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Directed Trusts: Making Them Work

Richard W. Nenno[*]
Wilmington Trust Company
Wilmington, DE

[*] Richard W. Nenno, Esquire, is a Senior Trust Counsel and Managing Director with Wilmington Trust Company, Wilmington, Delaware. He has over 40 years of estate-planning experience and is admitted to the practice of law in Delaware and Pennsylvania. Dick is a Fiduciary Fellow of ACTEC, a member of the Advisory Committee of the Heckerling Institute on Estate Planning, and a Distinguished Accredited Estate Planner. He received his undergraduate degree from Princeton, he earned his law degree at Harvard Law School, and he practiced law with a large Philadelphia firm for 5+ years before joining Wilmington Trust Company. Dick chaired the Trust Act Committee of the Delaware State Bar Association (the group that updates Delaware trust laws) for many years and still participates in its deliberations. He is recognized as a national speaker on estate-planning topics. Dick wrote the book on Delaware trusts (the latest edition is *Delaware Trusts 2017*) and is the author of numerous other publications, including Tax Management Portfolios on *Choosing a Domestic Jurisdiction for a Long-Term Trust* (T.M. 867), *Domestic Asset Protection Trusts* (T.M. 868), and *State Income Taxation of Trusts* (T.M. 869).

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TABLE OF CONTENTS

Note that a few states, including Delaware, have special trust advantages that may not be available under the laws of your state of residence, including asset protection trusts and directed trusts.

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ISSN 0886-3547

ISSN 0886-3547

I. INTRODUCTION

A. The Problem

Like many financial institutions, my firm — Wilmington Trust Company — offers a full array of trust services, including investment management. But, clients sometimes want to name a corporate trustee but also want to appoint an adviser, committee, or protector (not the corporate trustee) to control certain trust decisions.[1] Here are some examples:

- A client might want to fund an inter vivos dynasty trust with stock in the family company but want to continue to make decisions regarding the purchase, sale, and voting of such stock
- Members of a family might have a long-standing relationship with a successful money manager and want that manager (not the corporate trustee) to make investment decisions for trust assets
- A client might want someone other than the corporate trustee to decide when to make income or principal distributions to beneficiaries.

In a 2008 article, a Kentucky attorney observes that:[2]

> Despite the fact that there is no perfect solution to the question of trustee appointment and supervision, it is the author's opinion that the best course of action for our clients and their families is to appoint a single trustee — a trustee who is trained for the job — preferably a corporate institution, who will be responsible for all trust administration issues, *and* then appoint an advisor or a committee of advisors who will provide the corporate fiduciary with the necessary insight into the clients' family members and will provide meaningful oversight of the trustee's administrative services.
>
> The combination of a corporate trustee with a competent group of advisors should produce the best results for clients' families. The approach combines the strength of the corporate trust department and the personal touch that we humans demand and expect. While the use of an advisory committee might not solve all the problems, the recommended action has substantial merit and should be thoroughly evaluated with clients.

In these situations, the client wants to minimize the corporate trustee's involvement in such decisions and wants such trustee to lower its fees to reflect its reduced duties. Unfortunately, depending on the state law that governs these issues, even if a trust —"directed trust"[3] — directs the corporate trustee —"directed trustee"[4] — to make investments or distributions on the direction of someone else —"trust director"[5] — and relieves the directed trustee from liability for following such directions, such a trustee might have considerable monitoring or other responsibilities. Thus, the directed trustee might be placed in the unenviable position of being pressured to charge low fees while being subject to substantial risk of potential liability.

In states such as Delaware, trust directors have been part of trust arrangements since early in the 20th century. In contrast, the new player in multiparticipant trusts in many states is the protector, a role that has emigrated to this country from abroad over the past few decades.

B. Scope

This article will summarize the development and status of state directed-trust statutes where the trust director is not and is a co-trustee, identify factors to consider in constructing a state directed-trust statutory framework, and describe the status of the directed trust in the leading trust states. Next, it will survey the

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[1] *See* John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act,* 44 ACTEC L.J. 3 (Winter 2019); Jane Ditelberg, *Am I My Brother's Keeper: Willful Misconduct and the Directed Trustee Under the Uniform Directed Trust Act*, 44 ACTEC L.J. 207 (Spring 2019); James P. Spica, *From Strength to Strength: A Comment on Morley and Sitkoff's Making Directed Trusts Work*, 44 ACTEC L.J. 215 (Spring 2019); Todd A. Flubacher & Cynthia D.M. Brown, *If You Can't Beat 'Em, Join 'Em*, 157 Tr. & Est. 32 (Nov. 2018). Some state statutes use "adviser" and/or "wilful" while others use "advisor" and/or "willful." In this paper, I will use "adviser" and "wilful" which are the norms in Delaware unless the context requires otherwise.

[2] Sheldon G. Gilman, *Effective Use of Trust Advisers Can Avoid Trustee Problems*, 35 Est. Plan. 18, 23 (Mar. 2008) (emphasis in original).

[3] *See* Uniform Directed Trust Act (UDTA) §2(2) (2017). The text of the UDTA and a list of the jurisdictions that have enacted it may be viewed at www.uniformlaws.org.

[4] *See* UDTA §2(3) (2017).

[5] *See* UDTA §2(9) (2017).

ISSN 0886-3547

meager pertinent caselaw, provide guidelines, and consider the role of the protector. The article then will analyze some conflict-of-laws matters that the planner should address when creating a new directed trust, alert practitioners to a crucial limitation on the protection offered by state directed-trust statutes, and offer thoughts on crafting the role of the trust director. Finally, it will explore using a directed trust instead of a private trust company and address structuring a charitable-remainder trust (CRT) as a directed trust. Appendixes A and B give citations for the state directed-trust statutes; Appendix C lists citations to related sections of the Uniform Trust Code. Section seven of the sample generation-skipping trust agreement in Appendix D contains directed-trust language.

This article will focus on the directed trust. It will not consider either the ''consent trust''— a trust in which a corporate trustee makes investment, distribution, or other decisions only after obtaining the consent of an adviser, committee, etc., or the ''delegated trust''— a trust in which the corporate trustee, pursuant to the governing instrument or state law, hires someone to assist with the trust's administration and in which the corporate trustee retains potential liability for an agent's activities.

Throughout this article, I refer to provisions of the Uniform Trust Code (UTC), the Uniform Directed Trust Act (UDTA), and the Uniform Probate Code (UPC). Because states and the District of Columbia often did not enact provisions of uniform acts in proposed form, the attorney should study carefully the relevant statutes of all pertinent jurisdictions in a particular case.

II. STATE DIRECTED TRUST STATUTES: TRUST DIRECTOR IS NOT CO-TRUSTEE

A. Introduction

In the traditional form of the directed trust, a directed trustee makes investment changes, distributes income and principal, and takes other actions as directed by a trust director. Thus, the directed trustee ''stands at the center of a trust.''[6] Experienced Delaware practitioners describe the operation of a traditional directed trust as follows:[7]

> The trustee holds all power and authority to act, and the direction advisor directs the trustee to exercise those powers. Put another way, the advisor should be the only one able to make the decision; however, the trustee is still the owner of the trust assets and thus should be the only one with authority to act.

B. Delaware Origins

The directed trust began life in Delaware. Professor LaPiana of New York Law School explains:[8]

> Widespread knowledge and use of directed trusts are relatively recent developments in the American law of trusts. The most prominent home of this important development is the state of Delaware, whose law has long accepted the idea that some of the traditional duties of a trustee can be parceled out to other persons. More recently, the state's statutes have expressly recognized and made provisions for the division of the traditional duties and responsibilities of a trustee among a trustee and a variety of advisors, special trustees, and trust protectors. (Del. Code Ann. tit. 12 §3313.)
>
> These provisions, combined with Delaware's generous asset protection legislation (i.e., Del. Code Ann. tit. 12 §§3570 to 3576) and legislation making possible the creation of perpetual private trusts of personal property (i.e., Del. Code Ann. tit. 25 §503) make Delaware probably the most favored jurisdiction for creating dynasty trusts, trusts designed to benefit a family line forever, free from claims of creditors. Needless to say, the settlors of many of these trusts are not domiciliaries of Delaware.

There is ample evidence that directed trusts were common in Delaware decades ago. Thus, the 1958 U.S. Supreme Court decision in *Hanson v. Denckla*[9] considered a revocable trust with trust directors created in 1935.[10] Similarly, the 1984 Supreme Court of Delaware decision in *Stuart v. Wilmington Trust Company*[11] noted that, ''[a]s part of the overall trust scheme under the Trust Agreement as amended February 20, 1942 Elbridge A. Stuart established a trust advisory system.''[12] A 1965 Harvard Law Review article analyzed the adviser concept.[13]

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[6] UDTA §9 cmt. (2017).

[7] Flubacher & Brown, Note 1, above, at 41.

[8] William P. LaPiana, *The Directed Trust in Divorce Court*, 42 Est. Plan 44, 44 (Jan. 2015).

[9] *Hanson v. Denckla*, 357 U.S. 235 (1958).

[10] *Hanson*, 357 U.S. at 238-39.

[11] *Stuart v. Wilmington Trust Co.,* 474 A.2d 121 (Del. 1984).

[12] *Stuart*, 474 A.2d at 124.

[13] Note, *Trust Advisers*, 78 Harv. L. Rev. 1230 (1965).

ISSN 0886-3547

Delaware's long-standing directed-trust practice was codified in 1986,[14] and an unpublished 2004 case that I summarize below upheld the Delaware statute.[15] Effective in 2017, Delaware has a comparable structure for directed trusts involving co-trustees.[16]

C. Unsatisfactory Restatement Approach

1. Introduction

Commentators have pointed out that:[17]

> Limited liability is the crux of a workable directed trustee statute because it enables the trustee to simply perform an executory function and refrain from forming a subjective view about the advisability of the advisor's decisions to protect itself from liability.

The provisions of the Second and Third Restatements of Trusts fail the foregoing test.

2. Restatement Second of Trusts §185

Section 185 of the Second Restatement of Trusts provides:[18]

> If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, *unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power*.

This approach is problematic for the following reason:[19]

> If a statute follows the *Restatement Second* approach, the trustee shouldn't follow a direction if the advisor is violating its fiduciary duty. Thus, whenever the trustee receives direction, it must second-guess the advisor's decision and make a subjective evaluation of the decision. Consequently, the trustee continues to possess the fiduciary responsibility and liability for deciding whether to follow the direction. This doesn't effectively bifurcate the responsibilities.

3. Restatement Third of Trusts §75

Section 75 of the Third Restatement of Trusts says:[20]

> Except in cases covered by §74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, *unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.*

Section 75 of the Third Restatement suffers from the same infirmity as §185 of the Second Restatement.

D. Unsatisfactory Uniform Trust Code Approach

UTC §808(b) provides:[21]

> 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.*

Under the UTC, a ''person'' is:[22]

> [A]n individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

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[14] *See* 12 Del. C. §3313.

[15] *Duemler v. Wilmington Trust Co.,* No. 20033 NC, 2004 BL 31983 (Del. Ch. Nov. 24, 2004). Delaware courts give unpublished opinions substantial precedential weight (*Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A.,* 879 F.3d 79, 85, n.8 (3d Cir. 2018)).

[16] *See* 12 Del. C. §3313A.

[17] Flubacher & Brown, Note 1, above, at 34.

[18] Restatement (Second) of Trusts §185 (1959) (emphasis added).

[19] Flubacher & Brown, Note 1, above, at 33.

[20] Restatement (Third) of Trusts §75 (2007) (emphasis added).

[21] UTC §808(b) (amended 2018) (emphasis added).

[22] UTC §103(10) (amended 2018).

ISSN 0886-3547

This approach also is problematic for the following reason:[23]

> The UTC approach is similar to the *Restatement Second* approach, except it requires the trustee to refuse to follow direction if it constitutes a serious breach of a fiduciary duty. Thus, the trustee continues to possess the fiduciary responsibility and liability for deciding whether to follow the direction because the trustee must ascertain whether a serious breach of duty exists. This also doesn't effectively bifurcate the responsibilities because all responsibility isn't shifted to the advisor, and like the *Restatement Second* approach, the trustee effectively becomes a guarantor of the advisor's decisions.

The UTC comment discusses §808(b) as follows:[24]

> Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

Section 808(b) is not comforting to directed trustees. This is because a directed trustee must devote considerable resources to ensure that the directing person's action is not ''manifestly contrary to the terms of the trust'' or ''a serious breach of a fiduciary duty.'' Section 808's comment describes this as ''minimal oversight responsibility,'' but investment and trust officers who would provide such oversight assure me that it would be far more challenging to review someone else's investment and distribution decisions than to make those decisions themselves.

The comment to §808 does permit the terms of a trust to alter the provisions of §808, however. Specifically, it states that:[25]

> A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary.

Time will tell if courts uphold these arrangements.

Section 808 and its comment no longer appear in the text of the UTC because they have been superseded by corresponding provisions of the UDTA. Nevertheless, as shown in Appendix A, 14 states — Alabama, the District of Columbia, Florida, Kansas, Kentucky, Maryland, Massachusetts, Montana, New Jersey, Oregon, Pennsylvania, South Carolina, Texas (charitable trusts only), and Vermont have statutes based on UTC §808(b).

E. Unsatisfactory Uniform Directed Trust Act Approach

In 2014, the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, initiated a project (for which I was an observer) to draft a UDTA,[26] which was approved by the ULC in the summer of 2017. Under the UDTA the responsibilities of the trust director and the directed trustee are as follows:[27]

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

In addition to its duty to ensure that complying with a trust director's direction won't constitute wilful misconduct, a directed trustee has the following duty under the UDTA:[28]

> The UDTA also requires a trustee to ''take reasonable action'' to comply with a director's exercise or nonexercise of its powers. However, as the com-

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[23] Flubacher & Brown, Note 1, above, at 33. *See* James P. Spica, *Settlor-Authorized Fiduciary Indifference to Trust Purposes and the Interests of Beneficiaries Under the Uniform Trust Code*, 55 Real. Prop., Tr. & Est. L.J. 123 (Spring 2020).

[24] UTC §808 cmt. (amended 2018).

[25] UTC §808 cmt. (amended 2018).

[26] To view the text of the UDTA and to identify the jurisdictions that have enacted it, go to www.uniformlaws.org. For comprehensive coverage of the UDTA, *see* Morley & Sitkoff, Note 1, above.

[27] Morley & Sitkoff, Note 1, above, at 7 (footnote omitted; emphasis added). *See* UDTA §9(b) (2017).

[28] Morley & Sitkoff, Note 1, above, at 7, n.8 (citation omitted). *See* UDTA §9(a) (2017).

ISSN 0886-3547

ments to §9 make clear, the duty to take reasonable action is a duty to act reasonably in carrying out the acts necessary to comply with a director's action, not a duty to ensure that the substance of the direction is reasonable.

The UDTA requires trust directors and directed trustees to exchange information[29] but relieves such trustees of the duties to monitor trust directors' activities, to consult with trust directors, and to warn, inform, or advise beneficiaries.[30]

An Illinois commentator identifies a critical deficiency in the UDTA approach:[31]

> [I]n Delaware a directed trustee is not liable ''except in cases of willful misconduct *on the part of the fiduciary directed*.'' Such liability arises out of the specific misconduct of the directed trustee, and not from the contents of the direction or ''associative'' misconduct in carrying out the direction of an advisor who himself breaches his fiduciary duty. It does not require the directed trustee to evaluate the directions it receives; it requires the directed trustee to avoid its own willful misconduct in implementing the direction.

She elaborates:[32]

> What should a directed trustee do upon receipt of a direction to sell an asset to the advisor's spouse? Under the Illinois and Delaware statutes, the answer is clear: carry out the sale. The trustee would be liable for a loss if through willful misconduct the trustee failed to sell the asset, sold the wrong asset, or failed to consummate the sale on the terms the advisor directed. But if the decision of the advisor is carried out, the consequences of the decision are, and should be, the responsibility of the advisor whether the decision is simply poor investment advice or constitutes misconduct by the advisor (e.g., the sale to the spouse is at a price or on terms disadvantageous to the trust). If those acts are misconduct, they are the misconduct of the advisor.

As shown in Appendix A, 13 states — Arkansas, Colorado, Connecticut, Georgia, Indiana, Maine, Michigan, Nebraska, New Mexico, Utah, Virginia, Washington, and West Virginia — have enacted the UDTA as of this writing.

F. Protective Approach

As shown in Appendix A, 24 states — Alaska, Arizona, Delaware, Hawaii, Idaho, Illinois, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Wisconsin, and Wyoming—afford more protection to directed trustees than UTC §808(b) or UDTA §9. For example, a directed trustee of a Delaware trust is liable for following a distribution or investment direction only if such trustee engages in willful misconduct itself. Some other states extend protection only to directed trustees in investment matters, some require the directed trustee to carry out the direction properly, and some place no restrictions on the directed trustee's conduct.

G. Other Statute

Iowa's approach does not fit into any of the above categories.

H. No Statute

As shown in Appendix A, three states—California, New York, and Rhode Island—currently have no directed-trust statute, and the effectiveness of directed-trust language in trusts governed by the laws of these states is unpredictable. In New York, for instance, one case held that a directed trust worked, but a later case held that it did not.

In *In re Estate of Rubin*,[33] the decedent's will named his son and daughter as co-executors but specified that, in the event of disagreement, they were to act as directed by two named individuals. On the son's request, those individuals directed that he be given sole check-writing authority and management responsibility over five commercial properties. Rejecting the daughter's claim that the arrangement violated her rights as coexecutor, the court held:[34]

> [T]he designation of advisors . . . to make directives controlling the actions of the co-executors in any disputes is a valid limitation upon the powers of such executors . . . .

In *Matter of Rivas*,[35] though, the corporate trustee objected to a direction by the investment advisory committee formed under the governing instrument of

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[29] *See* UDTA §10 (2017).

[30] *See* UDTA §11 (2017).

[31] Ditelberg, Note 1, above, at 209 (footnote omitted; emphasis in original). For a description of the version of the UDTA that was enacted in Michigan, see Spica, Note 1, above.

[32] Ditelberg, Note 1, above, at 211.

[33] 540 N.Y.S.2d 944 (N.Y. Surr. Ct. Nassau Cty. 1989), *aff'd*, 570 N.Y.S.2d 996 (N.Y. App. Div. 1991).

[34] *In re Estate of Rubin*, 540 N.Y.S.2d at 948.

[35] 958 N.Y.S.2d 648, (N.Y. Surr. Ct. Monroe Cty. 2011), *aff'd*, 939 N.Y.S.2d 918 (N.Y. App. Div. 2012).

ISSN 0886-3547

a charitable trust to invest in the charitable donee's long-term investment pool. The court held:[36]

> [T]his Court cannot allow the proposed investment of the Helen Rivas Trust corpus, as such investment in the LTIP is contrary to the Agreement and the intent of the settlor, may give rise to an impermissible division of fiduciary loyalties among the majority of the Advisory Committee, and would also violate the Prudent Investor Act.

Efforts began in New York several years ago to draft directed trust legislation, but its enactment is not in sight.

III. STATE DIRECTED TRUST STATUTES: TRUST DIRECTOR IS CO-TRUSTEE

A. Introduction

Traditionally, a directed trust was a multiparticipant trust that had a single trustee and advisers, protectors, committees, etc. Over the years, though, some directed trusts have allocated fiduciary functions among co-trustees.

