

The New Utah Uniform Directed Trust Act

by Langdon T. Owen, Jr.

The Uniform Directed Trust Act (the Act) is now in effect in Utah, having been adopted in 2019. Utah Code Ann. §§ 75-12-101 to -18. Many practitioners have been using trust protectors for some time. A trust protector is one type of “trust director” under this Act, which also covers “trust advisors” and the holders of certain powers of direction however labelled. The Act provides useful and needed guidance as to these positions, while allowing for these positions to be important tools for providing flexibility for trusts. Trust directors, including trust protectors, can often provide quicker and more economical ways to adjust trust terms and solve administrative issues or disputes, particularly in very long-term trusts that can run for several lifetimes or generations, than the traditional methods of providing flexibility.

The traditional methods start with robust trustee discretion, which may include establishing new trusts with other terms where the trustee has strong discretion over when and how to distribute principal, a process known as trust decanting. For common law decanting, see *Phipps v. Palm Beach Trust Co.*, 196 S. 299 (Fla. 1949); *In re Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975); *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 11.1, 19.4 (1988); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 (2011). Trustee oversight and removal provisions are useful traditional methods. Trust modification under the trust code, Utah Code Sections 75-7-410 through 417, may be effective but such modification requires an agreement or court order. Actions on certain matters by beneficiaries may be allowed under an instrument. Powers of appointment can be a particularly powerful tool where they apply but can come with tax consequences that may not be acceptable and may not be able to deal with administrative issues. Utah Code Ann. §§ 75-10-101 to -18.

Each of those traditional methods has its place and value, but many practitioners have desired more, and have thus crafted trust protector provisions relying on general authorizations

such as Utah Code Section 75-7-105 or common law principles (the grantor can condition the gift as desired) including Restatement (Third) of Trusts section 64 (2002), or, in some states, on section 808 “Powers to Direct” of the Uniform Trust Code (a provision not adopted in Utah). The nature and extent of the powers and authority of trust protectors, and the uncertain liability that might be incurred by a trust protector or other sort of trust director, see, e.g., *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786 (Mo. Ct. App. 2009), led to the development of broader statutes that authorize and define trust protectors and more generally trust directors, in order to provide clarity. Special state legislation has been adopted in a few states, and recently the Uniform Directed Trust Act was promulgated in 2017 by the Commissioners for Uniform State Laws. The Uniform Act has, as of this writing, been adopted in ten states, including Utah.

What a Power of Direction is Not

The first thing to note about a power of direction granted to a trust director under the terms of a trust is what the power is not, because the Act does not apply to such matters. See Utah Code Ann. § 75-12-105(2). It is not a power of appointment (which is a non-fiduciary power) to designate a recipient of, or another power of appointment over, trust property, see also *id.* § 75-12-105(3); it is not a power to remove a fiduciary (trustee or trust director); it is not a settlor’s power of revocation; it is not the power of a beneficiary to affect the beneficiary’s interest or the interests of other beneficiaries where the beneficiary virtually represents the other beneficiaries, see *id.* § 75-7-301; and it is not a power required by the U.S. tax code to be a non-fiduciary power.

LANGDON T. OWEN, JR. is a member of the law firm of Cobne Kinghorn, P.C. in Salt Lake City, Utah. Mr. Owen is a transactional lawyer who practices in such areas as estate and tax planning, business and commercial transactions, health care law, nonprofit organizations, probate, and real estate.



Application

The Act applies to any trust whenever created with its principal place of administration in Utah, but for trusts existing before May 14, 2019, it only applies to actions after that date. Also, if administration is changed to Utah after that date, it applies only to actions and decisions after the change. Utah Code Ann. § 75-12-103(1). The trust may designate its principal place of administration if the trustee's principal place of business, the trust director's principal place of business (note: this expands the trust code provision on the point; *see id.* § 75-7-108(1)), or all or part of the administration of the trust occurs in the designated jurisdiction. *See id.* § 75-12-103(2). The Act provides that common law and principles of equity supplement the Act except to the extent modified by the Act or other law. *See id.* § 75-12-104.

