If we set aside a host of subsidiary nuances, we can sort the existing statutory provisions on the duties of a directed trustee into roughly three categories: (1) those that impose no duties (the Nevada/South Dakota/New Hampshire rule[26]); (2) those that impose moderate duties (such as the "wilful misconduct" standard in Delaware[27]); and (3) those that impose traditional duties (such as the "manifestly contrary to the terms of the trust" or "serious breach of a fiduciary duty" in Uniform Trust Code §808[28]). The text above excerpts sample blackletter provisions from within each category.

In thinking about how to pick among these options, or whether to come up with another, we should keep in mind the basic policy tension. On the one hand, permitting a fiduciary to act in a manner that the fiduciary knows is inimical to the beneficiary's welfare runs contrary to traditional fiduciary policy. On the other hand, imposing strong fiduciary duties on a directed trustee undermines the aim of relocating one or more functions of trusteeship with a trust director. Under Section 204(a)-(b), a trust director is subject to the same default and mandatory fiduciary duties as would be a sole trustee in the same circumstances (unless per Section 204(c) the terms of trust override this section to put those duties back on the directed trustee).

To bring this issue into sharper relief, consider two case studies against which to test the various options:

> *Case 1. Manifestly Disloyal and Imprudent Direction. O* conveys a fund in trust to *X*, a bank, as trustee for the benefit of *B1* and *B2*. The terms of the trust provide that *X* is subject to direction by *D* in the investment of the trust fund. *D* directs *X* to make substantial investments in a series of closely held startup companies in which *D* is personally invested or is an officer or director. *X* has actual knowledge of *D*'s conflicts of interest and that these investments are ill-suited to the purpose of the trust and the risk tolerance of *B1* and *B2*. Under Section 204, is not *D* liable for breach? What should *X* do? Consider also Section 304.
>
> *Case 2. Subtle Disagreements in Judgment. O* conveys a fund in trust to *X*, a bank, as trustee for the benefit of *B1* and *B2*. The terms of the trust provide that *X* is subject to direction by *D* in the investment of the trust fund. Within an otherwise broadly diversified portfolio of marketable securities, *D* directs *X* to retain a 7 percent concentration in one large capitalization stock. *X*'s internal policy manuals counsel against a concentration in excess of 5 percent. The overall portfolio allocation, per *D*'s directions, is 70 percent corporate securities (market risk) and 30 percent government bonds (risk free). *X*'s

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[26] Alaska Stat. § 13.36.375(c); Ga. Code Ann. § 53-12-303(b), (c); Idaho Code Ann. § 15-7-501(2), (5); 760 Ill. Comp. Stat. 5/16.3(f); Ky. Rev. Stat. Ann. § 286.3-275(1); Miss. Code Ann. § 91-8-1205; Nev. Rev. Stat. § 163.5549(1); N.H. Rev. Stat. Ann. § 564-B:12-1205; Ohio Rev. Code Ann. § 5185.25(C); S.D. Codified Laws §§ 55-1B-2, 55-1B-5; Tenn. Code Ann. §§ 35-3-122, 123, 35-15-1205.

[27] Several other state statutes follow Delaware's "wilful misconduct" formulation, or instead use "bad faith" or "reckless indifference." These include Colo. Rev. Stat. Ann. § 15-16-807(1); Mo. Ann. Stat. § 456.8-808(8); N.C. Gen. Stat. Ann. § 36C-8A-4; Utah Code Ann. §§ 75-7-906(4), 5(b); Va. Code Ann. § 64.2-770(E)(2); and Wis. Stat. Ann. § 701.0808.

[28] *See* Appendix C, which surveys the enactments of § 808 and the various nonuniform changes made to it across the enacting states.

internal portfolio managers, applying *X*'s internal policy manuals, would have allocated the trust portfolio 65 percent/35 percent. Under Section 204, would not *D*'s directions fall with the band of reasonable fiduciary discretion? What should *X* do? Consider also Section 304.

Subsection (d) - If Section 302(d) gives a directed trustee power to act in the absence of direction or consent in urgent circumstances, what should be the trustee's fiduciary standard of conduct in the exercise or nonexercise of that power? As suggested in the discussion notes to Section 302(d), should there be a distinction between circumstances in which direction or consent is refused and circumstances in which direction or consent is unavailable? The South Dakota statute, for example, draws such a distinction. It exonerates a directed trustee for "[a]ny loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization."[29] But it limits exoneration of a directed trustee for "any action or inaction … when an excluded fiduciary is required … to assume the role of" the trust director to circumstances other than "gross negligence or willful misconduct."[30]

Subsection (e) - The question presented by the placeholder for this subsection, which is the duty analogue for the powers provision in Section 302(f), is whether we should confirm by express statutory warrant that, outside of any area of direction, a directed trustee's duties are unaffected.