B. Unsatisfactory Uniform Trust Code Approach

The multi-trustee arrangement is covered by UTC §703,[37] under which:

- "A cotrustee must participate in the performance of a trustee's function unless . . . the cotrustee has properly delegated the performance of the function to another trustee."[38]
- "A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly."[39]
- "Each trustee shall exercise reasonable care to:

  (1) Prevent a cotrustee from committing a serious breach of trust; and

  (2) Compel a cotrustee to redress a serious breach of trust."[40]

The above continuing responsibilities make UTC §703 unsuitable for directed trusts.

As shown in Appendix B, 35 states follow this approach.

C. Unsatisfactory Uniform Directed Trust Act Approach

The UDTA contemplates that the trust director/directed trustee arrangement described above may be extended to multitrustee arrangements. Thus, UDTA §12 provides:[41]

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

This approach suffers from the same infirmity as the trust director/directed trustee arrangement noted previously.

As shown in Appendix B, 13 states — Arkansas, Colorado, Connecticut, Georgia, Indiana, Maine, Michigan, Nebraska, New Mexico, Utah, Virginia, Washington, and West Virginia—currently follow this approach.

D. Nonuniform Protective Statutes

As shown in Appendix B, 15 states — Alaska, Arizona, Delaware, Florida, Illinois, Louisiana, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, South Dakota, and Tennessee—have statutes that allow governing instruments to allocate fiduciary duties among cotrustees and relieve the non-responsible trustee from liability for the responsible trustee's activities. For example, a Delaware statute offers these two options:[42]

> If the terms of a governing instrument 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 duty and liability of the excluded trustee is as follows:
>
> (1) If the terms of the governing instrument 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 shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indi-

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[36] *Matter of Rivas*, 958 N.Y.S.2d 648 at 7.

[37] UTC §703 (amended 2018).

[38] UTC §703(c) (amended 2018).

[39] UTC §703(e) (amended 2018).

[40] UTC §703(g) (amended 2018).

[41] UDTA §12 (2017).

[42] 12 Del. C. §3313A(a)(1)-§3313A(2).

ISSN 0886-3547

rectly from compliance with the direction unless compliance with the direction constitutes wilful misconduct on the part of the directed cotrustee;

(2) If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any 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 in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this paragraph (a)(2), but shall remain a fiduciary with respect to any powers or other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee . . . .

The statute relieves a non-responsible trustee from the duty to monitor the activities of a responsible trustee and to communicate with trust beneficiaries[43] and imposes liability for decisions on the responsible trustee.[44]

E. No Statute

Appendix B shows that, at present, four states — California, Hawaii, New York, and Rhode Island — have no pertinent statute.

IV. DESIGNING THE DIRECTED TRUST STATUTORY FRAMEWORK

A. Introduction

In developing the UDTA, the drafting committee, of which Professor Sitkoff of Harvard Law School was the chair and Professor Morley of Yale Law School was the reporter, addressed certain issues that should be considered in developing directed trust legislation. Some of those issues are explored here.

B. Enabling vs. Off-the-Rack Statute

According to Professor Morley and Professor Sitkoff, Delaware has an ''enabling statute,'' whereas each of Alaska, Nevada, and South Dakota has an ''off-the-rack statute.''[45] They explain the distinction:[46]

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

Professors Morley and Sitkoff report that the UDTA drafting committee chose the enabling approach rather than the off-the-rack approach for these reasons:

- An enabling statute is simpler;
- Powers under an off-the-rack statute might come in awkward bundles;
- It's easier to draft governing instruments under an enabling statute; and
- An enabling statute is less disruptive of existing trusts.[47]

C. Standard of Liability Applicable to Directed Trustee

The drafting committee for the UDTA considered various options in deciding what residuary standard of liability, if any, should be imposed on a directed trustee:[48]

> Roughly speaking, the existing statutes fall into two groups. In one group, which constitutes a majority, are the statutes that provide that a directed trustee has no duty or liability for complying with an exercise of a power of direction. This group includes Alaska, New Hampshire, Nevada, and South Dakota.

The arguments in favor of this approach are as follows:[49]

> The policy rationale for these no duty statutes is that duty should follow power. If a director has the exclusive authority to exercise a power of direc-

[43] 12 Del. C. §3313A(a)(3).

[44] 12 Del. C. §3313A(b).

[45] Morley & Sitkoff, Note 1, above, at 15-16.

[46] Morley & Sitkoff, Note 1, above, at 16.

[47] Morley & Sitkoff, Note 1, above, at 17-19. The foregoing text describes problems in applying South Dakota's off-the-rack statute.

[48] UDTA §9 cmt. (2017).

[49] UDTA §9 cmt. (2017).

ISSN 0886-3547

tion, then the director should be the exclusive bearer of fiduciary duty in the exercise or nonexercise of the power. Placing the exclusive duty on a director does not diminish the total duty owed to a beneficiary, because a settlor of a directed trust could have chosen to make the trust director the sole trustee instead. Thus, on greater-includes-the-lesser reasoning, a settlor who could have named a trust director to serve instead as a trustee should also be able to give the trust director the duties of the trustee. Under the no duty 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 my view, the proponents of imposing no residual duty on the directed trustee fail to appreciate the essential role that the directed trustee plays in the directed trust. Indeed, at a conference sponsored by the Delaware Bankers Association a few years ago,[50] Delaware trust officers were polled on whether it is more difficult to administer a directed trust or a trust in which a trust officer's institution has full responsibility over investments and distributions. The universal view was that administering a directed trust was the harder task.

The arguments in favor of the other approach are as follows:[51]

> In the other group of statutes, which includes Delaware, Illinois, Texas, and Virginia, 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 acting under the direction of a director. 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 (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 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 director's exercise or nonexercise of the director's powers 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 has a duty to avoid willful misconduct.

The drafting committee found the arguments for imposing the willful misconduct standard more convincing.[52]

D. Defining Standard of Liability Applicable to Directed Trustee

Unlike Delaware,[53] the UDTA fails to define ''willful misconduct.'' Delaware commentators discuss this deficiency as follows:[54]

> In those states that set an outer limit of willful misconduct as the standard of liability applicable to a directed trustee, it's helpful for the jurisdiction to define ''willful misconduct'' to provide clarity and avoid uncertainty. Without a clear definition, questions may linger about what exactly constitutes willful misconduct in a particular situation.

E. Statutory Structure

Based on the foregoing discussion, I suggest that the ''ideal'' directed trust jurisdiction will have seven components.

First, the state's directed trust legislation will address the following three arrangements:

- A trust that has a directed trustee and a trust director who is not a co-trustee;
- A trust that has a directed trustee and a trust director who is a co-trustee; and
- A trust in which trustee duties are allocated between co-trustees.

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[50] For information on the 15th Annual Delaware Trust Conference to be held October 19-20, 2020, go to www.debankers.com.

[51] UDTA §9 cmt. (2017).

[52] UDTA §9 cmt. (2017).

[53] 12 Del. C. §3301(g).

[54] Flubacher & Brown, Note 1, above, at 34 (footnote omitted).

ISSN 0886-3547

For simplicity, I will assume that a trust has one directed trustee and one trust director or co-trustee.

Second, the directed trust legislation should be an enabling statute rather than an off-the-rack statute.

Third, the directed trust legislation should impose liability for an investment, distribution, or other decision on the trust director or co-trustee who is responsible for making it and should relieve the directed trustee from liability except for a diminished level of liability, such as wilful misconduct, for its own actions in executing a direction — not in evaluating the propriety of a trust director's or co-trustee's decision.

Fourth, the directed trust legislation should define the standard of liability, such as wilful misconduct, to which the directed trustee is held.

Fifth, the directed trust legislation should relieve the directed trustee from the duties to monitor the trust director's or co-trustee's conduct, to consult with the trust director or co-trustee, and to warn trust beneficiaries of potential adverse consequences of a trust director's or a co-trustee's decision.

Sixth, the directed trust legislation should require directed trustees and trust directors or co-trustees to provide each other with information that is needed to perform duties.

Seventh, the state should have caselaw upholding its directed-trust legislation.

V. DIRECTED TRUSTS IN THE LEADING TRUST JURISDICTIONS

A. Introduction

In January 2020, four commentators, one of whom has South Dakota ties, listed the leading personal trust jurisdictions as follows:[55]

> In our view, the four top-tier jurisdictions for 2020 (listed chronologically by the year they adopted their Rule Against Perpetuities (RAP) legislation) are South Dakota, Delaware, Alaska and Nevada.

Of these jurisdictions, two — Delaware (1986)[56] and South Dakota (1997)[57] — have offered directed trusts for some time; the other two — Nevada (2009)[58] and Alaska (2013)[59] — introduced them in recent years.

Given that Professors Morley and Sitkoff focus on Delaware and South Dakota, I will cover those states first and then turn to Alaska and Nevada.

B. Delaware

1. Introduction

Delaware's directed trust legislation (Delaware Legislation) consists primarily of the following four sections:

- 12 Del. C. §3313 Advisers;
- 12 Del. C. §3313A Excluded co-trustee;
- 12 Del. C. §3317 Co-fiduciaries and co-nonfiduciaries; duty to keep informed; and
- 12 Del. C. §3301 Application of chapter; definitions.

2. Trust Arrangements

The Delaware Legislation allows all three of the trust arrangements described above.

Regarding the first trust arrangement — a trust with a directed trustee and a trust director who is not a co-trustee, the Delaware Legislation provides:[60]

If a governing instrument provides that a fiduciary is to follow the direction of an adviser or is not to take specified actions except at the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of wilful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

The above provision codified in 1986[61] the practice that, as mentioned previously, had been followed in Delaware since early in the 20th century. In Delaware, an entity, such as a limited liability company, as well as an individual, may serve as an adviser. This is because a Delaware statute provides that '' 'Person' and 'whoever' respectively include corporations, companies, associations, firms, partnerships, societies and

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[55] Daniel G. Worthington, Mark Merric, John E. Sullivan & Ryan Thomas, *Which Trust Situs is Best in 2020?* 159 Tr. & Est. 70, 70 (Jan. 2020). *See* Worthington, Meric, Sullivan & Thomas at 71 (''Clients . . . can set up trusts in favorable jurisdictions to provide their assets with the most effective wealth transfer for generations, even perpetually, while legally eliminating current and future federal or state gift and death taxes and state income taxes'').

[56] *See* 12 Del. C. §3313(b). The statute codified a practice that started early in the 20th century (*see Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), *aff'd sub nom. Hanson v. Denckla*, 357 U.S. 235 (1958), involving a revocable trust created in 1935).

[57] *See* S.D. Codified Laws §55-1B-2(1), §55-1B-5.

[58] *See* Nev. Rev. Stat. §163.5549.

[59] *See* Alaska Stat. §13.36.072(c), §13.36.375(c).

[60] 12 Del C. §3313(b). The Delaware Legislation also covers a trust in which a fiduciary is to act with the consent of an adviser (12 Del. C. §3313(c)).

[61] 65 Del. Laws 422, §5 (1986).

ISSN 0886-3547

joint-stock companies, as well as individuals.''[62] The Delaware Legislation also provides that:[63]

> Where 1 or more persons are given authority by the terms of a governing instrument to direct . . . a fiduciary's actual . . . investment decisions, distribution decisions or other decision of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.

The Delaware Legislation contains the following definition of ''investment decision:''[64]

> For purposes of this section, unless the terms of the governing instrument provide otherwise, ''investment decision'' means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes, provided, however, that the power to lend for investment purposes shall be considered an investment decision only with respect to loans other than those described in §3325(19)b. and c. of this title), all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investment advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

The Delaware Legislation also contemplates that certain duties may be given to a protector:[65]

> For purposes of this section, the term ''adviser'' shall include a ''protector'' who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:
>
> (1) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
>
> (2) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
>
> (3) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument.

In *IMO Ronald J. Mount 2012 Irrevocable Dynasty Trust U/A/D December 5, 2012*,[66] the Delaware Court of Chancery confirmed that a protector may serve in a nonfiduciary capacity under Delaware law. The court wrote:[67]

> [U]nder the clear and unambiguous terms of the Dynasty Trust Instrument, the Trust Protector serves in a non-fiduciary capacity. Specifically, the Trust Instrument states that ''the Trust Protector, acting as such, shall serve in a non-fiduciary capacity.'' A settlor's decision to allow the trust protector to serve in a non-fiduciary capacity is valid and will be enforced under Delaware law. The public policy of our State, as articulated by the General Assembly, is to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments. As relevant here, 12 Del. C. §3313(a) provides that the governing instrument may provide that any such adviser (including a protector) shall act in a non-fiduciary capacity.
>
> Here, Ronald, as Settlor of the Dynasty Trust, clearly and unambiguously provided that the Trust Protector would fulfill that role in a non-fiduciary capacity.

Finally, the Delaware Legislation says that:[68]

> A person who accepts appointment as an adviser of a trust, or acts as an adviser of a trust under this section, submits to personal jurisdiction of this State regarding any matter related to the trust. This provision does not preclude other methods of obtaining jurisdiction over such adviser of a trust.

Regarding the second trust arrangement — a trust in which a directed trustee acts on the direction of a trust director who is a co-trustee, the Delaware Legislation provides this rule:[69]

> If the terms of the governing instrument confer upon the cotrustee the power to direct certain ac-

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[62] 1 Del. C. §302(15).

[63] 12 Del. C. §3313(a).

[64] 12 Del. C. §3313(d).

[65] 12 Del. C. §3313(f).

[66] C.A. No. 12892-VCS, 2017 BL 331356 (Del. Ch. Sept. 7, 2017).

[67] *IMO Ronald J. Mount*, 2017 BL 331356 at 7-8 (footnotes and internal quotation marks omitted).

[68] 12 Del. C. §3313(g).

[69] 12 Del. C. §3313A(a)(1).

ISSN 0886-3547

> tions of the excluded trustee, the excluded trustee must act in accordance with the direction and shall have no duty to act in the absence of such 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 wilful misconduct on the part of the directed cotrustee;

With respect to the third trust arrangement — a trust in which the governing instrument gives certain duties to one trustee to the exclusion of the other trustee, the Delaware Legislation says:[70]

> If the terms of the governing instrument confer upon the cotrustee exclusive authority to exercise any 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 in the exercise of the power, such that the excluded trustee shall not be a fiduciary with respect to any power as to which the governing instrument has conferred upon the cotrustee exclusive authority in accordance with this paragraph (a)(2), but shall remain a fiduciary with respect to any powers or other matters as to which the governing instrument has not conferred exclusive authority on the cotrustee.

3. Type of Statute

The Delaware Legislation is an ''enabling statute,''[71] which Professors Morley and Sitkoff find to be preferable to the ''off-the-rack'' approach that is in effect in South Dakota, Alaska, and Nevada.[72]

They describe the Delaware Legislation in this way:[73]

> The *enabling* statutes, typified by the Delaware statute, validate terms of a trust that grant a power of direction, but they do not prescribe any specific powers by default. A settlor has the freedom to grant a power of direction, but must specify which powers, if any, she will grant to a particular director.
>
> For example, the Delaware statute provides that a person other than a trustee may be ''given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decision of the fiduciary.'' Beyond this broad grant of authorization, however, the Delaware statute does not provide further guidance on which powers are included in a particular power of direction in a particular trust. Accordingly, under an enabling statute like Delaware's, the scope of a trust director's power of direction is determined by the terms of the trust. In other words, the content of a power of direction must be supplied by the terms of the trust. The statute provides no standard powers by default.

4. Applicable Standard

In the first two trust arrangements with which we are concerned; a trust in which a directed trustee is directed by a trust director who is not a co-trustee and in which a directed trustee is directed by a trust director who is a co-trustee, the directed trustee is not liable ''except in cases of wilful misconduct on the part of the fiduciary so directed.''[74] In the third trust arrangement at issue, the excluded trustee is relieved of all liability because the co-trustee holding the responsibility, as a trustee, can exercise the power itself and does not require the involvement of the excluded trustee. Regarding the second and third trust arrangements, the Delaware Legislation continues:[75]

> 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 shall have the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

5. Definition of Applicable Standard

For purposes of the Delaware Legislation, ''wilful misconduct'' is defined in the following way:[76]

> The term ''wilful misconduct'' shall mean intentional wrongdoing, not mere negligence, gross negligence or recklessness and ''wrongdoing'' means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

6. Relief From Duty to Monitor and Warn

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[70] 12 Del. C. §3313A(a)(2).

[71] Morley & Sitkoff, Note 1, above, at 15-16.

[72] Morley & Sitkoff, Note 1, above, at 15-16.

[73] Morley & Sitkoff, Note 1, above, at 14-15 (footnotes omitted; emphasis in original).

[74] 12 Del. C. §3313(b), §3313A(a)(1).

[75] 12 Del. C. §3313A(b).

[76] 12 Del. C. §3301(g). The same definition applies in interpreting governing instruments unless the governing instrument provides otherwise (12 Del. C. §3301(h)(5)).

ISSN 0886-3547

The Delaware Legislation includes the following provision for the first trust arrangement:[77]

> 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 or shall not take specified actions except at the direction of an adviser, 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.
>
> 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.

Similar provisions extend to the second and third trust arrangements.[78]

7. Requirement of Information Sharing

Information sharing is mandated in Delaware under the following statute:[79]

> Except as otherwise provided in a governing instrument, each trust fiduciary (including trustees, advisers, protectors, and other fiduciaries), and each trust nonfiduciary, has a duty upon request to keep all of the fiduciaries and nonfiduciaries for the trust reasonably informed about the administration of the trust with respect to any specific duty or function being performed by such fiduciary or nonfiduciary to the extent that providing such information to the other fiduciaries and nonfiduciaries is reasonably necessary for the other fiduciaries and nonfiduciaries to perform their duties; provided, however, that:
>
> (1) A fiduciary or nonfiduciary requesting and receiving any such information shall have no duty to: monitor the conduct of the fiduciary or nonfiduciary providing the information; provide advice to or consult with the fiduciary or nonfiduciary providing the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary or nonfiduciary receiving the information would or might have exercised the fiduciary's or nonfiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary or nonfiduciary providing the information; and
>
> (2) A fiduciary or nonfiduciary providing any such information shall have no duty to: monitor the conduct of the fiduciary or nonfiduciary requesting and receiving the information; provide advice to or consult with the fiduciary or nonfiduciary requesting and receiving the information; or communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary or nonfiduciary providing the information would or might have exercised the fiduciary's or nonfiduciary's own discretion in a manner different from the manner in which such discretion was actually exercised by the fiduciary or nonfiduciary requesting and receiving the information.

8. Confirming Caselaw

As covered below, the court of Chancery of Delaware rendered an unpublished decision in 2004 that upheld the Delaware Legislation.[80]

9. Comment

In my view, Delaware currently offers the most useful directed-trust legislation.

C. South Dakota

1. Introduction

South Dakota's directed trust legislation (South Dakota Legislation), which originally was enacted in 1997,[81] consists primarily of the following 15 sections:

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[77] 12 Del. C. §3313(e).

[78] 12 Del. C. §3313A(a)(3).

[79] 12 Del. C. §3317.

[80] *Duemler v. Wilmington Trust Co.,* No. 20033 NC, 2004 BL 31983 (Del. Ch. 2004).

[81] 1997 S.D. Laws 280 (1997).

