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Beyond UTC Section 808 and the Uniform Directed Trust Act

*Wayne E. Reames**

An assertion: the rise of "total return" investing, and the related shift away from the feudal vestiges of trust law inherent in "simple" income-only trusts, the "legal lists" and the "prudent man" investment standard represents the single most important innovation in trust practice of the second half of the twentieth century.

A prediction: the embrace of advisors and protectors, of directed trusts and fiduciary limitations, of the slicing and dicing of the traditional trustee function into ever more segregated but interrelated parts, will represent the single most profound change in trust design, administration and practice of the first half of the twenty-first century.

The traditional formulation of one party (the trustee) holding property (the *res*) for the benefit of another (the beneficiary) remained largely undisturbed from the 1535 English Statute of Uses[1] to the modern era. However, by the 1950s, concepts of dividing the traditional trustee function by separating investment and distribution decisions from administrative duties and placing checks on the trustee's authority by granting others removal powers beyond the court's traditional breach of trust remedies had already begun their pervasive seep into trust practice—and thereafter—law.

It is commonly asserted that the development of trust protectors arose out of offshore trust practice in the 1980s,[2] but the concepts (if not the terminology) of dividing the trustee function and empowering non-trustees with oversight authority predate the rise of offshore trusts by several decades.[3] Nevertheless, this mythological origin story has its uses: if your mental picture of a Cayman Islands banker is an unsavory character plotting in the shadows in a linen suit and Panama hat,[4] then empowering other individuals—individuals you can trust!—with the au-

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* Des Moines, Iowa.

1 27 Hen. 8 c. 10 (Eng.).

2 *See, e.g.*, Stewart E. Sterk, *Trust Protectors*, *Agency Costs and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2764 (2006).

3 *See, e.g.*, Note, *Trust Advisers*, 78 HARV. L. REV. 1230 (1965).

4 *Compare* Sydney Greenstreet in THE MALTESE FALCON (Warner Bros. 1941) *and* CASABLANCA (Warner Bros. 1942), *with* Jimmy Stewart in IT'S A WONDERFUL LIFE (Liberty Films 1946).

thority to direct trustee action or replace the trustee seems less a radical departure from centuries of fiduciary constancy than a necessary recognition that new innovations require new protections. But regardless of where credit (blame?) for these developments lies, their use has become so pervasive in practice, and the statutory and judicial pronouncements so piecemeal and inconsistent, a stronger response from academia and the trust bar, coupled with a call for greater consistency, *dare I say uniformity,* seems warranted. And this, of course, is uniquely suited to be undertaken by the commissioners as they guide the Uniform Trust Code (UTC) into its third decade.

This is not to say the UTC has overlooked these developments. Section 808 makes three broad assertions: First, if the terms of a trust confer upon a person power to direct certain trustee actions, the trustee must accept such direction.[5] Second, a power of direction (unless held by a beneficiary) is presumptively a fiduciary power.[6] Third, (a corollary to the second) the holder of a power of direction is liable for loss that results from a breach of fiduciary duty.[7] Thus, in one brief section in which the terms "advisers" and "protectors" are only noted in the commentary, the UTC covers a lot of ground, but creates new questions: Is this liberalization *only* available to new trusts, where "the terms of the trust" were included on formation? If fiduciary duty is "presumptive," can the trust override the presumption? Is the duty and standard of care of a director the same as that otherwise expected by a traditional trustee?

Moreover, how about some standardization of terminology? Consider South Dakota, which, in 1997, led the nation with a robustly modern statute,[8] providing for "Investment Trust Advisors" and "Distribution Trust Advisors" empowered to direct the trustee and perform fiduciary functions.[9] The statute also provided for "Trust Protectors" with a laundry list of potential authorities, each of which was to be presumptively nonfiduciary in nature.[10] But then in 2016, reacting to claims from other jurisdictions alleging trust protector liability despite

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5 UNIF. TRUST CODE § 808(b) (UNIF. LAW COMM'N 2010).