SECTION 304. DUTY OF DIRECTED TRUSTEE TO MONITOR. A directed trustee has no duty to:

(1) monitor the conduct of a trust director;

(2) provide advice to a trust director; or

(3) disclose to a beneficiary or other person that the trustee would have exercised or not exercised the trust director's powers in a manner different from the trust director.

Discussion Notes

Following the weight of existing statute law. This section provides that a directed trustee has no duty monitor a trust director, to provide advice to a trust director (as distinct from providing information per Section 305, but is the line between information and advice clean?), or to warn the beneficiaries about the trustee's disagreement with a trust director's conduct (but what if a beneficiary asks a directed trustee this question specifically?). Many existing state statutes, including those in Alaska, Colorado, Delaware, Idaho, Illinois, Kentucky, Maryland, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Virginia, Wisconsin, and Wyoming, are to similar effect. The Delaware provision,

[29] S.D. Codified Laws §55-1B-2.

[30] Id.

which was added to the Delaware divided trusteeship statute in 2007,[31] is representative:

> Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the fiduciary, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:
>
> (1) Monitor the conduct of the adviser;
>
> (2) Provide advice to the adviser or consult with the adviser; or
>
> (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.[32]

Reversing Rollins. It appears that this provision was meant to reverse the result in *Rollins v Branch Banking & Trust Company of Virginia*, a case decided by the Circuit Court of Virginia in 2002.[33] In *Rollins*, the settlor had funded a trust in the 1970s primarily with the stock of a single textile manufacturing company. The terms of the trust gave a committee of beneficiaries the power to direct subsequent investments. The committee never invoked this power to direct investments, however, and the trustee retained the concentrated position. Over the next two decades, the stock declined steeply in value. The beneficiaries sued.

The court held that the trustee was not liable for failing to divest the concentration. The court reasoned that the trustee's power to make investment decisions had been superseded by the direction authority given to the committee of beneficiaries. However, the court held the trustee liable for failing to warn the beneficiaries about the risks of the concentration and the declining value of the stock:

> To ensure the trust's conservation, a trustee also has a duty to keep informed as to the conditions of the trust. Additionally, the trustee has a duty to impart to the beneficiary any knowledge he may have affecting the beneficiary's interest and he cannot rid himself of this "duty to warn." In other words, the trustee has a duty to fully inform beneficiaries of all facts relevant to the subject matter of the trust which come into the trustee's knowledge and which are material for the beneficiary to know for the protection of his interests.[34]

Questions for discussion. One question for discussion is whether this act should follow the strong trend in the existing statutes toward expressly reversing the result in *Rollins*. Another question is how to reconcile such a waiver of a directed trustee's duties to monitor and warn with

[31] 2007 Del. Laws. Ch. 90 (S.B. 117).

[32] Del. Code tit. 12, §3313(e).

[33] 56 Va. Cir. 147 (2002).

[34] Id. at 149.

the more general standard of trustee fiduciary duties for a directed trustee under Section 303. Such a waiver would seem to be inconsistent with a high fiduciary standard of conduct. Still another question is whether to make up for the elimination of a directed trustee's duty to warn and monitor by giving a trust director fiduciary duties with regard to its own actions.

Administrative classification. In addition to express waiver of a directed trustee's duties to monitor and warn, many state statutes also classify a directed trustee's monitoring and warning activities as "administrative actions." The Delaware statute, for example, says:

> Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority.[35]

The apparent logic of such provisions is to ensure that if a directed trustee chooses for some reason to monitor or advise a trust director, the trustee does not become a de facto fiduciary with respect to those actions.

SECTION 305. INFORMING OTHER TRUST FIDUCIARIES.

(a) A trustee must reasonably inform other trust fiduciaries of the trustee's exercise or nonexercise of the trustee's powers to the extent that such information is reasonably related to the other trust fiduciaries' powers or duties.

(b) A trustee must provide to another trust fiduciary such information as the other trust fiduciary reasonably requests and is reasonably related to the other trust fiduciary's powers or duties.