ISSN 0886-3547

- S.D. Codified Laws §55-1B-1 Definition of terms;
- S.D. Codified Laws §55-1B-1.1 Governing instrument may provide trust advisor or trust protector with powers and immunities of trustee;
- S.D. Codified Laws §55-1B-2 Liability limits of excluded fiduciary — Relief from obligations for excluded fiduciary — Burden of proof in action against excluded fiduciary;
- S.D. Codified Laws §55-1B-3 Death of grantor;
- S.D. Codified Laws §55-1B-4 Trust advisor as fiduciary;
- S.D. Codified Laws §55-1B-5 Excluded fiduciary's liability for loss if trust protector appointed;
- S.D. Codified Laws §55-1B-6 Powers and discretions of trust protector;
- S.D. Codified Laws §55-1B-7 Submission to court jurisdiction — Effect on trust advisor or trust protector;
- S.D. Codified Laws §55-1B-8 Powers of trust protector incorporated by reference in will or trust instrument;
- S.D. Codified Laws §55-1B-9 Investment trust advisor or distribution trust advisor provided for in trust instrument;
- S.D. Codified Laws §55-1B-10 Powers and discretions of investment trust advisor;
- S.D. Codified Laws §55-1B-11 Powers and discretions of distribution trust advisor;
- S.D. Codified Laws §55-1B-12 Powers and discretions of family advisor;
- S.D. Codified Laws §55-2-11 Liability for acts of co-trustee; and
- S.D. Codified Laws §55-2-13 Notice to qualified beneficiaries of existence of trust — Written directions — Information to be provided to excluded fiduciaries — Liability limits of trustee —Variation of right of a beneficiary to be informed — Confidentiality of trust information.

2. Trust Arrangements

To understand the South Dakota Legislation, one must work through a thicket of definitions. A ''trust advisor'' is ''either an investment trust advisor or a distribution trust advisor.''[82]

An ''investment trust advisor'' is ''a fiduciary given authority by the instrument to exercise all or any portions of the powers and discretions set forth in §55-1B-10.''[83] The term ''fiduciary'' means ''a trustee . . . under any instrument . . . or any other party, including a trust advisor, a trust protector, or a trust committee, who is acting in a fiduciary capacity for any . . . trust . . . .''[84]

The South Dakota Legislation continues:[85]

> The powers and discretions of an investment trust advisor shall be as provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the investment trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary.

Such an advisor may possess seven powers in addition to those conferred by the Will or trust instrument.[86]

If one or more trust advisors are given authority by the terms of a governing instrument to direct a fiduciary's investment decisions, such trust advisors usually shall be considered to be fiduciaries when exercising such authority.[87] But, there is the following exception to the general rule:[88]

> So long as there is at least one fiduciary exercising the authority of the investment advisor pursuant to §55-1B-10 for the investment, except in the cases of willful misconduct or gross negligence by the fiduciary investment advisor in the selection or monitoring of the nonfiduciary trust advisors, the governing instrument may provide that such other trust advisors acting pursuant to this section are not acting in a fiduciary capacity.

A ''distribution trust advisor'' means ''a fiduciary, given authority by the instrument to exercise all or any portions of the powers and discretions set forth in §55-1B-11,''[89] which are:[90]

> The powers and discretions of a distribution trust advisor over any discretionary distributions of in-

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[82] S.D. Codified Laws §55-1B-1(3).
[83] S.D. Codified Laws §55-1B-1(6).
[84] S.D. Codified Laws §55-1B-1(4).
[85] S.D. Codified Laws §55-1B-10.
[86] S.D. Codified Laws §55-1B-10.
[87] S.D. Codified Laws §55-1B-4.
[88] S.D. Codified Laws §55-1B-4.
[89] S.D. Codified Laws §55-1B-1(7).
[90] S.D. Codified Laws §55-1B-11.

ISSN 0886-3547

come or principal, including distributions pursuant to an ascertainable standard or other criteria and appointments pursuant to §55-2-15, shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the distribution trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary.

Three specific powers that a distribution trust advisor may exercise unless prohibited by the Will or trust instrument are then set forth.[91]

An excluded fiduciary is shielded from liability for ''[a]ny loss that results from compliance with a direction of the trust advisor, including any loss from the trust advisor breaching fiduciary responsibilities or acting beyond the trust advisor's scope of authority,''[92] and for ''[a]ny loss that results from relying upon any trust advisor for valuation of trust assets.''[93]

For these purposes, ''excluded fiduciary'' means:[94]

> [A]ny fiduciary excluded from exercising certain powers under the instrument which powers may be exercised by the . . . trust advisor, trust protector, trust committee, or other persons designated in the instrument.

The South Dakota Legislation recognizes a third type of advisor — the ''family advisor,'' which is ''any person whose appointment is provided for in the governing instrument or by court order who is authorized to consult with or advise a fiduciary with regard to fiduciary or nonfiduciary matters and actions, and who may also be authorized by the governing instrument or court order to otherwise act in a nonfiduciary capacity.''[95]

It also provides that:[96]

> The powers and discretions of a family advisor are as provided in the governing instrument or by court order and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the family advisor.

The legislation then gives an exclusive list of the four powers and discretions that a family advisor may possess, relieves such an advisor from liability for action or inaction, limits judicial review of activities, and covers compensation.[97]

The South Dakota Legislation also contemplates that certain duties may be given to a ''trust protector,'' which term is defined to be ''any person whose appointment as protector is provided for in the instrument.''[98] The South Dakota Legislation does not define the term ''person,'' and there does not appear to be an overall definition of that term applicable to title 55 of the South Dakota Codified Laws.

For these purposes,[99] such person may not be considered to be acting in a fiduciary capacity except to the extent the governing instrument provides otherwise. However, a protector shall be considered acting in a fiduciary capacity to the extent that the person exercises the authority of an investment trust advisor or a distribution trust advisor.

The South Dakota Legislation describes the trust protector's function in these terms:[100]

> The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons.

It then lists 19 powers that a trust protector may possess[101] and specifies that a Will or trust instrument may incorporate some or all of those powers by reference.[102]

The South Dakota Legislation stipulates that:[103]

> If an instrument appoints a trust protector, the excluded fiduciary is not liable for any loss resulting from any action taken upon such trust protector's direction.

Professors Morley and Sitkoff criticize South Dakota's protector structure:[104]

> In South Dakota . . . the definition of a ''trust protector'' is circular: a trust protector is ''any person whose appointment as a protector is provided for in the instrument.'' S.D. Codified Laws §55-1B-1(2) (2017). In other words, a trust protector is a trust

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[91] S.D. Codified Laws §55-1B-11.
[92] S.D. Codified Laws §55-1B-2(1).
[93] S.D. Codified Laws §55-1B-2(4).
[94] S.D. Codified Laws §55-1B-1(5).
[95] S.D. Codified Laws §55-1B-1(10).
[96] S.D. Codified Laws §55-1B-12.
[97] S.D. Codified Laws §55-1B-12.
[98] S.D. Codified Laws §55-1B-1(2).
[99] S.D. Codified Laws §55-1B-1(2).
[100] S.D. Codified Laws §55-1B-6.
[101] S.D. Codified Laws §55-1B-6.
[102] S.D. Codified Laws §55-1B-8.
[103] S.D. Codified Laws §55-1B-5.
[104] Morley & Sitkoff, Note 1, above, at 13, n.37. For further discussion of this concern, see Morley & Sitkoff, Note 1, above at 15, n.48; Morley & Sitkoff, Note 1, above, at 15-16.

ISSN 0886-3547

protector. Elsewhere, the South Dakota statute provides examples of powers that might be granted to a protector. *Id.* §55-1b-6. But the statute does not say whether granting one of these powers necessarily makes a person into a protector or specify what else might make a person into a protector either.

South Dakota covers a few other items. First, the same individual or entity may simultaneously serve as a trust advisor and as a trust protector.[105] Second, South Dakota allows certain entities to serve as trust advisors and trust protectors.[106] In addition, the legislation says that:[107]

> By accepting an appointment to serve as a trust advisor or trust protector of a trust that is subject to the laws of this State, the trust advisor or the trust protector submits to the jurisdiction of the courts of South Dakota even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor or trust protector may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor or trust protector.

Although the matter is not entirely clear, all three trust arrangements described above might be available under the South Dakota Legislation. Nevertheless, it seems safest to choose the first trust arrangement — a trust with a directed trustee and a trust director who is not a co-trustee — rather than the second trust arrangement — a trust in which a directed trustee acts on the direction of a trust director who is a co-trustee — or the third trust arrangement — a trust in which a co-trustee acts to the exclusion of another co-trustee. This is because a statute provides that:[108]

> A trustee is responsible for the wrongful acts of a cotrustee to which he consented or which by his negligence he enabled the latter to commit, but for no others.

Professors Morley and Sitkoff describe how the UDTA solved a problem that had arisen in South Dakota:[109]

> The comment explains: ''It would normally be 'appropriate,' for a trust director to bring an action against a directed trustee if the trustee refused to comply with a director's exercise of a power of direction.'' UDTA §6(b)(1) cmt. The UDTA thus resolves the situation that arose in *Schwartz v. Wellin*, No. 2:13-CV-3595-DCN, 2014 WL 1572767 (D.S.C. Apr. 17, 2014). The comment describes the case and the UDTA's response:
>
> The court held that a trust director, which the terms of the trust referred to as a ''trust protector,'' lacked standing to bring a lawsuit under Rule 17(a)(1) of the Federal Rules of Civil Procedure, because the director was neither a real party in interest nor a party that could pursue a claim if not a real party in interest.
>
> In some circumstances, subsection (b)(1) may produce a different outcome. Rule 17(a)(1) allows a party to participate in litigation even if the party is not a real party in interest if the party is ''authorized by statute.'' Subsection (b)(1) supplies the requisite statutory authorization if participating in a lawsuit would be ''appropriate'' to a director's exercise or nonexercise of a power granted by the terms of the trust under subsection (a). UDTA §6(b)(1) cmt.

3. Type of Statute

The South Dakota Legislation is an ''off-the-rack statute,'' which Professors Morley and Sitkoff believe is less desirable than an ''enabling statute,''[110] such as is in effect in Delaware.[111]

They note a difficulty with the South Dakota approach:[112]

> The UDTA's further powers are also less underinclusive than the off-the-rack powers under the statutes, because the UDTA's further powers include every power appropriate to a particular trust, and not just the handful of powers bundled in the off-the-rack provision. The South Dakota statute, for example, grants an ''investment trust advisor'' the power to sell investments by default, but not the power to sue a trustee who refuses to comply with a direction to sell investments.

4. Applicable Standard

The South Dakota Legislation does not set a standard of liability for an excluded trustee in any of the three trust arrangements with which we are concerned. In my view, this is unwise because a court will

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[105] S.D. Codified Laws §55-1B-9.

[106] S.D. Codified Laws §51A-6A-66. *See* Aaron B. Flinn & Richard A. Johnson, *Special Purpose Entities; A New Frontier*, 159 Tr. & Est. 41 (May 2020).

[107] S.D. Codified Laws §55-1B-7.

[108] S.D. Codified Laws §55-2-11.

[109] Morley & Sitkoff, Note 1, above, at 20, n.68.

[110] Morley & Sitkoff, Note 1, above, at 17.

[111] 12 Del. C. §3313, §3313A.

[112] Morley & Sitkoff, Note 1, above, at 20-21 (footnote omitted).

ISSN 0886-3547

have to set its own standard for cases in which an excluded trustee is culpable.

5. Definition of Applicable Standard

The South Dakota Legislation does not contain a definition of the standard of liability for excluded trustees because there is none.

6. Relief From Duty to Monitor and Warn

The South Dakota Legislation includes the following provision:[113]

> Any excluded fiduciary is also relieved from any obligation to independently value trust assets, to review or evaluate any direction from a distribution trust advisor, or to perform investment or suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to any investments to the extent the trust advisor had authority to direct the acquisition, disposition, or retention of the investment. If the excluded fiduciary offers such communication to the trust advisor, trust protector, or any investment person selected by the investment trust advisor, such action may not be deemed to constitute an undertaking by the excluded fiduciary to monitor or otherwise participate in actions within the scope of the advisor's authority or to constitute any duty to do so.
>
> Any excluded fiduciary is also relieved of any duty to communicate with or warn or apprise any beneficiary or third party concerning instances in which the excluded fiduciary would or might have exercised the excluded fiduciary's own discretion in a manner different from the manner directed by the trust advisor or trust protector.
>
> Absent contrary provisions in the governing instrument, the actions of the excluded fiduciary (such as any communications with the trust advisor and others and carrying out, recording, and reporting actions taken at the trust advisor's direction) pertaining to matters within the scope of authority of the trust advisor or trust protector shall be deemed to be administrative actions taken by the excluded fiduciary solely to allow the excluded fiduciary to perform those duties assigned to the excluded fiduciary under the governing instrument, and such administrative actions may not be deemed to constitute an undertaking by the excluded fiduciary to monitor, participate, or otherwise take any fiduciary responsibility for actions within the scope of authority of the trust advisor or trust protector. . . .
>
> In an action against an excluded fiduciary pursuant to the provisions of this section, the burden to prove the matter by clear and convincing evidence is on the person seeking to hold the excluded fiduciary liable.

7. Requirement of Information Sharing

Information sharing is mandated in South Dakota under the following statute:[114]

> A trust advisor, trust protector, or other fiduciary designated by the terms of the trust shall keep each excluded fiduciary designated by the terms of the trust reasonably informed about:
>
> (1) The administration of the trust with respect to any specific duty or function being performed by the trust advisor, trust protector, or other fiduciary 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 is reasonably necessary for the excluded fiduciary to perform its duties; and
>
> (2) Any other material information that the excluded fiduciary would be required to disclose to the qualified beneficiaries under this section regardless of whether the terms of the trust relieve the excluded fiduciary from providing such information to qualified beneficiaries. Neither the performance nor the failure to perform of a trust advisor, trust protector, or other fiduciary designated by the terms of the trust as provided in this subdivision shall affect the limitation on the liability of the excluded fiduciary.

8. Confirming Caselaw

South Dakota has no relevant caselaw.

9. Comment

In my view, Delaware currently offers more useful directed trust legislation than South Dakota. The latter's approach is lengthy and cumbersome.

D. Alaska

1. Introduction

Alaska's directed trust legislation (Alaska Legislation) consists primarily of the following three sections:

- Alaska Stat. §13.36.375 Trustee advisor;
- Alaska Stat. §13.36.370 Trust protector; and
- Alaska Stat. §13.36.072 Co-trustees.

[113] S.D. Codified Laws §55-1B-2.

[114] S.D. Codified Laws §55-2-13.

ISSN 0886-3547

2. Trust Arrangements

The Alaska Legislation appears to allow all three of the trust arrangements described above.

Regarding the first trust arrangement — a trust with a directed trustee and a trust director who is not a co-trustee, the Alaska Legislation has provided since 2013 that:[115]

> [I]f, by the terms of the trust instrument, a trustee is designated to follow the directions of an advisor who is not designated in the trust instrument as being a trustee, the trustee who, by the terms of the trust instrument, is required to follow the directions of the advisor is not liable, individually or as a fiduciary, to a beneficiary for a consequence of the trustee's compliance with the advisor's directions . . . .

The Alaska Legislation also contemplates that certain duties may be given to a trust protector:[116]

> (a) A trust instrument may provide for the appointment of a trust protector.
>
> (b) A trust protector appointed under (a) of this section has the powers, delegations, and functions conferred on the protector by the trust instrument, which may include the power to
>
> (1) remove and appoint a trustee;
>
> (2) modify or amend the trust instrument to achieve favorable tax status or to respond to changes in 26 U.S.C. (Internal Revenue Code) or state law, or the rulings and regulations under those laws;
>
> (3) increase or decrease the interests of any beneficiary to the trust; and
>
> (4) modify the terms of a power of appointment granted by the trust.
>
> (c) A modification authorized under (b) of this section may not
>
> (1) grant a beneficial interest to an individual or a class of individuals unless the individual or class of individuals is specifically provided for under the trust instrument;
>
> (2) modify the beneficial interest of a governmental unit in a trust created under AS 47.07.020(f).
>
> (d) Subject to the terms of the trust instrument, a trust protector is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector taken when performing the function of a trust protector under the trust instrument.

Similarly, the Alaska Legislation appears to permit the second trust arrangement — a trust in which a directed trustee acts on the direction of a trust director who is a co-trustee and the third trust arrangement — a trust in which the governing instrument gives certain duties to one trustee to the exclusion of the other trustee, under the following statute:[117]

> 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 . . . 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 . . . . In this subsection, ''power'' means the power to direct . . . specified actions by other trustees.

3. Type of Statute

The Alaska Legislation, like the South Dakota Legislation and the Nevada Legislation, is an ''off-the-rack statute,'' which Professors Morley and Sitkoff find to be inferior to the Delaware Legislation,[118] which is an ''enabling statute.''[119]

4. Applicable Standard

In the first trust arrangement with which we are concerned — a trust in which a directed trustee is directed by a trust director who is not a co-trustee, the Alaska Legislation says:[120]

> An advisor under this subsection is liable to the beneficiaries as a fiduciary with respect to the exercise of the advisor's directions by a trustee as if the trustee were not in office, and the advisor has the exclusive obligation to account to the beneficiaries and to defend an action brought by the beneficiaries with respect to the exercise of the advisor's directions by the trustee.

Similar rules are given for the second trust arrangement — a trust in which a directed trustee is directed by a trust director who is a co-trustee and the third

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[115] Alaska Stat. §13.36.375(c).

[116] Alaska Stat. §13.36.370.

[117] Alaska Stat. §13.36.072(c). Another statute involving co-trustees is not germane here (Alaska Stat. §13.36.110).

[118] Morley & Sitkoff, Note 1, above, at 17.

[119] 12 Del. C. §3313, §3313A.

[120] Alaska Stat. §13.36.375(c).

ISSN 0886-3547

trust arrangement — in which a co-trustee is given responsibilities to the exclusion of the other trustee.[121] The Alaska Legislation does not set a standard of liability for a directed or excluded trustee in any of the three trust arrangements.[122] In my view, this is ill-advised for the first two trust arrangements because a court will be forced to create one when, as inevitably will happen, a directed trustee inadvertently or wilfully executes a direction improperly.

5. Definition of Applicable Standard

The Alaska Legislation imposes no standard of liability for a directed or excluded trustee so there is no need to define any such standard.

6. Relief From Duty to Monitor and Warn

The Alaska Legislation includes the following provision for the first trust arrangement:[123]

> [T]he trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of a power of the trustee if the exercise of the power complies with the directions given to the trustee.

Similar provisions extend to the second and third trust arrangements.[124]

7. Requirement of Information Sharing

The Alaska Legislation relieves a directed or excluded trustee from liability for following a direction in all three scenarios ''regardless of the information available to the trustee.''[125]

Nevertheless, Professors Morley and Sitkoff point out the following problem with Alaska's approach:[126]

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

8. Confirming Caselaw

Alaska has no pertinent caselaw.

9. Comment

In my view, Alaska should consider enacting some of the desirable attributes described above, which might include amending the Alaska Legislation to be an ''enabling statute,'' imposing a standard of liability on a directed or excluded trustee for its own conduct, limiting a directed or excluded trustee's monitoring and investigating duties more specifically, and adding more robust information-sharing requirements.