6 *Id.* § 808(d).

7 *Id.*

8 *See generally* Act of Mar. 19, 1997, ch. 280, § 1, 1997 S.D. Sess. Laws 436 (codified at S.D. CODIFIED LAWS §§ 55-1B-1 to 7). Other states soon followed suit: similar statutes were enacted in Idaho (1999), Wyoming (2003), Tennessee (2004) and unique nonliability provisions were afforded to protectors by Alaska (2003).

9 *See* Act of Mar. 2, 2005, ch. 260, §§ 2, 6-7, 2005 S.D. Sess. Laws 589 (codified as amended at S.D. CODIFIED LAWS ch. 55-1B).

10 *See* S.D. CODIFIED LAWS §§ 55-1B-2 to 3 (2019).

exculpatory trust language,[11] South Dakota created as a new classification the "family advisor" who may be granted certain oversight powers but who is never ever a fiduciary.[12] Thus, under the South Dakota model, some advisors have to be fiduciaries, some advisors can't be fiduciaries, and protectors may or may not be, but only because the instrument says so and not because of the powers they have. This is not a model of clarity.

The recent updates to the UTC provide some much needed assistance on each of these fronts, with the commissioners' endorsement of the Uniform Directed Trust Act (UDTA) as a wholesale expansion and replacement of section 808. This act provides a significant structural underpinning to directed trusts, although arguably adding no great advancement to the existing treatments afforded by the bespoke statutes of South Dakota or Alaska. If only by providing a common starting point for further developments and an acknowledgment of section 808's significant inadequacies, the UDTA represents forward progress. By proposing the term "trust director" for fiduciaries with traditional trustee powers of investment or distribution, the UDTA opens the door for a trifurcation of status, with "directors" as inherent fiduciaries, "advisors" (in the South Dakota family advisor sense) in an inherently nonfiduciary role, and "protectors" occupying a more flexible middle ground based on the powers and authorities granted to them by the instrument.

But even with the terminology set[13] and the basic structural framework outlined, for these developments to continue in an orderly manner a generally agreed upon allocation of duties and liability proportionate to power and intent must be developed and implemented interjurisdictionally. Here, the UDTA falls short.

As Professors Morley and Sitkoff explain in an excellent article in this very Journal, section 8 of the UDTA addresses the problem of fiduciary duty by imposing similar duties as applicable to a trustee "in a like position and under similar circumstances."[14] While this approach got the UDTA "out the door" by empowering the courts to weigh the duty in the context of the power rather than specifying by statute the duties associated with each possible power, this seems like a nineteenth cen-

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11 *See, e.g.*, Robert T. McLean Irrevocable Tr. v. Patrick Davis, P.C., 283 S.W.3d 786, 794-95 (Mo. Ct. App. 2009).

12 *See* Act of Feb. 18, 2016, ch. 231, §§ 15, 18, 2016 S.D. Sess. Law 540 (codified as amended at S.D. CODIFIED LAWS ch. 55-1B).

13 And I've been well beaten to the expected Shakespeare reference. *See* Shyla R. Buckner & Michelle Rosenblatt, *A Rose By Any Other Name: Utilizing and Drafting Powers for Trustees, Trustee Advisors, and Trust Protectors*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 41, 96 (2015).

14 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3, 35 (2019).

tury solution to a twenty-first century problem: the entire structure of the existing bespoke directory power statutes of states like South Dakota is expressly intended to limit, and in many cases eliminate entirely, fiduciary liability from the exercise of these non-trustee powers. As the saying goes, this is a feature not a bug.

Here the terminology provides insight: a "protector" is a guardian and overseer of the trust and its trustee. If the sole concern was poor or improper trustee performance, the existence of traditional trustee liability claims coupled with a third-party trustee removal power would adequately protect the interest of beneficiaries. However, the modern statutes also contemplate empowering protectors to take action to account for changed circumstances or unexpected situations. Accordingly, the modern advisor/protector/director statutes go beyond simply allocating trustee duties among multiple parties by authorizing new powers and authorities not well suited to a traditional trustee's duty analysis.