Powers That May Be Granted

The Act allows a settlor a great deal of ability to grant powers to a trust director under the terms of a trust, and, unless limited by the terms of the trust, such granted powers include any further power appropriate to the exercise or non-exercise of the granted power of direction. *See id.* § 75-12-106(1), (2)(a). Power of direction “means a power over a trust granted by the terms of the

trust to the extent the power is exercisable while the person is not serving as a trustee.” *Id.* 75-12-102(5). It includes power over investment, management, or distribution of trust property or other matters of trust administration but is subject to the exclusions under Utah Code Section § 75-12-105 already described above. *See id.* The Official Comment to Uniform Act Section 6 contains a long list of the sorts of powers that might be granted:

acquire, dispose of, exchange, or retain an investment; make or take loans; vote proxies for securities held in trust; adopt a particular valuation of trust property or determine the frequency or methodology of valuation; adjust between principal and income or convert to a unitrust; manage a business held in the trust; select a custodian for trust assets; modify, reform, terminate, or decant a trust; direct a trustee's or another director's delegation of the trustee's or other director's powers; change the principal place of administration, situs, or governing law of the trust; ascertain the happening of an event that affects the administration of the trust; determine the capacity of a trustee, settlor, director, or beneficiary



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of the trust; determine the compensation to be paid to a trustee or trust director; prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust; grant permission before a trustee or another director may exercise a power of the trustee or other director; or release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director. This subsection does not, however, override the background law that regulates the formation of a trust, such as the requirements that a trust be lawful, not contrary to public policy, and possible to achieve.

See, e.g., Uniform Trust Code § 404 (2000), *see* Utah Code Ann. § 75-7-404; RESTATEMENT (THIRD) OF TRUSTS §§ 29–30 (2003).

Further, the Official Comments to Uniform Act Section 6 describe what may be included in further appropriate powers:

Examples of further powers that might be appropriate include a power to: (1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000) [*see* Utah Code § 75-7-1013]; (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director's powers.

The Act provides some limits on trust directors under Utah Code Section 75-7-107 by making them as responsible as a trustee under like circumstances in dealing with payback provisions of a first-party special needs trust or with a charitable interest in the trust.

Who May Be a Trust Director

A “trust director” is a person other than a person serving as trustee who has been granted such a power, regardless of the term by which the person is called, e.g., “trust protector,” “trust advisor,” and even if the terms of the trust purport to disclaim trust director status. Utah Code Ann. § 75-12-102(9); *see also* Official Comment (9) to Uniform Act § 2. A settlor or beneficiary may be a trust director (other than for the excluded powers described above, such as powers of appointment, power of revocation, etc.).

A beneficiary may be a trust director although not labeled as such, for example where the trust allows a majority of beneficiaries to release a trustee from liability since they would not be exercising authority through virtual representation; this could lead to the

majority beneficiaries being responsible to the minority for an abusive release. Official Comment (4) to Uniform Act § 5.

Relief From Co-Trustee and Co-Director Liability

A serving co-trustee cannot be a trust director; however, a co-trustee may be relieved of liability concerning another co-trustee's exercise or non-exercise of a trust power to the same extent a directed trustee may be relieved from duty or liability with respect to a trust director's power of direction. Utah Code Ann. § 75-12-112. This co-trustee provision allows a trust to provide for specialized trustees acting without imposing co-trustee obligations on other co-trustees; for example, there could be an investment trustee, a benefits trustee, and an administrative trustee who may be separately responsible for their respective functions. Such co-trustees would not, however, be trust directors.