Discussion Notes

This Section, which is the directed trustee counterpart to Section 206 for a trust director, facilitates smooth operations in a divided trusteeship by imposing upon a directed trustee a duty to give another trust fiduciary information reasonably related to the other fiduciary's powers or duties. Subsection (a) imposes an affirmative duty to give such information. Subsection (b)

[35] Del. Code Ann. tit. 12, § 3313(e). *See also* Md. Code. Ann., Est. & Trusts § 14.5-808(c)(2); Miss. Code Ann. § 91-8-1204(b); N.H. Rev. Stat. Ann. § 564-B:12-1204(b); Ohio Rev. Code Ann. § 5185.25(B), (D); S.D. Codified Laws § 55-1B-2; Tenn. Code Ann. § 35-15-1204(b); Va. Code Ann. § 64.2-770(E)(4); Wis. Stat. Ann. § 701.0808(4).

imposes a duty to respond to a reasonable request for such information. We should discuss whether both are necessary and whether one or both should be default. In all events, the purpose is to validate only reasonable requests for information, and to tie reasonability to the scope of the requesting fiduciary's powers and duties. Another possible formulation for "reasonably requests" and "reasonably related" is "reasonable under the circumstances" as under Uniform Trust Code §813(a).

The language of this section is parallel in scope and function to Section 206, which imposes a similar duty on a trust director. Indeed, if reworded to apply to "a trust fiduciary," this Section and Section 206 could be collapsed into a single section, as would be apt if we decide or are required to collapse the articles structure of this draft. The duty of a directed trustee to give information to a beneficiary is governed by the trust fiduciary law of an enacting state as modified by Sections 303-304.

ARTICLE 4

CO-TRUSTEES

[No blackletter yet.]

Discussion Notes

Under traditional law, codified by Uniform Trust Code §703(g), a cotrustee is under a continuing duty to "prevent a cotrustee from committing a serious breach of trust" and to "compel a cotrustee to redress a serious breach of trust." Restatement (Third) of Trusts §81(2) (2007) is to similar effect: "Each trustee also 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." Under traditional law, the terms of a trust cannot eliminate this duty to prevent or redress breach by a cotrustee. Restatement (Third) of Trusts §81 cmt. b explains: "Even in matters for which a trustee is relieved of responsibility, however, 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."

There is some tension between these rules and the phenomenon of divided trusteeship as recognized by many existing statutes. Per the discussion notes to Sections 303 and 304, many state statutes permit the terms of a trust to subject a trustee to direction by a trust director while substantially reducing or even eliminating the trustee's duties relative to what those duties would have been if the director were a cotrustee. The question thus arises, is it time to rework the law of cotrusteship to reconcile it to the rules that have evolved in the functionally similar context of divided trusteeship? At least three states--Alaska, Florida, and North Carolina--have statutory provisions that move in this direction. Those provisions are reproduced below.

Alaska Stat. Ann. § 13.36.072

Notwithstanding the other provisions of this section, if the terms of a trust instrument provide for the appointment of more than one trustee but confer on one or more of the trustees, to the exclusion of other trustees, the power to direct or prevent specified actions of other trustees,

the excluded trustees shall act in accordance with the exercise of the power. An excluded trustee under this subsection is not liable, individually or as a fiduciary, for a consequence that results from complying with the exercise of the power, regardless of the information available to the excluded trustee. An excluded trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. A trustee having the power is liable to the beneficiaries as a fiduciary with respect to the exercise of the power as if the excluded trustees were not in office and has the exclusive obligation to account to and to defend an action brought by the beneficiaries with respect to the exercise of the power. In this subsection, "power" means the power to direct or prevent specified actions by other trustees.

Florida Stat. Ann. § 736.0703(9)

If the terms of a trust provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the excluded trustee, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of § 736.0808(2) [based on Uniform Trust Code §808] do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.

North Carolina Gen. Stat. Ann. § 36C-7-703

If the terms of a trust confer upon a cotrustee, to the exclusion of another cotrustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the following apply:

(1) The duty and liability of the excluded trustee is as follows:

a. If the terms of a trust confer upon the cotrustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes intentional misconduct on the part of the directed cotrustee.

b. If the terms of the trust confer upon the cotrustee any other power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the cotrustee.

c. The excluded trustee has no duty to monitor the conduct of the cotrustee, provide advice to the cotrustee, or consult with or request directions from the cotrustee. The excluded trustee is not required to give notice to any beneficiary of any action taken

or not taken by the cotrustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the cotrustee, including confirming that the directions of the cotrustee have been carried out, do not constitute monitoring of the cotrustee nor do they constitute participation in decisions within the scope of the cotrustee's authority.

(2) Except as otherwise provided in sub-subdivision a. of subdivision (1) of this subsection, the cotrustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and has the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

ARTICLE 5

MISCELLANEOUS PROVISIONS

SECTION 501. 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 502. 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 7003(b).

SECTION 503. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 504. EFFECTIVE DATE. This [act] takes effect . . . .