E. Nevada

1. Introduction

Nevada's directed trust legislation (''Nevada Legislation''), which was not enacted until 2009[127] and which has not been amended since 2015,[128] contains 17 sections, the first 10 of which consist of a general definitions section followed by nine sections that define ''custodial account,'' ''custodial account owner,'' ''directing trust adviser,'' ''distribution trust adviser,'' ''fiduciary,'' ''instrument,'' ''investment trust adviser,'' ''trust adviser,'' and ''trust protector.''[129] The remaining seven sections are:

- Nev. Rev. Stat. §163.5548 Circumstances under which fiduciary is ''directed fiduciary;''
- Nev. Rev. Stat. §163.5549 Limitations on liability of directed fiduciary;
- Nev. Rev. Stat. §163.555 Action authorized upon incapacity or death of settlor;
- Nev. Rev. Stat. §163.5551 Circumstances in which trust advisers are considered fiduciaries;
- Nev. Rev. Stat. §163.5553 Powers of trust protector;
- Nev. Rev. Stat. §163.5555 Trust protector and trust adviser: Submission to jurisdiction of courts of this State; and

[121] Alaska Stat. §13.36.072(c).

[122] Alaska Stat. §13.36.375(c), §13.36.072(c).

[123] Alaska Stat. §13.36.375(c).

[124] Alaska Stat. §13.36.072(c).

[125] Alaska Stat. §13.36.375(c), 13.36.072(c).

[126] Morley & Sitkoff, Note 1, above, at 51, n.178.

[127] 2009 Nev. Laws 215, §20-§37.

[128] 2015 Nev. Laws 524, §42, §43, §55, §56.

[129] Nev. Rev. Stat. §163.553, §163.5533, §163.5535, §163.5536, §163.5537, §163.554, §163.5541, §163.5543, §163.5545, §163.5547.

ISSN 0886-3547

- Nev. Rev. Stat. §163.5557 Powers of investment trust adviser and distribution trust adviser.

2. Trust Arrangements

Like the South Dakota Legislation, the Nevada Legislation is chock-a-block with definitions. A ''trust adviser'' is ''a distribution trust adviser or investment trust adviser.''[130]

An ''investment trust adviser'' is ''a fiduciary given authority by the [trust] instrument to exercise any or all of the powers and discretion set forth in NRS 163.5557.''[131] The term ''fiduciary'' means ''a trustee . . . under any instrument . . . or any other person, including an investment trust adviser, trust protector or a trust committee which is acting in a fiduciary capacity for any . . . trust. . . .''[132] The Nevada Legislation continues:[133]

> 1. An instrument may provide for the appointment of a person to act as an investment trust adviser . . . with regard to investment decisions. . . .
>
> 2. An investment trust adviser may exercise the powers provided to the investment trust adviser in the instrument in the best interests of the trust. The powers exercised by an investment trust adviser are at the sole discretion of the investment trust adviser and are binding on all other persons. The powers granted to an investment trust adviser may include, without limitation, the power to:
>
> (a) Direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust.
>
> (b) Vote proxies for securities held in trust.
>
> (c) Select one or more investment advisers, managers or counselors, including the trustee, and delegate to such persons any of the powers of the investment trust adviser.

It also says ''[i]f one or more trust advisers are given authority, by the terms of an instrument, to direct . . . a fiduciary's investment decisions, the investment trust advisers shall be considered fiduciaries when exercising that authority unless the instrument provides otherwise.''[134]

A ''distribution trust adviser'' means ''a fiduciary given authority by an instrument to exercise any or all powers and discretion set forth in NRS 163.5557,''[135] which are:[136]

> 1. An instrument may provide for the appointment of a person to act as . . . a distribution trust adviser with regard to . . . discretionary distributions . . . .
>
> 3. A distribution trust adviser may exercise the powers provided to the distribution trust adviser in the instrument in the best interests of the trust. The powers exercised by a distribution trust adviser are at the sole discretion of the distribution trust adviser and are binding on all other persons. Except as otherwise provided in the instrument, the distribution trust adviser shall direct the trustee with regard to all discretionary distributions to a beneficiary.

No guidance is given as to whether a distribution trust adviser acts in a fiduciary capacity.[137]

The Nevada Legislation also contemplates that certain duties may be given to a ''trust protector,'' which is defined to be ''any person whose appointment is provided for in the instrument.''[138] The Nevada Legislation does not define the term ''person'' and does not cover the circumstances, if any, in which a protector serves in a fiduciary capacity.

The Nevada Legislation describes the trust protector's function in these terms:[139]

> A trust protector may exercise the powers provided to the trust protector in the instrument in the best interests of the trust. The powers exercised by a trust protector are at the sole discretion of the trust protector and are binding on all other persons.

It then lists 12 powers that a trust protector may possess[140] and specifies that a trust instrument may incorporate some or all of those powers by reference.[141]

The Nevada protector structure is deficient for the same reasons that Professors Morley and Sitkoff identified for the South Dakota legislation, as described above.

A directed fiduciary is shielded from liability for loss resulting from ''complying with a direction of a

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[130] Nev. Rev. Stat. §163.5545.

[131] Nev. Rev. Stat. §163.5543.

[132] Nev. Rev. Stat. §163.554.

[133] Nev. Rev. Stat. §163.5557(1)-§163.5557(2).

[134] Nev. Rev. Stat. §163.5551.

[135] Nev. Rev. Stat. §163.5537.

[136] Nev. Rev. Stat. §163.5557(1), §163.5557(3).

[137] Nev. Rev. Stat. §163.5551 covers investment trust advisers only.

[138] Nev. Rev. Stat. §163.5547.

[139] Nev. Rev. Stat. §163.5553(1).

[140] Nev. Rev. Stat. §163.5553(1).

[141] Nev. Rev. Stat. §163.5553(2).

ISSN 0886-3547

directing trust adviser, whether the direction is to act or to not act.''[142]

For these purposes, a ''directing trust adviser'' is ''a trust adviser, trust protector or other person designated in the trust instrument who has the authority to give directives that must be followed by the fiduciary,''[143] and a fiduciary is a ''directed fiduciary'' for any action that such fiduciary ''is directed to take or prohibited from taking by a directing trust adviser.''[144]

Professors Morley and Sitkoff raise the following concern about these provisions:[145]

The Nevada statute provides,

> A directed fiduciary is not liable for any obligation to perform an investment or suitability review, inquiry or investigation or to make any recommendation or evaluation with respect to any investment, to the extent that the investment is made by a directing trust adviser. Nev. Rev. Stat. §163.5549(2) (2015).

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

Finally, the Nevada Legislation says that:[146]

> If a person accepts an appointment to serve as a trust protector or a trust adviser of a trust subject to the laws of this State, the person submits to the jurisdiction of the courts of this State, regardless of any term to the contrary in an agreement or instrument. A trust protector or a trust adviser may be made a party to an action or proceeding arising out of a decision or action of the trust protector or trust adviser.

Although the matter is not entirely clear, all three trust arrangements described above might be available under the Nevada Legislation.

3. Type of Statute

The Nevada Legislation is an ''off-the-rack statute,'' which Professors Morley and Sitkoff believe is less desirable than an ''enabling statute,''[147] such as is in effect in Delaware.[148]

4. Applicable Standard

The Nevada Legislation does not set a standard of liability for a directed trustee in any of the three trusts arrangement with which we are concerned. In my view, this is unwise because a court will have to set its own standard for cases in which an excluded trustee is culpable.

5. Definition of Applicable Standard

The Nevada Legislation does not contain a definition of the standard of liability for directed trustees because there is none.

6. Relief From Duty To Monitor and Warn

The Nevada Legislation includes the following provision:[149]

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

7. Requirement of Information Sharing

The Nevada Legislation does not address this subject.

8. Confirming Caselaw

Nevada has no relevant caselaw.

9. Comment

In my view, Delaware currently offers more useful directed trust legislation than Nevada. The latter's approach is lengthy and cumbersome.

VI. CASELAW

A. Introduction

To my knowledge, only two courts have decided whether a directed-trust statute afforded protection to a directed trustee. A third case is instructive.

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[142] Nev. Rev. Stat. §163.5549(1)(a).
[143] Nev. Rev. Stat. §163.5536.
[144] Nev. Rev. Stat. §163.5548(3).
[145] Morley & Sitkoff, Note 1, above, at 51, n.178.
[146] Nev. Rev. Stat. §163.5555.
[147] Morley & Sitkoff, Note 1, above, at 17.
[148] 12 Del C. §3313, §3313A.
[149] Nev. Rev. Stat. §163.5549(2).

ISSN 0886-3547

B. Rollins v. Branch Banking and Trust Company of Virginia (2001)

In *Rollins v. Branch Banking and Trust Company of Virginia*,[150] a Virginia trial court held that a trustee was not liable for the $25 million loss caused by the retention of stock as directed by the beneficiaries. The court did not dismiss the beneficiaries' claim that the trustee had breached a duty to warn them about the deteriorating condition of trust investments, however, and the case was settled on this issue. The case's precedential value is uncertain because Virginia has revised its directed trust statute since it was issued. In light of *Rollins*, several states have modified their statutes to absolve directed trustees of monitoring and other duties.

C. Duemler v. Wilmington Trust Company (2004)

In *Duemler v. Wilmington Trust Company*,[151] a Delaware vice chancellor ruled that a corporate trustee was not liable for the failure of a sophisticated investment adviser (i.e., securities lawyer in this case) to direct the trustee on an investment decision where the trustee forwarded relevant information to the adviser. The court held:[152]

> The Court . . . finds that section 3313(b) of title 12 of the Delaware Code insulates fiduciaries of a Delaware trust from liability associated with any loss to the trust where a governing instrument provides that the fiduciary is to follow the direction of an advisor, the fiduciary acts in accordance with such direction and the fiduciary did not engage in willful misconduct. The trust agreement involved in this case appointed Plaintiff as the investment advisor to the Trust and, at all times, Plaintiff made all of the investment decisions for the Trust, including not to tender the securities in the Exchange Offer. In connection with Plaintiffs decision not to tender the securities in the Exchange Offer, Wilmington Trust acted in accordance with Plaintiff's instructions, did not engage in willful misconduct by not forwarding the Exchange Offer materials to Plaintiff and had no duty to provide information or ascertain whether Plaintiff was fully informed of all relevant information concerning the Exchange Offer. Accordingly, 12 Del. C. §3313(b) insulates Wilmington Trust from all liability for any loss to the Trust resulting from plaintiff's decision not to tender the securities in the Exchange Offer.

Commentators wrote in 2012 that:[153]

> While the Delaware Chancery Court may well be willing to construe its directed trust statute in a manner contemplated by the legislature, it remains to be seen how other state courts will interpret similar ''bifurcation'' type statutes, including the degree of protection conveyed by them.

D. Shelton v. Tamposi (2013)

Even though it didn't involve the apportionment of liability between a trust director and a directed trustee, the Supreme Court of New Hampshire's decision in *Shelton v. Tamposi*[154] is a cautionary tale for those who draft and administer directed trusts. In *Shelton*, the sole trustee (an individual) was in charge of distributions and investment directors were responsible for investments.

The trustee contended that she could require the investment directors to sell illiquid investments to make funds available for distribution; the investment directors insisted that she could not. Affirming the lower court, the New Hampshire Supreme Court sided with the investment directors.[155] The case shows that the drafting attorney must make clear in the governing instrument who is in charge when investment and distribution decisions are placed in different hands.

VII. GUIDELINES

A. Introduction

In operation, the directed trustee executes the directed trust. Thus, the directed trustee buys and sells trust assets and distributes income and principal as directed by the trust director.

B. Governing Instrument Must Be Clear

The will or inter vivos trust instrument that establishes the directed trust must clearly identify the powers that are to be directed currently and over time. The

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[150] 56 Va. Cir. 147 (Va. Cir. Ct. 2001). For a summary of the decision, see Charles A. Redd, *Directed Trusts—Who's Responsible?* 154 Tr. & Est. 11, 13 (Sept. 2015).

[151] No. 20033 NC, 2004 BL 31983 (Del. Ch. 2004). For a summary of the decision, see Charles A. Redd, *Directed Trusts—Who's Responsible?* 154 Tr. & Est. 11, 12-13 (Sept. 2015).

[152] *Duemler,* No. 20033 NC, 2004 BL 31983 at 1.

[153] Richard B. Covey & Dan T. Hastings, *Power to Direct Trustee Action; Virginia Law*, Prac. Drafting 10910, 10913 (July 2012).

[154] 62 A.3d 741 (N.H. 2013).

[155] *Shelton*, 62 A.3d at 748.

ISSN 0886-3547

terms should include any administrative acts that are to be directed. For example, if the trust director has the power to choose the entity that will have custody of trust assets, then the governing instrument should contain language instructing the trust director to direct the directed trustee to sign custody agreements.

C. Who's In Charge?

The *Shelton* case demonstrates how important it is for the governing instrument to specify who has the deciding vote when investment and distribution decisions are made by different parties.

D. Cover Compensation and Expenses

The governing instrument also should cover what, if anything, a trust director will be paid for services and the extent to which such a director will be reimbursed for out-of-pocket expenses. A common arrangement in many Delaware trusts is to appoint a beneficiary as trust director for investments and to authorize the beneficiary-director to hire an investment manager. In such cases, the trust director might serve without compensation but be reimbursed for expenses, including investment counsel fees. Language in the governing instrument specifying that a trust director will receive ''reasonable'' compensation is too vague to be helpful.

E. Share Information

The governing instrument should require the trust director and the directed trustee to share information that each party needs to fulfill responsibilities. For example, a directed trustee often must report asset values for nonmarketable assets on reports that must be filed with regulators. The trust director choosing such investments should be required to furnish their values on request.

F. Require Written Directions

To avoid confusion, the governing instrument should establish a procedure to confirm that directions have been given and received.

G. Require Written Acceptance

To make sure that a trust director is willing and able to undertake duties, the governing instrument should require a trust director to accept appointment in writing.

H. Choose Director With Care

Because a trust director bears considerable responsibility for the ultimate success of a trust, the person given that responsibility must be chosen with care. This subject is explored more fully below.

VIII. THE PROTECTOR

A. Introduction

Since the turn of the 21st century, the ''protector'' — which long has been a feature of offshore trusts — has begun to appear in trusts created in the United States, and several states have enacted statutes in which the protector's role is defined.[156] The protector sometimes becomes involved in decisions (e.g., directing investments or distributions) that have traditionally fallen within the domain of the trust director; at other times, the protector is charged with responsibilities such as replacing trustees and trust directors, amending trust provisions, and changing situs that used to require court involvement.

B. Careful Drafting Is Key

Governing instruments must clearly spell out the powers, rights, duties, and responsibilities of directed trustees and trust directors, including protectors.

Matters that should be addressed include:

- The protector's powers and duties, including power to enforce the trust;
- Whether the protector has ongoing monitoring responsibilities regarding the exercise of one or more powers (e.g., to remove a trust director or trustee);
- The amount and source of the protector's compensation;
- The extent to which the protector will be reimbursed for out-of-pocket expenses, including counsel fees and court costs incurred in carrying out duties;
- Whether the protector will serve in a fiduciary capacity for some or all duties; and
- How successor protectors will be chosen.

C. Fiduciary or Not Fiduciary

Much has been written on whether or not a protector should serve in a fiduciary capacity.[157] In my view, it depends on the power that is being exercised.

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[156] *See* Jessica L. Showers, *Trust Protectors: A Practical Solution to Many Trust Problems*, 46 Est. Plan. 3 (Nov. 2019).

[157] *See* Richard C. Ausness, *When Is a Trust Protector a Fiduciary?* 27 Quinnipiac Prob. L.J. 277 (2014).

ISSN 0886-3547

Protectors should certainly serve in a fiduciary capacity if they are discharging traditional investment or distribution duties. Even if protectors are handling protector functions, protectors usually should do so in a fiduciary capacity, but there are exceptions to the rule. For example, if a protector is given a power under §675(4)(C)[158] to swap trust assets in order to acquire grantor-trust treatment, then the power must be held in a nonfiduciary capacity.

D. Caselaw

In recent years, courts have begun to decide cases involving protectors. Relevant cases include:

- *Robert T. McLean Irrevocable Trust v. Ponder* (Mo. 2013)**:**[159] Although the protector could replace the trustee, a Missouri intermediate appellate court held that the protector did not have a duty to monitor the trustee's activities to determine if the protector should exercise the power.

- *Schwartz v. Wellin* (S.C. 2014)**:**[160] Given that the protector was not a ''real party in interest'' under South Dakota law, a federal district judge in South Carolina held that the protector could not prevent the individual trustees from terminating a huge South Dakota dynasty trust.

- *SEC v. Wyly* (N.Y. 2014):[161] A federal district judge in New York held that the trustors' control over the protectors of foreign trusts caused the trusts to be grantor trusts for federal income-tax purposes so that the trustors owed the IRS billions of dollars in taxes.

- *Minassian v. Rachins* (Fla. 2014):[162] A Florida intermediate appellate court concluded that the trustee's appointment of a protector pursuant to the trust instrument and the protector's modification of trust terms during litigation was allowed to resolve the dispute because it was in accordance with the trustor's intent.

- *In re IMO Daniel Kloiber Dynasty Trust* (Del. 2014):[163] The Delaware Court of Chancery deferred deciding questions involving the effectiveness of the exercise of the protector's powers pending the outcome of a divorce proceeding in Kentucky.

- *In re Eleanor Pierce (Marshall) Stevens Living Trust* (La. 2015):[164] An intermediate appellate court held that the ''protector'' is allowed by Louisiana law and therefore upheld a protector's removal of the trustee.

IX. CONFLICT OF LAWS — GOVERNING PRINCIPLES

A. Background

If a resident of one state (Home State) concludes that the needs of his or her family will be best served by creating a directed trust in another state (Trust State), then the attorney must take steps to ensure that Trust State law will apply in evaluating the directed trust arrangement and that the courts of the Trust State (rather than the courts of the Home State or some other state) will make such assessment. Given that the testator's/trustor's intent will be a court's starting point in analyzing these issues,[165] the governing instrument should designate the applicable law and the supervising court and the client and the attorney should take the steps described below to ensure that those designations will be honored

B. What Law Applies?

1. Introduction

On this issue, the practitioner should consider the Second Restatement of Conflict of Laws[166] and the UTC.

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[158] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[159] 418 S.W.3d 482 (Mo. Ct. App. 2013).

[160] No. 2:13-cv-3595-DCN, 2014 BL 107668 (D.S.C. Apr. 17, 2014).

[161] 56 F. Supp. 3d 394 (S.D.N.Y. 2014). For a summary of the decision, see William E. Keenan & Diana S.C. Zeydel, *Is Designating an Independent Trustee a Tax Panacea?* 43 Est. Plan. 3, 6-8 (Feb. 2016).

[162] 152 So. 3d 719 (Fla. Dist. Ct. App. 2014).

[163] 98 A.3d 924 (Del. Ch. 2014). *See* William P. LaPiana, *The Directed Trust in Divorce Court,* 42 Est. Plan. 44 (Jan. 2015).

[164] 159 So. 3d 1101 (La. Ct. App. 2015).

[165] *See* Restatement (Second) of Conflict of Laws Ch. 10, Introductory Note (1971); UTC §103(18) (amended 2018).