If there are trust directors with joint powers, the action is made by a majority, unless the terms of the trust provide otherwise. *See id.* § 75-12-106(2)(b). This could make the joint trust directors jointly responsible as if they were co-trustees with co-trustee responsibility. Official Comment to Uniform Act § 6(b)(2). This co-responsibility can, however, be avoided if desired because the fiduciary duty of a director closely tracks the duty of a trustee. Thus, separating out areas of independent responsibility appears to be allowable. Similarly, a directed director should also be allowable. Official Comments to Uniform Act § 8.

Fiduciary Duty

As to the exercise or non-exercise of a granted power of direction, the Act provides that the trust director will have the same fiduciary duty and liability as to that power as a trustee or co-trustee holding the power in a like position and under similar circumstances. *See id.* § 75-12-108(1). The trust may, however, vary the director's duty and liability to the extent the trust could vary the duty or liability of a trustee in a like position under similar circumstances, *see id.* § 75-7-1008 (providing that there is no exculpation for acts in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries); the trust may also impose additional duties and liabilities, *see id.* § 75-12-108(1), (3).

The Act also excludes duties and liabilities under the Act for a health care provider acting in that capacity, unless the trust provides otherwise. *See id.* § 75-12-108(2). This could protect the provider in determining capacity or sobriety of someone such as a settlor or beneficiary. The provider would still be subject to rules applicable to his or her profession. The trustee would need to take reasonable action to comply with the provider's direction even if the provider cannot be liable under the Act. Official Comment to Uniform Act § 8(b).

The Official Comments to Uniform Act Section 8 provide some guidance to applying the trustee-like duties of the trust director. First they encourage the courts to “make use of the flexibility built into fiduciary law” and to apply fiduciary principles “in a context-specific manner that is sensitive to the particular circumstances and structure of each directed trust.” Official Comment to Uniform Act § 8. The comments also state that a trust director will have a trustee’s duty of advance disclosure where a non-routine transaction is contemplated, citing RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. d (2007), subject, however, to the limitations under the Act, *see* Utah Code Ann. § 75-12-111(2), that eliminate duties to monitor, inform, or advise. *Id.* The comments go on to note that “springing duties” are contemplated so that the trust director need not act unless requested by a beneficiary to do so. *See id.*

Also, the trust could, as with a trustee, waive applicable duties of a trust director other than the duty “to act in good faith and in accordance with the purposes of the trust” and could exculpate the director except for acting in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries. *See* Utah Code Ann. §§ 75-7-105(2)(b), -108. Where extended discretion is granted, such as by use of such

terms as “sole,” “absolute,” or “uncontrolled,” this would be applied as it would be for a trustee so that the fiduciary may not “act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power.” RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c (2003). The comments also state that the Act contemplates directed directors so that the directing director would have responsibility, but the directed director would be relieved to the same extent as a directed trustee, leaving only the willful misconduct standard that would apply to a directed trustee. Official Comment to Uniform Act § 8; *see also* Utah Code Ann. § 75-12-109.

Acting Under Direction

The directed trustee is required to take reasonable action to comply with the direction and is not liable in doing so. However, the directed trustee may not comply to the extent that by complying the trustee would engage in willful misconduct. *See id.* § 75-12-109(1), (2). The willful misconduct standard is a minimum mandatory standard that the terms of the trust may not reduce. Official Comment to Uniform Act § 9. An exercise by a director of a power to release a trustee or another director is not effective where the breach involved the trustee’s or the other director’s willful misconduct,

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Kody L. Condos

Ms. Condos received her J.D. in 2019 from the S.J. Quinney College of Law where she graduated with High Honors. Prior to joining the firm as an attorney, she clerked for Clyde Snow and was a judicial intern for the Utah Supreme Court Justice John A. Pearce.

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the release was induced by improper conduct of the trustee or the other director, or at the time of the release the releasing director did not know the material facts relating to the breach. *See id.* § 75-12-109(3). When in doubt, the trustee may petition the court for instruction. *See id.* § 75-12-109(3). Also, the trust could impose additional duties and liabilities on the trustee. *See id.* § 75-12-109(5).