Consider the standard obsequence to the settlor's intent incorporated into the UTC by section 105(b)'s admonition that the "terms of a trust prevail over any provision of this [Code]." Now imagine a trust instrument that simply provides that a trustee shall have no fiduciary duties to the beneficiaries whatsoever. Under the common law, it is unthinkable that such a provision would be given effect, a prohibition mirrored by UTC section 105(b)(2)'s non-waivable trustee duty "to act in good faith and in accordance with the terms and purposes of the trust." Except section 808's apparently waivable "presumption"[15] of fiduciariness,[16] nothing else in the UTC (or the UDTA) is contrary to this traditional pillar of trust law: a trustee must be a fiduciary because if the property is not being held "in trust," the property is not being held *in* a trust. This insight is (implicitly) endorsed by commentators who strongly urge a fiduciary obligation on protectors.[17]

But, while trustee-sized liability may very well be suited for persons with a directory power over traditional trustee functions, it does not suit the limited oversight and adjustment powers grantable to a trust protector that, by their very nature, are intended to be wielded in a more flexible and adaptive manner.[18] For example, the strict and exacting impartiality between all beneficiaries and their interests typically required of a trustee to avoid fiduciary liability may drive a trustee to inaction in instances where decisions impact beneficiaries asymmetri-

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15 *See* UNIF. TRUST CODE § 808(d) (UNIF. LAW COMM'N 2010).

16 Yep, I made this word up. Let's make it happen!

17 *See, e.g.*, Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 25 PROB. & PROP. 50, 53 (2011).

18 Morley & Sitkoff, *supra* note 14, at 46-47.

cally.[19] Transferring some of these decisions from a fiduciary to a third party whose duties are limited to acting in good faith in furtherance of the perceived goals of the settlor and the trust has the advantage of protecting the trustee from this no-win scenario.

However, while I fear an overzealous imposition of trustee-style duties on trust protector decisions, we cannot simply sacrifice the intent of the settlor on the altar of flexibility by making advisors and protectors wholly unaccountable. Two middle grounds seem worthy of further consideration: First, the document (or statute) could express areas in which discrimination between beneficiaries may occur, for example authorizing any action that enhances the interests of older generations at the expense of younger ones. Second, we could work to refine the limits of a "fiduciary" trust duty, in recognition that not all relationships with a duty are the same and that the powers grantable to advisors and protectors are varied.[20] Other solutions may be developed,[21] but the task seems clear: we must adapt to the reality of the modern trust movement toward slicing and dicing of duties and oversight before fundamentally incompatible state laws and judicial pronouncements create a hopelessly inconsistent hodgepodge of rules.

During the twentieth century, a massive modernization effort was undertaken to adapt and renew trust practice and law to the realities of modern portfolio investment, with attendant innovations in both investment and distribution philosophy. This adaption and renewal, along with the standardization and uniformity both sought and attained by the widespread adoption of the Uniform Trust Code, has reinvigorated the trust form for use by generations to come. However, the next frontier of development will be on the governance side, as the flexibility of portfolio investment will be mated to advisors, protectors and directors influencing and modernizing the traditional trustee's roles and responsibilities. To remain relevant, future versions of the UTC must address the powers of these new actors, and the duties and liabilities imposed upon them, beyond the mere adoption of the Uniform Directed Trust Act.

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19 *See id.*

20 While at first blush it may seem UDTA section 8 adopts this approach, I cannot reconcile how applying liability equal to that of "a trustee in a like position and under similar circumstances" will address the goal of the modern statutes to create new flexibilities in trust design while minimizing the liability of powerholders acting in good faith. *See* Morley & Sitkoff, *supra* note 14, at 32.

21 See Sterk, *supra* note 2, at 2761, for a proposal influenced by "agency cost analysis."