[166] Restatement (Second) of Conflict of Laws (1971). A reference to the ''Restatement'' refers to the Second Restatement of Conflict of Laws. Courts in Arizona, Delaware, California, and the Ninth Circuit follow the Restatement: *DePrins v. Michaeles*, 942 F.3d 521, 525 (1st Cir. 2019) (''Arizona follows the Restatement (Second) of Conflict[s] of Laws''); *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249, 255 (Del. 2013) (''When confronted with a choice-of-law issue, Delaware courts adhere to the Restatement (Second) of Conflict of Laws.''); *In re Zukerkorn*, 484 B.R. 182, 189 (B.A.P. 9th Cir. 2012) (''Federal courts in the Ninth Circuit and California state courts both look to the Restatement (Second) of Conflicts [sic] of Law . . . for the choice of law rules.''); *Wal-*

ISSN 0886-3547

2. Restatement — General

Under the Restatement, the effectiveness of a governing law designation in a trust is a function of the following:

- Whether the trust holds personal property or real property (the Restatement refers to it as ''movables'' or ''land,'' respectively);
- Whether the trust is created by Will or inter vivos; and
- Whether the issue involves:

  (1) The ''validity'' of a trust provision;

  (2) The ''administration'' of the trust;

  (3) The ''construction'' of a trust provision; or

  (4) Restraints on alienation of a beneficiary's interest.

It usually is apparent whether a trust is being funded with real or personal property and whether the governing instrument is a Will or inter vivos document. Moreover, the effectiveness of a directed trust statute is not a matter of construction (which relates to the identification of the beneficiaries)[167] or of restraints on a beneficiary's interest. Although it might seem that the effectiveness of a directed trust is a matter of ''validity,'' ''validity'' is not a catch-all category. This is because the Restatement has the following narrow definition of the term:[168]

> Some questions of validity relate only to the trust provisions and not to the will as a testamentary disposition. A trust may be invalid, in whole or in part, because it violates the rule against perpetuities or a rule against the suspension of the absolute ownership or of the power of alienation; because it violates a rule against accumulations; because the purpose is illegal; because of an illegal condition, such as one promoting divorce or restraining marriage.

3. Restatement—Personal Property

Restatement §269 covers the law that is used to resolve questions involving the validity of provisions of a trust of movables created by will,[169] and §270 covers the law that is used to resolve questions involving the validity of provisions of a trust of movables created inter vivos.[170] When analyzing the validity of a trust provision under Restatement §269 or §270, the following three questions must be answered:

(1) Is the question one of ''validity''?

(2) Does the Trust State have a substantial relation to the trust?

(3) Does the trust provision in question violate a strong public policy of the Home State?

As just mentioned, questions of validity relate to issues such as whether the trust violates the rule against perpetuities or the rule against accumulations. The Trust State has a substantial relation to the trust if, among other things, the trustor designated it as the place of the trust's administration, the trustee lives or does business in the Trust State when the trust is created, or the trust assets are located in the Trust State at that time.[171] According to the authorities, the strong-public-policy issues that justify a departure from §270's general rule involve trust provisions designed to defeat a surviving spouse's right of election and that violate a state's restrictions on testamentary gifts to charity,[172] which are not relevant here.

For an inter vivos trust, it also is necessary to determine whether the Trust State or the Home State has the most significant relationship to the matter at issue. Regarding this issue, §270 directs us to §6 of the Restatement, which provides:[173]

> [T]he factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and

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dron v. Huber (In re Huber), 493 B.R. 798, 807 (Bankr. W.D. Wash. 2013) (''courts in the Ninth Circuit follow the approach of the Restatement (Second) of Conflict of Laws'').

[167] Restatement (Second) of Conflict of Laws §268 cmt. e (1971).

[168] Restatement (Second) of Conflict of Laws §269 cmt. d (1971).

[169] Restatement (Second) of Conflict of Laws §269 (1971).

[170] Restatement (Second) of Conflict of Laws §270 (1971).

[171] Restatement (Second) of Conflict of Laws §270 cmt. b (1971).

[172] Restatement (Second) of Conflict of Laws §269 cmts. c, i, §270 cmts. b, e (1971); Austin W. Scott, William F. Fratcher & Mark L. Ascher, *7 Scott and Ascher on Trusts*, 45.4.2.4 at 3254-60 (5th ed. 2007) (hereafter ''7 *Scott on Trusts*''); *Bogert on Trusts* §296 at 61-63, §297 at 70, 73-74).

[173] Restatement (Second) of Conflict of Laws §6(2) (1971).

ISSN 0886-3547

(g) ease in the determination and application of the law to be applied.

Nevertheless, under the Restatement's framework, the effectiveness of a directed trust seems to fall within the administration category —not the validity category — because a comment under Restatement §271 provides:[174]

> The term ''administration of a trust,'' as it is used in the Restatement of this Subject, 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.

A trustor's designation of a state's law to govern questions regarding the administration of a testamentary trust[175] or inter vivos trust[176] of personal property will be respected, even if the designated state has no connection with the trust.

4. Restatement — Real Property

The law that governs questions of validity[177] and administration[178] for a trust that holds real property is the law that would be applied by the courts of the situs of the property. Accordingly, the ability of a testator/trustor to select the directed trust law of a Trust State for such a trust is limited.

5. Uniform Trust Code

Unlike the Restatement, the UTC does not contain different rules for trusts that hold real property and trusts that hold personal property, nor does the UTC distinguish between testamentary trusts and trusts inter vivos. UTC §107 does set rules for determining which state's law applies in determining the ''meaning and effect'' of trust provisions.[179] But, the term ''meaning and effect'' seems to correspond most closely to matters of ''construction'' under the Restatement and therefore is not pertinent to our subject.

No UTC provision covers governing law for matters of ''validity'' or ''administration,'' but UTC §107's comment suggests:[180]

> Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

To determine a trust's ''principal place of administration,'' UTC §108(a) stipulates:[181]

> 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:
>
> (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.

In a state that has enacted the UDTA, designations of the principal place of administration may also be effective if a trust director is connected with the selected jurisdiction.[182]

Regarding the governance of the trust's ''dispositive provisions,'' which seems to correspond to ''validity'' under the Restatement, §107's comment refers to ''the law of the place having the most significant relationship to the trust's creation''[183] and offers the following guidelines to determine which state's law governs a trust's ''dispositive provisions:''[184]

> Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. Other more general factors that may be pertinent in particular cases include the relevant policies of the fo-

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[174] Restatement (Second) of Conflict of Laws §271 cmt. a (1971) (cross references omitted).

[175] Restatement (Second) of Conflict of Laws §271(a) (1971).

[176] Restatement (Second) of Conflict of Laws §272 (1971).

[177] Restatement (Second) of Conflict of Laws §278 (1971).

[178] Restatement (Second) of Conflict of Laws §279 (1971).

[179] UTC §107 (amended 2018). See Appendix C for state citations. *See also* UPC §2-703 (2010) (meaning and legal effect of governing instrument generally is determined by local law selected in governing instrument).

[180] UTC §107 cmt. (amended 2018).

[181] UTC §108(a) (amended 2018). See Appendix C for state citations.

[182] UDTA §3(b)(2) (2017).

[183] UTC §107 cmt. (amended 2018).

[184] UTC §107 cmt. (amended 2018) (citations omitted).

ISSN 0886-3547

rum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result.

6. Recommendations

In light of the above discussion, a testator/trustor who wants Trust State law to determine the effectiveness of a directed trust arrangement should designate Trust State law to govern matters of validity and administration, appoint a directed trustee in the Trust State, and make sure that a significant part of the trust's management will occur in the Trust State. The directed trustee should execute the governing instrument in the Trust State, and the testator/trustor might do so as well. Conversely, the testator/trustor should minimize ties to the Home State by *not* designating the law of the Home State, *not* appointing a Home State directed trustee, *avoiding* administration in the Home State, and *not* executing the governing instrument there.

C. Which State's Courts Should Exercise Jurisdiction?

1. Introduction

To determine which state's courts should adjudicate questions involving the effectiveness of directed trust statutes, the practitioner must look to the Restatement, the UTC, and the UPC.

2. Restatement — Personal Property

For trusts of movables created by will or inter vivos, §267 of the Restatement provides that:[185]

> The administration of a trust of interests in movables is usually supervised . . . by the courts of the state in which the trust is to be administered.

Comment c to §267 indicates that the will or trust instrument may designate the state of administration,[186] and comment d describes the implications of such a designation as follows:[187]

> If the trust is to be administered in a particular state, that state has jurisdiction to determine through its courts not only the interests of the beneficiaries in the trust property but also the liabilities of the trustee to the beneficiaries, even though it does not have jurisdiction over the beneficiaries, or some of them. . . . .
>
> So also a court of the state in which the trust is administered may give instructions as to the powers and duties of the trustee, although the beneficiaries or some of them are not subject to the jurisdiction of the court, provided they are given opportunity to appear and be heard.

Comment e discusses the role of the court of primary supervision as follows:[188]

> Where the trustee has not qualified as trustee in any court and the trust is to be administered in a particular state, the courts of that state have primary supervision over the administration of the trust. They have and will exercise jurisdiction as to all questions which may arise in the administration of the trust. Thus, if an inter vivos trust is created with a trust company as trustee, the courts of the state in which the trust company was organized and does business will exercise jurisdiction over the administration of the trust.

If the Home State court has jurisdiction over the trustee or the trust, comment e to §267 suggests that it should defer to the Trust State's courts.[189]

The Scott treatise summarizes the applicable principles as follows:[190]

> Trust administration is ordinarily governed by the law of the state of primary supervision, and the rights of the parties ought not depend on the fact that a court of some other state happens to have acquired jurisdiction. Such a court may give a judgment based on its own local law, or it may attempt to apply the law of the state of primary supervision but apply it incorrectly.

3. Restatement — Real Property

For trusts that hold interests in land created by Will or inter vivos, §276 of the Restatement provides as follows:[191]

> The administration of a trust of an interest in land is supervised by the courts of the situs as long as the land remains subject to the trust.

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[185] Restatement (Second) of Conflict of Laws §267 (1971). *See* 7 *Scott on Trusts*, §45.2.2.4.1 at 3102-14, §45.2.2.4.2 at 3114-22, §45.2.2.5 at 3122-25; *Bogert on Trusts*, §292 at 21-22.

[186] Restatement (Second) of Conflict of Laws §267 cmt.c (1971).

[187] Restatement (Second) of Conflict of Laws §267 cmt.d (1971).

[188] Restatement (Second) of Conflict of Laws §267 cmt.e (1971).

[189] Restatement (Second) of Conflict of Laws §267 (1971).

[190] *7 Scott on Trusts*, §45.2.2.6 at 3125.

[191] Restatement (Second) of Conflict of Laws §276 (1971). *See* Restatement (Second) of Conflict of Laws §276 cmt. b (1971); *7 Scott on Trusts*, §46.2.2-§46.2.2.2 at 3373-82, §46.2.3-§46.2.3.2 at 3382-89; *Bogert on Trusts*, §292 at 20-21.

ISSN 0886-3547

4. Uniform Trust Code

Under the UTC, establishing the ''principal place of administration'' of a trust is critical in determining which state's courts should handle trust questions because UTC §202 provides in pertinent part:[192]

> (a) By accepting the trusteeship of a trust having its principal place of administration in this State . . . the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.
>
> (b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

Section 202's comment explains:[193]

> This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries.

As mentioned above, UTC §108(a) and UDTA §3(b)(2), specify that a governing instrument's designation of a trust's principal place of administration will be respected if a trustee or trust director resides or has its principal place of business in the state or if trust administration occurs there.[194]

5. Uniform Probate Code

The UPC's approach is a bit different. UPC §7-203 provides:[195]

> The Court will not, over the objection of a party, entertain proceedings under Section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.

Although §7-203 and the rest of Article 7 do not appear in the 2010 version of the UPC,[196] at least seven states have statutes based on §7-203.[197]

Section 7-101 of the UPC defines ''principal place of administration'' as follows:[198]

> Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them.

6. Recommendations

To ensure that the courts of Trust State will adjudicate disputes arising under the Trust State's directed trust statute, the governing instrument should designate the Trust State as the trust's situs and principal place of administration, appoint a corporate trustee in the Trust State, and fix as much administration there as possible. The client and the attorney again should minimize those contacts with the Home State by *not* designating Home State law, *not* appointing a Home State corporate trustee, and *avoiding* administration there.

7. Suggested Language

If a client wants a trust to be governed by the law of a particular state and to have all issues involving

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[192] UTC §202 (amended 2018). See Appendix C for state citations. *See also Matter of Bruce F. Everston Dynasty Trust*, 446 P.3d 705, 707, n.3 (Wyo. 2019) (''Although the Trust property is located in Nebraska, the district court had jurisdiction over these proceedings because the principal place of administration of the Trust is in Cheyenne, Wyoming'').

[193] UTC §202 cmt. (amended 2018).

[194] UTC §108(a) (amended 2018).

[195] UPC §7-203 (2008).

[196] The text of the UPC may be viewed at www.uniformlaws.org.

[197] *See* Alaska Stat. §13.36.045; Haw. Rev. Stat. §560:7-203; Idaho Code §15-7-203; Mass. Gen. Laws ch. 203E, §203; Mich. Comp. Laws §700.7205; N.C. Gen. Stat. §36C-2-203; Utah Code Ann. §75-7-204. *See also In re Seneker Trust*, No. 317003 & 317096, 2015 BL 51771 (Mich. Ct. App. Feb. 26, 2015).

[198] UPC §7-101 (2008). *See* Alaska Stat. §13.36.005; Haw. Rev. Stat. §560:7-101; Idaho Code §15-7-101; Mich. Comp. Laws §700.7209; RSMo §456.027(3); Neb. Rev. Stat. Ann. §30-3816.

ISSN 0886-3547

the trust adjudicated there, he or she might include the following language:

> This agreement creates a [Trust State] trust, and all matters pertaining to the validity, construction, and application of this agreement; to the administration of the trusts created by it; and to the effectiveness of restraints on alienation of beneficiaries' interests hereunder shall be governed by [Trust State] law. [Trust State] shall be the situs and the principal place of administration of all trusts hereunder, and the courts of [Trust State] shall have exclusive jurisdiction over any action brought with respect to any trust hereunder.

If the client wants the law that governs questions of administration and the supervising court to change if the trust's situs is moved to another state, the following sentence might be inserted after the above sentences:

> However, if the successor trustee hereunder is located in any state other than the State of [Trust State], the situs and the principal place of administration of such trust shall become that of the location of the successor trustee, and thereafter the laws governing the administration of such trust and the effectiveness of restraints on alienation of beneficiaries' interests hereunder shall be those of the new situs and the courts of that state shall have exclusive jurisdiction over any action brought with respect to a trust hereunder.

D. Conflict of Laws — An Illustration

Some might be surprised to learn that directed trusts have been around for a long time. In its 1957 *Lewis v. Hanson* decision, [199] the Supreme Court of Delaware considered whether a Florida resident had validly exercised a power of appointment over a revocable trust containing directed trust provisions that she, while a Pennsylvania resident, had created in Delaware with Wilmington Trust Company in 1935. The court described its task as follows:[200]

> [W]e think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

The court found that Delaware law rather than Florida law should determine whether Mrs. Donner had validly exercised her power of appointment:[201]

> In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered.
>
> Generally speaking, a creator of an inter vivos trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware.
>
> Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the situs of the trust created by the agreement of 1935 is Delaware, and that, therefore, its law determines its validity.
>
> Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it.
>
> We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

[199] *Lewis v. Hanson*, 128 A.2d 819 (Del. 1957), *aff'd sub nom. Hanson v. Denckla*, 357 U.S. 235 (1958).

[200] *Lewis*, 128 A.2d at 825.

[201] *Lewis*, 128 A.2d at 826 (citations omitted).

ISSN 0886-3547

The court then arrived at the critical issues for present purposes:[202]

> [T]he main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.
>
> By the agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however, specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

The court sustained the validity of the trust and the exercise of the power of appointment:[203]

> If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that limitation would not have made the trust testamentary in character. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation could have been imposed by requiring the consent of a third party. . . . Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.
>
> The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.
>
> The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust property that, as a matter of law, the Wilmington Trust Company, and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid inter vivos trust and not an agency relationship as the Lewis Group contends.

X. CAVEATS, PRIVATE TRUST COMPANIES, AND CHARITABLE-REMAINDER TRUSTS

A. Caveat 1: Limitation of Protection Provided By Directed Trust

The relief provided to a directed trustee by even the most protective statute is not unlimited. A directed trust statute is a state-law creation and thus will protect a directed trustee only from state-law claims. Specifically, it will not shield a directed trustee from claims arising under federal law, such as tax laws and anti-money-laundering penalties. An Illinois commentator puts it this way:[204]

> In my view, there are some actions that a trustee, directed or not, cannot take under any circumstances because they are unlawful. Examples of such actions include money laundering, violating currency restrictions, engaging in fraud, or making material misrepresentations. The trustee should be prohibited from implementing these directions, not because of the willful misconduct of the advisor, and not because it would be willful misconduct if the trustee made the same decision, but because the directed trustee should not knowingly violate applicable laws. And no grantor or advisor should expect a trustee, directed or not, to behave otherwise.

B. Caveat 2: Identity of Trust Director

In a properly constructed directed trust, the directed trustee should not (and will not) be held liable in the event of catastrophe. This makes the choice of the trust director critical in achieving success. Not only should the trust director be competent to perform the designated duties, but such director also should have sufficient resources to make a trust whole in case of

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[202] *Lewis*, 128 A.2d at 828.

[203] *Lewis,* 128 A.2d at 828 (citations omitted).

[204] Ditelberg, Note 1, above, at 212.

ISSN 0886-3547

dishonesty, negligence, inattention, or other failings. An entity such as a limited-liability company sometimes is appointed as a trust director to limit the members' potential liability. Such an entity should be funded sufficiently to protect the trust and its beneficiaries.

C. Caveat 3: Trust Director — Standard of Liability

Given that the trust director should bear ultimate responsibility for such director's decisions, the planner should be reluctant to limit such director's potential liability to a standard such as gross negligence. In addition, the trust director should be held liable in a fiduciary capacity unless the circumstances require otherwise.

D. Caveat 4: Trust Director — Regulatory Concerns

Practitioners should be mindful that the appointment of an entity as a trust director might raise securities law or bank regulatory issues. A commentator describes such an issue in Michigan:[205]

> [W]holesale adoption of the UDTA in Michigan could have been interpreted as authorizing nonbanking organizations to exercise trust powers to the terms of trusts granting powers of direction.
>
> In Michigan, that interpretation could have affected the process of enactment; for the Michigan Constitution requires a supermajority in both houses of the State legislature for the enactment of any general law providing for the incorporation of trust companies or regulating the business thereof. But the interpretation also threatens, in the way suggested above, the practical significance of conservation of aggregate fiduciary responsibility. For that reason (as well as the possible constitutional complication), the MUDTA limits the entities to which a settlor may grant powers of direction to those *otherwise* authorized by Michigan law to act as trustees: '' 'Trust director' means an organization permitted to exercise trust powers in this state as described in section 1105(2) of the Banking Code of 1999, 1999 PA 276, or an individual, if that person is granted a power of direction.''