If a trustee and a trust director share a power, the trustee would have its normal fiduciary duty in voting on the exercise or non-exercise of the power but would have a reduced duty in executing the joint decision. The Official Comment to Uniform Act Section 9 gives the example of a trustee serving on a committee with others including the trust director. The trustee would vote as a normal trustee but reasonably comply as a directed trustee unless compliance would be willful misconduct. Also, where a trustee's action is subject to a veto or approval power of a trust director, the trustee would act under its normal fiduciary duty in proposing the action, but if vetoed, the trustee would only be subject to the reduced willful misconduct standard in choosing whether to comply with the veto.

Duty to Inform; No Duty to Monitor

A trustee is required to inform the trust director, and a trust director is required to inform a trustee or other director, of information reasonably related to the powers and duties of the person to be informed, and that person may rely on that information without breaching the trust, unless the person engages in willful misconduct. *See id.* § 75-12-110.

Further, a trustee or trust director has no duty to monitor the other or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning instances the trustee or director may have acted differently than the other did, unless the trust provides otherwise. *See id.* § 75-12-111. If such monitoring, informing, or advising occurs, it does not mean the trustee or director doing so has assumed a duty to do so.

Limitations of Actions, etc.

In keeping with the theme of the Act to apply trustee rules with respect to trust directors, the Act provides limitations of actions against directors the same as for trustees, including the effect on limitations periods of reports or accountings provided, Utah Code § 75-12-113, provides defenses for directors like those for a trustee, *see id.* § 75-12-114, provides for jurisdiction over a director of a trust subject to the Act, *see id.* § 75-12-115, and applies other trustee provisions to directors relating to acceptance, bond, compensation, resignation, removal, and replacement, *see id.* § 75-12-116.

Duty to Whom?

To whom is the trust protector's duty owed? Could the duty run to the trust itself for assuring the intention of the settlor even if the burden of enforcement falls to the beneficiaries? A possible duty to the trust itself was suggested but not decided by a case cited above, *Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C.*, 283 S.W.3d 786 (Mo. Ct. App. 2009).

A difference in to whom duties are owed could provide some basis for a difference in the standard of conduct applicable to, or in the protections available for, or in the persons who may enforce the duty against, a trust protector accused of some form of breach of duty, compared to a trustee similarly accused. Under the Uniform Act as adopted in Utah, the choice has been made: the duty of a trust director (trust protector, however called) is to the beneficiaries, and although the duty may be modified by the trust instrument, a minimal fiduciary duty remains and it runs to the beneficiaries.

The suggestion in the *McLean* case of a duty to the trust itself was, however, plausible. Particularly given the quasi-corporate nature of estates and trusts under modern statutes (like the Uniform Probate Code; *see* Utah Code Ann. § 75-3-808), a duty to the trust itself might be a realistic possibility. This possibility would apply to a trust protector rather than to a trustee, because the trust protector is a new and distinct position while the trustee has traditionally been viewed as owing its duties to the beneficiaries in implementing the settlor's intent under the trust instrument. The trust instrument creates a relationship (an organizational relationship of authority and benefit) but not a separate entity. The Uniform Probate Code rule is designed to make the estate a quasi-corporation so as to protect the personal representative's personal assets from estate liabilities. Uniform Law Comments to Uniform Probate Code § 3-808. This principle applies as well under the Uniform Trust Code even though a trust is not a separate entity. *See* Utah Code Ann. § 75-7-1010. Note that attorneys and others can have fiduciary duties to organizations not treated as separate entities, for example, unincorporated associations. While such a locus of the duty was plausible, the Act did not go in this direction.

Conclusion

Trust protector and trust director provisions can help solve issues for trusts that are difficult to deal with otherwise, and they have proven their worth despite a lack of statutory guidance. With the adoption of the Act and the clarity it brings, the use of these sorts of provisions will likely expand and benefit even more trusts.