E. The Directed Trust as an Alternative to a Private Trust Company

Wealthy individuals sometimes explore creating private trust companies (PTCs) to serve as trustees of trusts for family members. PTCs are very expensive to form, involve potential registration with and regulation by the Securities and Exchange Commission and other state and federal agencies, and are vulnerable to disruption if key personnel depart. By establishing directed trusts with a directed trustee, such families may avoid that expense and those regulatory headaches.

An appropriate directed trustee may offer access to a number of investment, trust, tax, estate-planning, and other officers so that if one of them leaves, the administration of trusts will not be harmed. The appointment of family members as trust directors will minimize the directed trustee's fees and provide the control that is so important to many families.

F. Charitable-Remainder Trusts and Trust Directors

From time to time, I am asked whether a charitable-remainder trust (CRT) may have a trust director. The IRS has ruled that a CRT in which the trustee would invest on direction of an investment manager would qualify, provided that such manager exercised powers in a fiduciary capacity.[206] Attorneys should draft CRTs with this in mind. However, it should be noted that the IRS had ruled previously that the investment of assets on the direction of investment counsel would disqualify a CRT.[207]

XI. CONCLUSION

The hallmarks of effective directed-trust legislation have emerged in recent years. Such legislation should set forth clear rules for three trust arrangements — a trust that has a directed trustee and a trust director who is not a co-trustee, a trust that has a directed trustee and a trust director who is a co-trustee, and a trust that has one co-trustee who is responsible for making investment, distribution, and/or other decisions to the exclusion of another co-trustee. The legislation should be a streamlined enabling statute rather than a cumbersome off-the-rack statute, impose responsibility for decisions for which the trust director is tasked exclusively on the trust director, and impose a diminished standard of liability, such as wilful misconduct, on the directed trustee solely for its conduct in executing a direction, with such standard being defined in the legislation. It also should excuse the directed trustee from the duties to monitor the trust di-

[205] Spica, Note 1, above, at 219 (internal quotation marks omitted; emphasis in original).

[206] *See* PLR 9442017.

[207] *See* PLR 8041100.

ISSN 0886-3547

rector's activities, to advise or consult with the trust director, and to communicate with, alert, or warn beneficiaries of disagreements with the trust director's decisions but require directed trustees and trust directors to share information. Armed with this knowledge as well as the caveats and guidelines provided by this article, practitioners should be well equipped to make their clients' directed trusts work.

ISSN 0886-3547

APPENDIX A

State Directed Trust Statutes: Trust Director Is Not Co-trustee

(As of June 2020)

State	Citation	Effective Date
Follows §808(b) of Uniform Trust Code[1] (14)—Directed trustee liable if direction of trust director is manifestly contrary to terms of trust or trustee knows direction is serious breach of fiduciary duty of trust director		
Alabama	Ala. Code §19-3B-808(b), §19-3B-103(10)	1/1/07
District of Columbia	D.C. Code Ann. §19-1308.08(b), §19-1301.03(11)	3/10/04
Florida	Fla. Stat. §736.0808(2)	7/1/07
Kansas	Kan. Stat. Ann. §58a-808(b), §58a-103(9)	1/1/03
Kentucky	Ky. Rev. Stat. Ann. §386B.8-080(2), §386B.1-010(10), §446.010(33)	7/15/14
Maryland	Md. Code Ann., Est. & Trusts §14.5-808(b)(1)(ii)(1)-§14.5-808(b)(1)(ii)(2), §14.5-103(q)	1/1/15
Massachusetts	Mass. Gen. Laws ch. 203E, §808(b), §103	7/8/12
Montana	Mont. Code Ann. §72-38-808(2), §72-38-103(12)	10/1/13
New Jersey	NJSA §3B:31-61(b)	7/17/16
Oregon	Or. Rev. Stat. §130.685(2), §130.735(2), §130.010(11)	1/1/06
Pennsylvania	20 Pa. C.S. §7778(b)	11/6/06
South Carolina	S.C. Code Ann. §62-7-808(b), §62-7-103(9)	5/23/05
Texas (charitable trusts only)	Tex. Prop. Code Ann. §114.003(b), §111.004(10)	1/1/06
Vermont	14A VSA §808(b), §103(10)	7/1/09
Follows §9 of Uniform Directed Trust Act[2] (13)—Directed trustee liable if fails to take reasonable action to comply with trust director's exercise or nonexercise of power of direction or if compliance with trust director's exercise or nonexercise of power of direction would constitute wilful misconduct by directed trustee		
Arkansas (wilful misconduct standard not included)	Ark. Code Ann. §28-76-109(a)	1/1/20
Colorado	Colo. Rev. Stat. §15-16-809(1)—§15-16-809(2)	8/2/19
Connecticut	Conn. Gen. Stat. §45a-500i(a)—§45a-500i(b)	1/1/20
Georgia (bad faith on part of directed trustee substituted for willful misconduct)	Ga. Code Ann. §53-12-504(a), §53-12-303(a)	7/1/18
Indiana	Ind. Code §30-4-9-9(a)—§30-4-9-9 (b)	7/1/19
Maine	Me. Rev. Stat. Ann. tit. 18-B, §2109(1)—§2109(2)	1/1/20
Michigan (willful misconduct standard not included)[3]	Mich. Comp. Laws §700.7703a(7)	3/29/19
Nebraska	Neb. Rev. Stat. §30-4309(a)—§30-4309(b)	9/1/19
New Mexico	N.M. Stat. Ann. §46-14-9(A)—§46-14-9(B)	1/1/19
Utah	Utah Code Ann. §75-12-109(1)—§75-12-109(2)	5/14/19
Virginia	Va. Code Ann. §64.2-779.32(A)—§64.2-779.32(B)	7/1/20
Washington	Wash. Rev. Code. §11.001.0009(1), §11.001.0009(2)	1/1/21
West Virginia	W. Va. Code §44D-8A-809(a)—W. Va. Code §44D-8A-809(b), §44D-8-808	7/1/20
Has nonuniform protective statute (24)—Directed trustee relieved from liability for following direction of trust director		
Alaska	Alaska Stat. §13.36.375(c)	9/9/13
Arizona (bad faith or reckless indifference)	Ariz. Rev. Stat. Ann. §14-10808(B)	1/1/09
Delaware (wilful misconduct; statute codified long-standing practice (see *Lewis v. Hanson*, 128 A.2d 819 (Del. 157); statute upheld in *Duemler v. Wilmington Trust Co.*, No. 20033 NC, 2004 BL 31983 (Del. Ch. 2004))	12 Del. C. §§3313, §3301(g), §3317; 1 Del. C. §302(15)	7/3/86

ISSN 0886-3547

State	Citation	Effective Date
Hawaii	Haw. Rev. Stat, §560:7-302(b)	4/30/14
Idaho	Idaho Code §15-7-501(2)(a), §15-7-501 (5), §15-1-201(34)	7/1/99
Illinois (willful misconduct)	760 ILCS §3/808(f)(1), §3/103(23)	1/1/13
Kentucky (corporate trustees, investment decisions, authorized directions only)	Ky. Rev. Stat. Ann. §§286.3-275, §286.1-010(3)	7/15/96
Maryland (willful misconduct; unclear when overrides §14.5-808(b))	Md. Code Ann., Est. & Trusts §14.5-808(c)	1/1/15
Minnesota (willful misconduct)	Minn. Stat. §501C.0808 subd. 6(a)(1), §501C.0103(j)	1/1/16
Mississippi	Miss. Code Ann. §91-8-808(b), §91-8-808 (d), §91-8-710, §91-8-1205	7/1/14
Missouri	RSMo §456.8-808(2), §456.8-808(8)	8/28/12
Nevada	Nev. Rev. Stat. §163.5549, §163.5536, §163.5537, §163.554, §163.5543, §163.5545, §163.5547, §163.5548	10/1/09
New Hampshire	N.H. Rev. Stat. Ann. §564-B:8-808(b), §564-B:1-103(9), §564-B:7-711, §564-B:12-1205	9/9/08
New Jersey (investment decisions only; willful misconduct or gross negligence; unclear when overrides NJSA §3B:31-61(b))	NJSA §3B:31-62(b)	7/17/16
Has nonuniform protective statute (23)—Directed trustee relieved from liability for following direction of trust director (cont'd)		
North Carolina	N.C. Gen. Stat. §36C-8A-4(a)	6/11/12
North Dakota (willful misconduct)	N.D. Cent. Code §59-16.2-07(3)(a), §59-16.2-02	8/1/17
Ohio	Ohio Rev. Code Ann. §5808.08(B), §5815.25(B)—§5815.25(C)(1)	1/1/07
Oklahoma (investment decisions only; negligent execution)	Okla. Stat. Ann. tit. 60, §175.19	2/19/68
South Dakota	S.D. Codified Laws §55-1B-2, §55-1B-1, §55-1B-5	3/19/97
Tennessee	Tenn. Code Ann. §35-15-808(b), §35-15-808(e), §35-15-1205(1)—§35-15-1205(2), §35-15-710	7/1/13
Texas (noncharitable trusts only; wilful misconduct)	Tex. Prop. Code Ann. §114.0031(f), §111.004(10)	6/19/15
Utah (investment decisions only; willful misconduct or gross negligence)	Utah Code Ann. §§75-7-906(4), §75-1-201(35)	7/1/04
Wisconsin (willful misconduct; trust director may not be trustee)	Wis. Stat. §§701.0808(2), §701.0103(7)	7/1/14
Wyoming	Wyo. Stat. §§4-10-808(b), §4-10-717, §4-10-103(a)(vi), §4-10-103(a)(xii), §4-10-103(a)(xxii), §4-10-103(a)(xxiii), §4-10-103(a)(xxviii), §4-10-718	7/1/07
Has other statute (1)		
Iowa (unless trustee knows attempted exercise violates terms of trust or knows powerholder is incompetent)	Iowa Code Ann. §633A.4207(2), §633A.1102(11)	7/1/00
Has no statute (3)		
California		
New York		
Rhode Island		

[1] To view the text of the Uniform Trust Code (UTC) and a list of the states that have enacted it, go to www.uniformlaws.org.

[2] To view the text of the Uniform Directed Trust Act (UDTA) and a list of the states that have enacted it, go to www.uniformlaws.org.

[3] Directed trustee shall not comply with exercise or nonexercise of power if exercise or nonexercise was obtained with directed trustee's collusion or by directed trustee's fraud and compliance would be in pursuance of that collusion or fraud.

ISSN 0886-3547

APPENDIX B

State Directed Trust Statutes: Trust Director Is Co-Trustee

(As of June 2020)

State	Citation	Effective Date
Follows §703 of Uniform Trust Code[1] (35)—Co-trustee must participate in performance of trustee's function and must prevent co-trustee from committing and compel co-trustee to redress serious breach of trust		
Alabama	Ala. Code §19-3B-703(c), §19-3B-703(g)	1/1/07
Arizona	Ariz. Rev. Stat. Ann. §14-10703(C), §14-10703(G)	1/1/09
Arkansas	Ark. Code Ann. §28-73-703(c), §28-73-703(g)	9/1/05
Colorado	Colo. Rev. Stat. §15-5-703(3), §15-5-703(7)	1/1/19
Connecticut	Conn. Gen. Stat. §45a—499tt(c), §45a—499tt(g)	1/1/20
District of Columbia	D.C. Code Ann. §19-1307.03(c), §19-1307.03(g)	3/10/04
Florida	Fla. Stat. §736.0703(3), §736.0703(7)	7/1/07
Illinois	760 ILCS §3/703(c), 760 ILCS §3/703(g)	1/1/20
Kansas	Kan. Stat. Ann. §58a-703(c), §58a-703 (g)	1/1/03
Kentucky	Ky. Rev. Stat. Ann. §386B.7-030(3), §386B.7-03(7)	7/15/14
Maine	Me. Rev. Stat. Ann. tit. 18-B, §703(3), 703(7)	7/1/05
Maryland (does not require prevention or redress of breach of trust)	Md. Code Ann., Est. & Trusts §14.5-703(b)	1/1/15
Massachusetts	Mass. Gen. Laws §203E, §703(c), §703(f)	7/8/12
Michigan	Mich. Comp. Laws §700.7703(2), §700.7703(7)—§700.7703(8)	4/1/10
Minnesota	Minn. Stat. §501C.0703(c), §501C.0703(g)	1/1/16
Mississippi	Miss. Code Ann. §91-8-703(c), §91-8-703 (g)	7/1/14
Missouri	RSMo §456.7-703(3), §456.7-703(7)	1/1/05
Montana	Mont. Code Ann. §72-38-703(3), §72-38-703(7)	10/1/13
Nebraska	Neb. Rev. Stat. §30-3859(c), §30-3859(g)	1/1/04
New Hampshire	N.H. Rev. Stat. Ann. §564-B:7-703(c), §564-B:7-703(g)	10/1/04
New Jersey	NJSA §3B:31-48(c), §3B:31-48(g)	7/17/16
New Mexico	N.M. Stat. Ann. §46A-7-703(C), §46A-7-703(G)	7/1/03
North Carolina	N.C. Gen. Stat. §36C-7-703(c), §36C-7-703(g)	1/1/06
North Dakota	N.D. Cent. Code §59-15-03(3), §59-15-03(7)	8/1/07
Ohio	Ohio Rev. Code Ann. §5807.03(C), §5807.03(G)	1/1/07
Oregon	Or. Rev. Stat. §130.610(3), §130.610 (7)	1/1/06
Pennsylvania	20 Pa. C.S. §7763(c), §7763(g)	11/6/06
South Carolina	S.C. Code Ann. §62-7-703(c), §62-7-703(g)	1/1/06
Tennessee	Tenn. Code Ann. §35-15-703(c), §35-15-703(g)	7/1/04
Utah	Utah Code Ann. §75-7-703(3), §75-7-703(7)	7/1/04
Vermont	14A VSA §703(c), §703(g)	7/1/09
Virginia	Va. Code Ann. §64.2-756(C), §64.2-756 (G)	7/1/06
West Virginia	W. Va. Code §44D-7-703(c), §44D-7-703(g)	6/10/11
Wisconsin	Wis. Stat. §701.0703(3), §701.0703(7)	7/1/14
Wyoming	Wyo. Stat. §4-10-703(c), §4-10-703(g)	7/1/03
State	**Citation**	**Effective Date**
Follows §12 of Uniform Directed Trust Act[2] (13)—Directed trustee liable if fails to take reasonable action to comply with co-trustee's exercise or nonexercise of power of direction or if compliance with cotrustee's exercise or nonexercise of power of direction would constitute willful misconduct by directed trustee		
Arkansas (willful misconduct standard not included)	Ark. Code Ann. §28-76-112	1/1/20

ISSN 0886-3547

State	Citation	Effective Date
Colorado	Colo. Rev. Stat. §15-16-812	8/2/19
Connecticut	Conn. Gen. Stat. §45a-500*l*	1/1/20
Georgia (bad faith on part of directed trustee substituted for willful misconduct)	Ga. Code Ann. §53-12-505	7/1/18
Indiana	Ind. Code §30-4-9-12	7/1/19
Maine	Me. Rev. Stat. Ann. tit. 18-B, §2112	1/1/20
Michigan	Mich. Comp. Laws §700.7703(10)	3/29/19
Nebraska	Neb. Rev. Stat. §30-4312	9/1/19
New Mexico	N.M. Stat. Ann. §46-14-12	1/1/19
Utah	Utah Code Ann. §75-12-112	5/14/19
Virginia	Va. Code Ann. §64.2-756(I)	7/1/20
Washington	Wash. Rev. Code §11.001.0012	1/1/21
West Virginia	W. Va. Code §44D-8A-812	7/1/20
Has nonuniform protective statute (15)—Trustee not responsible for function allocated to co-trustee		
Alaska	Alaska Stat. §13.36.072(c)	9/9/13
Arizona (bad faith or reckless indifference)	Ariz. Rev. Stat. Ann. §14-10808(B)	1/1/09
Delaware	12 Del. C. §3313A(a)	8/30/17
Florida (willful misconduct)	Fla. Stat. §736.0703(9)	7/1/14
Illinois	760 ILCS 3/808	1/1/13
Louisiana	La. Rev. Stat. Ann. §9:2114.1	8/1/15
Michigan	Mich. Comp. Laws §700.7703b(9)(a)	3/29/19
Mississippi	Miss. Code Ann. §91-8-808(b), §91-8-808(d), §91-8-710, §91-8-1205	7/1/14
Nevada	Nev. Rev. Stat. §163.5549, §163.5536, §163.5537, §163.554, §163.5543, §163.5545, §163.5547, §163.5548	10/1/09
New Hampshire	N.H. Rev. Stat. Ann. §564-B:7-711, §564-B:12-1205	9/9/08
North Carolina	N.C. Gen. Stat. §36C-7-703(g1)	10/1/15
Ohio	Ohio Rev. Code Ann. §5808.08(B), §5815.25(B)-§5815.25(C)(1)	1/1/07
Oklahoma (investment decisions only; negligent execution)	Okla. Stat. Ann. tit. 60, §175.19	2/19/68
South Dakota	S.D. Codified Laws §55-1B-2, §55-1B-1	3/19/97
Tennessee	Tenn. Code Ann. §§35-15-808, §35-15-1205	7/1/13
Has no statute (4)		
California		
Hawaii		
New York		
Rhode Island		

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[2] To view the text of the Uniform Directed Trust Act (UDTA) and a list of the states that have enacted it, go to www.uniformlaws.org.

ISSN 0886-3547

APPENDIX C

State Uniform Trust Code Successor Trustee Statutes

(As of June 2020)

State	UTC §107	UTC §108	UTC §111	UTC §202	UTC §411
	Governing Law	Principal Place of Administration	Nonjudicial Settlement Agreements	Jurisdiction Over Trustee and Beneficiary	Modification or Termination of Noncharitable Irrevocable Trust by Consent
Alabama	Ala. Code §19-3B-107	Ala. Code §19-3B-108	Ala. Code §19-3B-111	Ala. Code §19-3B-202	Ala. Code §19-3B-411
Arizona	Ariz. Rev. Stat. Ann. §14-10107	Ariz. Rev. Stat. Ann. §14-10108	Ariz. Rev. Stat. Ann. §14-10111	Ariz. Rev. Stat. Ann. §14-10202	Ariz. Rev. Stat. Ann. §14-10411
Arkansas	Ark. Code Ann. §28-73-107	Ark. Code Ann. §28-73-108	Ark. Code Ann. §28-73-111	Ark. Code Ann. §28-73-202	Ark. Code Ann. §28-73-411
Colorado	Colo. Rev. Stat. §15-5-107	Colo. Rev. Stat. §15-5-108, §15-16-803(2)[2]	Colo. Rev. Stat. §15-5-111	Colo. Rev. Stat. §15-5-202	Colo. Rev. Stat. §15-5-411
Connecticut	Conn. Gen. Stat. §45a-499g	Conn. Gen. Stat. §45a-499h[2]	Conn. Gen. Stat. §45a-499k	Conn. Gen. Stat. §45a-499n	Conn. Gen. Stat. §45a-499ee
District of Columbia	D.C. Code Ann. §19-1301.07	D.C. Code Ann. §19-1301.08	D.C. Code Ann. §19-1301.11	D.C. Code Ann. §19-1302.02	D.C. Code Ann. §19-1304.11
Florida	Fla. Stat. §736.0107	Fla. Stat. §736.0108	Fla. Stat. §736.0111	Fla. Stat. §736.0202	
Illinois	760 ILCS §3/107	760 ILCS §3/108	760 ILCS §3/111	760 ILCS §3/202	760 ILCS §3/411
Kansas	Kan. Stat. Ann. §58a-107	Kan. Stat. Ann. §58a-108	Kan. Stat. Ann. §58a-111	Kan. Stat. Ann. §58a-202	Kan. Stat. Ann. §58a-411
Kentucky	Ky. Rev. Stat. Ann. §386B.1-050	Ky. Rev. Stat. Ann. §386B.1-060	Ky. Rev. Stat. Ann. §386B.1-090	Ky. Rev. Stat. Ann. §386B.2-020	Ky. Rev. Stat. Ann. §386B.4-110
Maine	Me. Rev. Stat. Ann. tit. 18-B, §107	Me. Rev. Stat. Ann. tit. 18-B, §108, §2103(2)[2]	Me. Rev. Stat. Ann. tit. 18-B, §111	Me. Rev. Stat. Ann. tit. 18-B, §202	Me. Rev. Stat. Ann. fit. 18-B, §111
Maryland	Md. Code Ann., Est. & Trusts §14.5-107	Md. Code Ann., Est. & Trusts §14.5-108	Md. Code Ann., Est. & Trusts §14.5-111	Md. Code Ann. Est. & Trusts §14.5-202	Md. Code Ann., Est. & Trusts §14.5-410
Massachusetts	Mass. Gen. Laws ch. 203E, §107 (reserved)	Mass. Gen. Laws ch. 203E, §108[1]	Mass. Gen. Laws ch. 203E, §111	Mass. Gen. Laws ch. 203E, §202	Mass. Gen. Laws. ch. 203E, §411
Michigan	Mich. Comp. Laws §700.7107	Mich. Comp. Laws §700.7108[2]	Mich. Comp. Laws §700.7111	Mich. Comp. Laws §700.7202	Mich. Comp. Laws §700.7411
Minnesota	Minn. Stat. §501C.0107	Minn. Stat. §501C.0108	Minn. Stat. §501C.0111	Minn. Stat. §501C.0206	Minn. Stat. §501C.0411
Mississippi	Miss. Code Ann. §91-8-107	Miss. Code Ann. §91-8-108	Miss. Code Ann. §91-8-111	Miss. Code Ann. §91-8-202	Miss. Code Ann. §91-8-411
Missouri	RSMo. §456.1-107	RSMo. §456.1-108[1]	RSMo §456.1-111	RSMo §456.2-202	RSMo §456.4-411A-§456.4-411B
Montana	Mont. Code Ann. §72-38-107	Mont. Code Ann. §72-38-108	Mont. Code Ann. §72-38-111	Mont. Code Ann. §72-38-203	Mont. Code Ann. §72-38-411
Nebraska	Neb. Rev. Stat. §30-3807	Neb. Rev. Stat. §30-3808[2]	Neb. Rev. Stat. §30-3811	Neb. Rev. Stat. §30-3813	Neb. Rev. Stat. §30-3837
New Hampshire	N.H. Rev. Stat. Ann. §564-B:1-107	N.H. Rev. Stat. Ann. §564-B:1-108	N.H. Rev. Stat. Ann. §564-B:1-111	N.H. Rev. Stat. Ann. §564-B:2-202	N.H. Rev. Stat. Ann. §564-B:4-411
New Jersey	NJSA §3B:31-7	NJSA §3B:31-8	NJSA §3B:31-11		NJSA §3B:31-27
New Mexico	N.M. Stat. Ann. §46A-1-107	N.M. Stat. Ann. §46A-1-108, §46-14-3(B)[2]	N.M. Stat. Ann. §46A-1-111	N.M. Stat. Ann. §46A-2-202	N.M. Stat. Ann. §46A-4-411
North Carolina	N.C. Gen. Stat. §36C-1-107	N.C. Gen. Stat. §36C-1-108[1]	N.C. Gen. Stat. §36C-1-111	N.C. Gen. Stat. §36C-2-202	N.C. Gen. Stat. §36C-4-411

ISSN 0886-3547

State	UTC §107	UTC §108	UTC §111	UTC §202	UTC §411
	Governing Law	Principal Place of Administration	Nonjudicial Settlement Agreements	Jurisdiction Over Trustee and Beneficiary	Modification or Termination of Noncharitable Irrevocable Trust by Consent
North Dakota	N.D. Cent. Code §59-09-07	N.D. Cent. Code §59-09-08	N.D. Cent. Code §59-09-11	N.D. Cent. Code §59-10-02	N.D. Cent. Code §59-12-11
Ohio	Ohio Rev. Code Ann. §5801.06	Ohio Rev. Code Ann. §5801.07	Ohio Rev. Code Ann. §5801.10	Ohio Rev. Code Ann. §5802.02	Ohio Rev. Code Ann. §5804.11
Oregon	Or. Rev. Stat. §130.030	Or. Rev. Stat. §130.022	Or. Rev. Stat. §130.045	Or. Rev. Stat. §130.055	Or. Rev. Stat. §130.200
Pennsylvania	20 Pa. C.S. §7707	20 Pa. C.S. §7708[1]	20 Pa. C.S. §7710.1	20 Pa. C.S. §7712	20 Pa. C.S. §7740.1
South Carolina	S.C. Code Ann. §62-7-107	S.C. Code Ann. §62-7-108	S.C. Code Ann. §62-7-111	S.C. Code Ann. §62-7-202	S.C. Code Ann. §62-7-411
Tennessee	Tenn. Code Ann. §35-15-107	Tenn. Code Ann. §35-15-108	Tenn. Code Ann. §35-15-111	Tenn. Code Ann. §35-15-202	Tenn. Code Ann. §35-15-411
Utah	Utah Code Ann. §75-7-107	Utah Code Ann. §§75-7-108, 75-12-103(2)[2]	Utah Code Ann. §75-7-110	Utah Code Ann. §75-7-202	Utah Code Ann. §75-7-411
Vermont	14A VSA §107	14A VSA §108	14A VSA §111	14A VSA §202	14A VSA §411
Virginia	Va. Code Ann. §64.2-705	Va. Code Ann. §64.2-706[1,2]	Va. Code Ann. §64.2-709	Va. Code Ann. §64.2-711	Va. Code Ann. §64.2-729
West Virginia	W. Va. Code §44D-1-107	W. Va. Code §44D-1-108[1,2]	W. Va. Code §44D-1-111	W. Va. Code §44D-2-202	W. Va. Code §44D-4-411
Wisconsin	Wis. Stat. §701.0107	Wis. Stat. §701.0108[1]	Wis. Stat. §701.0111	Wis. Stat. §701.0202	Wis. Stat. §701.0411
Wyoming	Wyo. Stat. §4-10-107	Wyo. Stat. §4-10-108	Wyo. Stat. §4-10-111	Wyo. Stat. §4-10-202	Wyo. Stat. §4-10-412

[1] Does not have §108(b) of Uniform Trust Code requiring trustee to administer trust in appropriate jurisdiction.

[2] Has §3(b) of Uniform Directed Trust Act under which principal place of administration is based on location or residence of trust director as well as on location or residence of trustee or where administration occurs. To view the text of the Uniform Directed Trust Act and a list of the states that have enacted it, go to www.uniformlaws.org.

Note: To view the text of the Uniform Trust Code (UTC) and the states that have enacted it, go to www.uniformlaws.org.

ISSN 0886-3547

APPENDIX D: GENERATION-SKIPPING TRUST AGREEMENT

Generation-Skipping Trust Agreement[208]

(As of May 2020)

NOT A VALID TRUST AGREEMENT SAMPLE Generation-Skipping Trust Agreement

[*Intended to Use Trustor's GST Exemption*]

THIS AGREEMENT, made this _____ day of _____, 20_____, between [*TRUSTOR'S NAME*], of _____ County, State of _____, hereafter called ''Trustor,'' and WILMINGTON TRUST COMPANY, a Delaware trust company, hereafter called ''Trustee,'' WITNESSETH:

WHEREAS, Trustor desires to establish a trust of the property described in the attached ''Schedule'' and other property which may be added from time to time, all of which is hereafter called the ''trust fund''; and

WHEREAS, Trustee accepts such trust and agrees to administer it in accordance with the terms and conditions of this agreement;

NOW, THEREFORE, Trustor hereby gives Trustee the property described in ''Schedule A,'' in trust, for the following purposes:

SECTION 1: *DISTRIBUTION*.

A. *Until Death of Trustor*. Until Trustor's death, Trustee shall hold the trust fund in further trust, and, subject to Subsection F of this Section 1, Trustee may, from time to time, distribute to such of Trustor's issue as shall be living from time to time all, some, or none of the net income and/or principal in such amounts and proportions (whether equally or unequally, and even to the exclusion of one or more beneficiaries) as Trustee, in its sole discretion, deems appropriate, after taking account of all other sources of funds available to them. Trustee shall accumulate any net income not so distributed and add it to principal at least annually, to be disposed of as a part of it. No such distribution shall be deemed to be an advancement, and no such distribution shall be made that would discharge anyone's legal obligation to support any of such issue.

B. *On Death of Trustor*. On Trustor's death, Trustee shall divide the assets then held hereunder into shares for Trustor's then living issue, per stirpes, and administer and distribute such shares according to the provisions of Subsection C of this Section 1.

C. *Shares Held for Issue*. Trustee shall hold each share set aside for an issue of Trustor in further trust for such issue, referred to hereafter in this Subsection C as the ''beneficiary.''

(1) *During the Beneficiary's Life*. During the beneficiary's life and subject to Subsection F of this Section 1, Trustee may, from time to time, distribute to the beneficiary and his or her issue all, some, or none of the net income and/or principal in such amounts and proportions (whether equally or unequally, and even to the exclusion of one or more beneficiaries) as Trustee, in its sole discretion, deems appropriate, after taking account of all other sources of funds available to them. Trustee shall accumulate any net income not so distributed and add it to principal at least annually, to be disposed of as a part of it. No such distribution shall be deemed to be an advancement, and no such distribution shall be made that would discharge the beneficiary's legal obligation to support any of such issue.

(2) *On the Death of the Beneficiary*. On the death of the beneficiary, Trustee shall distribute so much of the beneficiary's share as is then held hereunder, free from this trust, to such of Trustor's issue (other than the beneficiary) and the spouses of such issue (including the beneficiary's spouse), in such manner and amounts, and on such terms, whether in trust or otherwise, as is effectively appointed by specific reference hereto in the last written instrument which the beneficiary executes and delivers to Trustee during his or her lifetime or, failing any such instrument, in his or her Will. However, the beneficiary may not appoint any more than an income interest to his or her spouse or to a spouse of any other issue of Trustor. Before the beneficiary exercises this nongeneral power of appointment, he or she should consider Section 2041(a)(3) of the Code and 25 Delaware Code Sections 501-505, as amended, or any corresponding Delaware statutes enacted after the date of this agreement.

On the death of the beneficiary, Trustee shall divide the balance of the beneficiary's share, to the extent not effectively appointed, into further shares for his or her then living issue, per stirpes, but if no such issue is then liv-

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ISSN 0886-3547

ing, then for the then living issue, per stirpes, of the closest ascendant of the beneficiary who was an issue of Trustor and who has then living issue, but if no such issue is then living, then for Trustor's then living issue, per stirpes. Trustee shall hold each share set aside pursuant to the preceding sentence in further trust under the provisions of this Subsection C. Any share set aside for an issue of Trustor for whose benefit a share is then held in trust under the provisions of this Subsection C shall be distributed to the Trustee of such share, to be added to its principal and disposed of as a part of it.

D. *Perpetuities Savings Clause*. Notwithstanding the foregoing provisions, unless sooner terminated in the manner previously provided, each trust held hereunder shall end in its entirety or with respect to certain of its assets on the date, if any, required by the Delaware rule against perpetuities. Thereupon, Trustee shall distribute the principal of such trust or such assets, as the case may be, free from trust, to the beneficiary for whom the trust was set aside.

E. *Failure of Issue*. If, at any time, Trustee holds any portion of the principal of the trust fund not disposed of effectively under the previous provisions, then, at such time, Trustee shall distribute such principal, free from trust, to such then living person or persons as are then determined to be Trustor's distributees by the application of the intestacy laws of the State of Delaware governing the distribution of intestate personal property then in effect, as though Trustor had died at that particular time, unmarried, intestate, a resident of the State of Delaware, and owning such property then so distributable.

F. *Distribution Adviser*. Trustee shall exercise its discretionary power to distribute income and/or principal to Trustor's issue pursuant to Subsection A or Subsection C of this Section 1 only on the written direction of the distribution adviser who shall be [*Person Not Trustor or Beneficiary*], so long as [*he/she*] is willing and able to act in such capacity.

If at any time there is no distribution adviser, Trustee may act in the matter as it deems appropriate.

The distribution adviser shall act in a fiduciary capacity and conform to the purposes of this agreement. Such adviser shall have no duty to inquire into or see to the performance by Trustee of its duties under this agreement.

The distribution adviser shall receive no compensation and shall not be reimbursed for expenses incurred while acting as such adviser.

SECTION 2: *MINORITY OR OTHER INCAPACITY*.

If any property is otherwise required to be distributed to a beneficiary who has not attained age twenty-five (25) or is, in Trustee's opinion, unable to manage funds due to illness or infirmity, Trustee may:

A. Distribute such property to such beneficiary himself or herself; or

B. Apply such property for the benefit of such beneficiary; or

C. Hold the property not so distributed or applied in a separate trust hereunder for the benefit of such beneficiary and distribute or apply the net income and principal thereof as provided in Subsections A and B hereof.

Trustee shall distribute the property in such trust to such beneficiary upon his or her attaining age twenty-five (25) or upon the termination of his or her incapacity (as the case may be). If the beneficiary dies prior to such distribution, Trustee shall distribute the property to such beneficiary's estate.

SECTION 3: *MERGER WITH SIMILAR TRUSTS*.

If, at any time, a trust is set aside for any person or persons under the terms of this agreement that is substantially the same as any other trust established for that person or persons, Trustee may, in its sole discretion, merge the trust created hereunder with the other trust for such person or persons, and the two trusts shall thereafter be held, administered, and distributed as one. However, Trustee shall not combine any trust having an inclusion ratio, as defined in Section 2642 of the Code (hereafter ''inclusion ratio''), of other than zero (0) with a trust having an inclusion ratio of zero (0).

SECTION 4: *ALTERNATIVE METHODS OF DISTRIBUTION*.

Trustee may take any reasonable steps to disburse funds to or for a beneficiary, including: (i) distribution, either by hand or mail, to the beneficiary or the guardian of the person or property (whether the guardian is formally appointed or a natural guardian); (ii) distribution to a custodian for the beneficiary under the Uniform Transfers to Minors Act (or similar statute) of any state; (iii) deposit to the account of the beneficiary in any federally insured depository; (iv) direct application for the benefit of the beneficiary; or (v) distribution to a new or existing trust for the beneficiary.

SECTION 5: *SPENDTHRIFT PROVISION*.

ISSN 0886-3547

A beneficiary may not alienate or in any other manner assign or transfer his or her interest in any trust hereunder, and no one (including a spouse or former spouse) may attach or otherwise reach any interest of any beneficiary hereunder to satisfy a claim against that beneficiary, whether the claim is legal or equitable in origin. The provisions of this Section shall not limit or otherwise affect any power of appointment conferred upon a beneficiary or the right of a beneficiary to disclaim or release any interest created hereunder.

SECTION 6: *TRUSTEE'S POWERS*.

In addition to those powers granted by law, Trustee is specifically authorized and empowered, in its sole discretion, but subject to the provisions of Sections 7 and 10:

A. To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property held hereunder, for such price and upon such terms and credits as it deems proper.

B. To invest in any kind of property, real, personal, or mixed, regardless of the laws governing investments by fiduciaries, without any duty to diversify investments.

C. Unless otherwise directed by the investment adviser named in Section 7 hereof, to execute securities transactions, without necessity of providing written confirmation thereof to such adviser at the time of settlement, and to execute securities transactions through any brokerage service, whether discount or full service, including M&T Securities, at its normal rates of compensation, without diminution of compensation otherwise payable to Trustee, even if Wilmington Trust Company is serving as Trustee.

D. To vote directly or by proxy at any election or stockholders' meeting any shares of stock, including stock of M&T Bank Corporation, even if Wilmington Trust Company is serving as Trustee.

E. To participate in any plan or proceeding, including any voting trust plan for liquidating, protecting, or enforcing any interest in any property, or for reorganizing, consolidating, merging, or adjusting the finances of any corporation issuing any such interest; to accept in lieu thereof any new or substituted stocks, bonds, notes, or securities, whether of the same or a different kind or class, or with different priorities, rights, or privileges; to pay any assessment or any expense incident thereto; and to do any other act or thing that it deems necessary or advisable in connection therewith.

F. To deposit, or arrange for the deposit of, securities at Depository Trust Company (DTC) and/or at any other securities depository or clearing corporation.

G. To make any division or distribution in cash or in kind or partly in cash and partly in kind; to make reasonable valuations of the property so divided or distributed; and to elect to recognize taxable gain or loss resulting from a distribution. Trustee may consider the income tax basis of the property then available for division or distribution, as well as the circumstances of the beneficiaries, and need not make division or distribution on a pro rata, asset-by-asset basis. Trustee shall not adjust the interest of any beneficiary as a result of any action taken or forborne under the provisions of this Subsection G.

H. To make loans, against adequate collateral, to the Personal Representative of the estate of any beneficiary and/or to purchase any property belonging to his or her estate.

I. To borrow money, extend loans, pledge assets, and provide guarantees for any purpose connected with the protection, preservation, or improvement of the trust estate whenever in its judgment advisable, and as security to pledge any real or personal property forming a part of the trust estate upon such terms and conditions as it may deem advisable.

J. To bring or defend litigation, participate in arbitration or mediation, compromise or settle any claim in favor of or against any trust hereunder, and to execute all agreements, deeds, and releases necessary or proper in connection therewith. However, Trustee need not institute or defend any suit or proceeding unless its expenses, including counsel fees and costs, are available in the trust fund or are advanced or guaranteed in an amount and in a manner reasonably satisfactory to it. Trustee shall incur no liability to anyone for any action taken or not taken pursuant to the preceding sentence.

K. To retain attorneys-at-law, accountants, investment counsel, agents, and other advisers and to pay all compensation and other costs associated therewith from the trust without diminution of compensation otherwise payable to Trustee.

L. To pay the taxes and expenses of maintaining, repairing, improving, and insuring any real property held hereunder.

ISSN 0886-3547

M. Except as otherwise provided, to determine whether receipts and disbursements, including its commissions, are allocable or chargeable to income or principal.

N. To renounce, in whole or in part, any property or interest in property that may become payable to any trust hereunder, except to the extent that the distribution of such property resulting from such renunciation is fundamentally inconsistent with the provisions of this agreement.

O. To divide any trust hereunder into separate trusts if the purposes for which the trust was created are better served thereby.

P. To take such actions as are necessary to cause gains from the sale or exchange of trust assets (as determined for federal income-tax purposes) to be taxed for federal income-tax purposes as part of a distribution of principal to a beneficiary.

Q. To invest in any closely held company, limited liability company, or partnership, or in any successor entity, and to purchase additional interests in any such entity, even though, as a result, such trust is invested largely or entirely in such entity.

R. To settle its accounts judicially or nonjudicially at any time and from time to time and to pay all of its counsel, accountant, or other professional fees and costs associated therewith from the trust without diminution of compensation otherwise payable to Trustee.

S. To invest in, retain, or otherwise deal in any securities managed, issued, underwritten, or distributed by Trustee or by any of its affiliates, any participation in any investment company registered under the Investment Company Act of 1940, any investment fund exempt from registration under the Investment Company Act of 1940, for which Trustee or its affiliates is an adviser or agent, and any other ''affiliated investment'' within the meaning of 12 Delaware Code Section 3312, as amended, or any corresponding Delaware statute enacted after the date of this agreement, and is authorized to otherwise deal with or transact business with any of its affiliates, notwithstanding the fact that such trustee or affiliate may receive separate fees, commissions, or other costs directly from such security, fund, ''affiliated investment,'' dealing, or transaction.

SECTION 7: *INVESTMENT ADVISER*.

During any period in which an investment adviser is serving and notwithstanding any other provision hereunder, the investment adviser shall:

A. Serve in a fiduciary capacity and hold and exercise the full powers to manage the investments of the Trust. Trustee shall exercise such powers only upon the investment adviser's written directions and shall be required to exercise such powers if so directed, including, but not limited to, all investment powers granted under Subsections (2) through (5), and Subsections (7) through (14) of 12 Delaware Code Section 3325, as amended, or any corresponding Delaware statute enacted after the date of this agreement, all powers described as an ''investment decision'' in 12 Delaware Code Section 3313(d), as amended, or any corresponding Delaware statute enacted after the date of this agreement, and all the powers in Subsections A, B, D, E, I, Q, and S of Section 6 with respect to each trust hereunder; provided that: (i) Trustee shall sell any M&T Bank Corporation stock held by it hereunder unless specifically directed to do otherwise by such adviser; (ii) the purchase, sale, and voting of M&T Bank Corporation stock shall be solely on the direction of the investment adviser; (iii) Trustee shall manage and invest the otherwise uninvested cash in each such trust in its sole discretion; and (iv) notwithstanding the foregoing, during an emergency or based upon exigent circumstances, where the Trustee reasonably believes based upon its actual knowledge that its inaction would be ''wilful misconduct'' within the meaning of 12 Delaware Code Section 3313(b), as amended, or any corresponding Delaware statute enacted after the date of this agreement, then the Trustee is hereby authorized and empowered to take such action regarding the investment management of such trust as it, in its sole discretion, shall deem to be for the best interest of the beneficiaries of such trust. The power set forth in (iv) above is solely intended to give the Trustee the ability to act should such action become essential to the trust fund, but does not impose a duty upon the Trustee to monitor or warn an interested party concerning the investments of the trust fund nor does this power create a duty of the Trustee to take such action.

B. The initial investment adviser shall be [*Name of Adviser*]. The investment adviser may resign as investment adviser of any trust hereunder by written notice delivered to the Trustee and the adult beneficiaries who may then receive income or principal. Until Trustor's death, a majority of the Trustor's then living issue who have attained age twenty-five (25) may remove the investment adviser and a successor investment adviser may be a person, if any, chosen from time to time by a majority of Trustor's then living issue who have at-

ISSN 0886-3547

tained age twenty-five (25) as shall be able to act. After Trustor's death, the investment adviser of each trust hereunder shall be the beneficiary for whom the trust was set aside, provided that he or she has attained age twenty-five (25). If such beneficiary has not attained age twenty-five (25) or is unwilling or unable to serve, the investment adviser of such trust shall be the person, if any, chosen from time to time by a majority of Trustor's then living issue who have attained age twenty-five (25) as shall be able to act, until such beneficiary attains age twenty-five (25) or is no longer unwilling or unable to act, at which time such beneficiary shall become the investment adviser of such trust. To qualify, any person appointed investment adviser of a trust hereunder shall deliver a written instrument to Trustee indicating acceptance and agreement that all powers conferred upon such adviser will be exercised in a fiduciary capacity for the exclusive interest of the beneficiaries.

C. With regard to trust assets over which the investment adviser holds the power to direct Trustee and in addition to the investment adviser's other duties herein, the investment adviser shall have the duty (i) to confirm to Trustee, in writing, the value of trust assets, whether publicly traded or nonpublicly traded assets, at least annually and upon request by Trustee, (ii) to direct Trustee with respect to making any representation, warranty, or covenant required to be made in order to maintain any investment, (iii) to direct and instruct Trustee on future actions, if any, to be taken with respect to such representations, warrantees, and covenants, (iv) to manage or participate in the management of any entity owned by the trust, to the extent such entity's governing instruments or applicable law require the owners to manage the same, and (v) to direct Trustee to sign agreements and any other documentation required in connection with the purchase of any investment and the maintenance of any such investment. With regard to the investment adviser's exercise of the foregoing powers, all such directions to the Trustee shall be in writing, delivered in such manner as the Trustee may specify from time to time by written notice to investment adviser. Further, the Trustee shall have no obligation to investigate or confirm the authenticity of directions it receives or the authority of the person or persons conveying them, and the Trustee shall be exonerated from any and all liability in relying on any such direction from a person purporting to be the investment adviser without further inquiry by the Trustee. Notwithstanding the foregoing, Trustee has no duty to monitor whether the investment adviser is abiding by its duty to provide valuation of publicly traded or nonpublicly traded assets and shall not be liable for failing to request a valuation or for the investment adviser's failure to give Trustee a valuation.

D. Whenever, pursuant to the terms of this Agreement, Trustee acts at the direction of any investment adviser regarding the exercise of the Trustee's powers as to any particular matter, or whenever Trustee takes no action except at the direction of any investment adviser, then notwithstanding any other provision hereunder, (i) as provided in 12 Delaware Code Section 3313(b), as amended, or any corresponding Delaware statute enacted after the date of this agreement, Trustee shall not be liable for any loss resulting from such acts or inaction except in cases of wilful misconduct proven by clear and convincing evidence, and (ii) to the extent any such action or inaction concerns a matter outside the scope of 12 Delaware Code Section 3313(b), as amended, or any corresponding Delaware statute enacted after the date of this agreement, in accordance with 12 Delaware Code Section 3303, as amended, or any corresponding Delaware statute enacted after the date of this agreement, Trustee shall have no liability hereunder except for Trustee's own wilful misconduct proven by clear and convincing evidence. The Trustee shall be under no obligation to review the trust assets, make any investment recommendations with respect to trust assets, solicit any direction from the investment adviser, value the assets if they are nonpublicly traded, or insure trust assets. As provided in 12 Delaware Code Section 3313(e), as amended, or any corresponding Delaware statute enacted after the date of this agreement, Trustee shall have no duty to monitor the conduct of the investment adviser, provide advice to the investment adviser, consult with the investment adviser, or communicate with or warn or apprise any beneficiary or third party concerning instances in which the Trustee would or might have exercised the Trustee's own discretion in a manner different from the manner directed by the investment adviser.

E. The investment adviser may direct the Trustee to employ the professional services of accountants, investment management professionals, attorneys, tax advisers, and such other advisers (''Agent'') as the investment adviser determines necessary to fulfill the duties of managing the investments of the trust. The investment adviser shall be solely responsible for the oversight, supervision, and monitoring of such Agent and shall notify the Trustee in writing of the employment of such Agent. The Trustee shall have no obligation to investigate or confirm the authenticity of directions it receives or the authority of the Agent conveying any such directions, and the Trustee shall be exonerated from any and all liability in relying on any such direction from a person purporting to be an Agent of the investment adviser without further inquiry by the Trustee until such time as the Trustee is notified in writing of the termination of such Agent's employment. The fees

ISSN 0886-3547

associated with the retention of an Agent by the investment adviser shall not diminish the compensation otherwise payable to the Trustee.

F. The investment adviser need not inquire into Trustee's performance of its duties and shall not be held liable for any loss whatsoever to any trust hereunder, unless it results from actions taken in bad faith. The investment adviser shall serve without compensation but may be reimbursed for out-of-pocket expenses, including investment counsel fees.

SECTION 8: *ADDITIONS TO THE TRUST FUND*.

With the consent of Trustee, any person may add property to any trust hereunder, and such property shall thereafter be held by Trustee as a part thereof. However, no property shall be added to a trust if such addition would cause the inclusion ratio of such trust to become other than zero (0). Instead, such property shall be held as a separate trust with terms identical to those of the trust to which the property would have been added.

SECTION 9: *TRUST IRREVOCABLE*.

This trust shall be irrevocable and not subject to amendment by Trustor or any other person. However, if, after the effective date of this agreement, any future requirements imposed by the Code or any regulations promulgated thereunder would cause the intended generation-skipping-transfer-tax-exempt status of any trust hereunder to be lost because of the failure of such trust to terminate immediately prior to the expiration of the period of the common-law rule against perpetuities or any specified term of years designated by the Code or the regulations promulgated thereunder, or because of any other reason, Trustee shall have the power to amend this agreement in any manner necessary for the sole purpose of complying with the requirements imposed by the Code or the regulations promulgated thereunder so that the intended generation-skipping-transfer-tax-exempt status of such trust is preserved. Trustee may rely upon the advice of counsel in taking any action pursuant to the authority given to Trustee, and Trustee shall be without liability therefor.

SECTION 10: *GRANTOR TRUST*.

A. *Substitution of Trust Property*. Trustor expressly reserves the right to substitute other property for that property then held by Trustee, provided that the investment adviser confirms in a writing filed with the Trustee that the property so substituted shall be of equal value to the property so replaced. The right granted in this Section is a personal right of Trustor and is not to be considered exercisable in a fiduciary capacity. Trustor has the right to relinquish this power of substitution and may do so by giving Trustee thirty (30) days written notice.

B. *Discretionary Tax Reimbursement*. Trustee, in Trustee's sole discretion, may reimburse Trustor for any income taxes payable on income of the trust fund.

SECTION 11: *NON-ACCRUAL OF INCOME*.

Any statute or rule of law to the contrary notwithstanding, any income accrued or on hand and not actually distributed to a beneficiary upon the termination of his or her interest shall be treated as though it had, in fact, accrued thereafter.

Any income accrued upon shares of stock or interest-bearing property when delivered to Trustee shall be treated as though such income had, in fact, accrued after such delivery.

SECTION 12: *THIRD PARTIES NOT OBLIGED TO FOLLOW FUNDS*.

No person or corporation dealing with Trustee shall be obliged to see to the application of money paid or property delivered to Trustee, to inquire into the propriety of Trustee's exercise of its powers, or to determine the existence of any fact upon which Trustee's power to perform any act hereunder may be conditioned.

SECTION 13: *TRUSTEE'S COMPENSATION*.

Unless otherwise agreed upon in writing between Trustee and Trustor (or, after Trustor's death or incapacity, by the investment adviser, or, if none, by a majority of the current beneficiaries of any trust created under this trust agreement who are over the age of twenty-five [25] years), Trustee shall receive compensation for its services hereunder from time to time in accordance with the current rates then charged by it for trusts of similar size and character. If Trustee renders any extraordinary services, it may receive additional compensation therefor.

SECTION 14: *RESIGNATION AND REMOVAL OF TRUSTEE*.

Trustee may resign as Trustee of any trust hereunder by written notice delivered to the adult beneficiaries to whom Trustee then may distribute income and principal, and Trustee may be removed by written notice delivered to Trustee signed by a majority of such beneficiaries who have attained age thirty (30). In either case, another bank or trust company, which is not related or subordinate to such beneficiaries within the meaning of Section 672(c) of the Code, shall be appointed successor Trustee by written notice signed by a majority of such beneficiaries who have attained age twenty-one (21).

ISSN 0886-3547

Unless objections are filed as provided below, Trustee shall deliver the assets held in such trust to the successor Trustee. If a successor Trustee is not appointed in the above manner, Trustee may petition the Delaware Court of Chancery to appoint a successor Trustee.

Upon giving notice of resignation or upon receiving notice of removal, Trustee shall deliver a statement of its activities to the date of such notice for which it has not reported to the person or persons to whom Trustee gave notice of resignation or who were authorized to remove Trustee. Such person or persons shall have sixty (60) days from receipt of such statement to file with Trustee any objections to its actions as Trustee. If no such objections are filed, Trustee shall be without any further liability or responsibility to any past, or future beneficiaries.

No successor Trustee shall be required to examine into the acts of its predecessor Trustee, and each successor Trustee shall have responsibility only with respect to the property actually delivered to it by its predecessor Trustee.

Notwithstanding the foregoing provisions of this Section, Trustee may, but shall not be required to, prepare and file accountings for a trust hereunder with the Delaware Court of Chancery. Further, prior to delivering all the property of a trust hereunder to a successor trustee or to making any partial or complete distribution of the trust estate, Trustee may require an approval of the trust's accounting either by a release and discharge by the beneficiary or beneficiaries of the trust or by the Delaware Court of Chancery. All of Trustee's fees and expenses (including reasonable counsel fees, accountant, or other professionals fees) attributable to any accounting and/or approval shall be paid by the trust.

SECTION 15: *MERGER OF CORPORATE TRUSTEE.*

Any corporation resulting from any merger, conversion, reorganization, or consolidation to which any corporation acting as Trustee hereunder shall be a party, or any corporation to which shall be transferred all or substantially all of any such corporation's trust business, shall be the successor of such corporation as Trustee hereunder, without the execution or filing of any instrument or the performance of any further act and shall have the same powers, authorities, and discretions as though originally named in this agreement; provided, however, that in the case of any corporation that is acting as a Trustee hereunder, the provisions of this Section shall apply only if the resulting or transferee corporation is domiciled in the same jurisdiction as the corporation that was acting as Trustee.

SECTION 16: *TRUST SITUS*.

This agreement creates a Delaware trust, and all matters pertaining to the validity, construction, and application of this agreement; to the administration of the trusts created by it; and to the effectiveness of restraints on alienation of beneficiaries' interests hereunder shall be governed by Delaware law. The Delaware Court of Chancery shall have exclusive jurisdiction over any action brought with respect to any trust hereunder.

SECTION 17: *ADOPTED PERSONS AND PERSONS BORN OUT OF WEDLOCK*.

For all purposes of this agreement, with regard to adopted persons, only a person adopted while under age twenty-one (21) shall be deemed to be a child and an issue of the adopting person and an issue of the ascendants of the adopting person, and, furthermore, the children and issue of a person so adopted shall be deemed to be issue of the adopting person and his or her ascendants. A person born out of wedlock shall not be deemed to be a child or an issue of his or her parent or an issue of the ascendants of his or her parent unless such child is acknowledged in writing by such parent.

SECTION 18: *DEEMED INCAPACITY OF TRUSTOR, TRUSTEE, OR ADVISER*.

An individual Trustor, Trustee, or adviser shall be deemed to be incapacitated: (i) during any period that such individual is legally incompetent as determined by a court of competent jurisdiction; (ii) during any period that a conservator or guardian for such individual has been appointed, based upon his or her incapacity; (iii) during any period when two (2) physicians licensed to practice medicine certify in writing to Trustee (if Trustor's capacity is at issue), to Trustor or the adviser (if a Trustee's capacity is at issue), or to Trustor and Trustee (if an adviser's capacity is at issue), that in the opinion of such physicians, such individual, as a result of illness, age, or other cause, no longer has the capacity to act prudently or effectively in financial affairs; or (iv) thirty (30) days after Trustee or any trust beneficiary requests such Trustor, Trustee, or adviser, as applicable, to provide a certificate from a physician licensed to practice medicine that, in the opinion of such physician, such individual has the capacity to act prudently or effectively in financial affairs if such Trustor, Trustee, or adviser, as applicable, fails to provide such certification within such period.

SECTION 19: *ILLIQUID ASSETS*.

To the extent that any of the creditors of Trustor, or any other beneficiary of a trust hereunder, asserts a claim that it is entitled, through the exercise of the judicial process or otherwise, to reach the assets of the trust in satisfaction of its claim, Trustee shall have no obligation to defend the trust or its assets against any such claim or

ISSN 0886-3547

to initiate or intervene in any litigation, arbitration proceeding, or mediation proceeding for the purpose of resisting any such claim, unless Trustee is reasonably satisfied that it will be fully indemnified from the assets of the trust for all of its liabilities and expenses (including professional fees and expenses of counsel, accountants, and expert witnesses) arising from or attributable to Trustee's participation therein. If Trustee reasonably determines that the readily marketable assets of the trust are, or have become, insufficient for such purposes, Trustee may request that the Trustor or beneficiary provide Trustee with comparable indemnity, supported with such security as may be satisfactory to Trustee in its sole discretion, and in the absence of such additional indemnity or security, Trustee may refuse to participate in any such proceeding or may withdraw from an ongoing proceeding, even if such refusal or withdrawal may result in the granting or awarding of relief against the trust (including a distribution of trust assets in satisfaction of a claim). Trustee shall incur no liability to anyone whomsoever in connection with any such refusal or withdrawal pursuant to this Section 19.

SECTION 20: *DEFINITIONS*.

A. ''Issue'' of a person means all the lineal descendants of that person of all generations.

B. ''Code'' means the Internal Revenue Code of 1986, as amended, or any corresponding federal tax statute enacted after the date of this agreement. A reference to a specific section of the Code refers not only to that section but also to any corresponding provision of any federal tax statute enacted after the date of this agreement, as in effect on the date of application.

C. Use of any gender in this agreement includes the masculine, feminine, and neuter genders as appropriate. Use of the singular number includes the plural and vice versa unless the context clearly requires otherwise.

D. In applying any provision of this agreement which refers to a person's issue, ''per stirpes,'' the children of that person are the heads of their respective stocks of issue, whether or not any child is then living.

E. ''Personal Representative'' means the executor or administrator of a decedent's estate and shall include all persons serving in such capacity from time to time.

F. Use of the verb ''shall'' in this agreement indicates a mandatory direction, and use of the verb ''may'' indicates authorization to take action.

G. Captions, headings, and sub-headings, as used herein, are for convenience only and have no legal or dispositive effect.

IN WITNESS WHEREOF, [*TRUSTOR'S NAME*], Trustor, has set [*his/her*] Hand and Seal the _____ day of _____, 20_____, and WILMINGTON TRUST COMPANY, Trustee, has caused this agreement to be signed in its name by one of its Vice Presidents and its corporate seal to be affixed by one of its Assistant Secretaries the _____ day of _____, 20_____, all done in duplicate as of the date of execution by Trustor, which date shall be the effective date of this instrument.

WITNESS:

_____ _____[SEAL]

[*TRUSTOR'S NAME*], Trustor

WILMINGTON TRUST COMPANY

By: _____

Vice President

Attest: _____

Assistant Secretary

WITNESS:

_____ By: _____

Investment Adviser

WITNESS:

_____ By: _____

Distribution Adviser

SCHEDULE A''

Consisting of One Page of Generation-Skipping Trust Agreement

Dated _____

Between

ISSN 0886-3547

[*TRUSTOR'S NAME*]

and

WILMINGTON TRUST COMPANY

* * *

CASH in the amount of One Dollar ($1.00)

* * *

STATE OF _____)

) SS.

COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 20_____, by [*TRUSTOR'S NAME*].

_____

Notary Public

STATE OF DELAWARE)

) SS.

COUNTY OF NEW CASTLE)

The foregoing instrument was acknowledged before me this _____ day of _____, 20_____, by _____, a Vice President of WILMINGTON TRUST COMPANY, a Delaware trust company, on behalf of the company.

_____

Notary Public

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