ONUS FIDUCIAE EST OMNIS DIVISA IN PARTES TRES:[*] A STATUTORY PROPOSAL FOR PARTITIONING TRUSTEESHIP

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Author's Synopsis: This Article proposes an adaptation of Uniform Trust Code provisions expressly to authorize settlors to partition trusteeship into separately acceptable, unblended trust relations pertaining to investment, dispositive discretions, and the residuum of trustee functions. The resulting fiduciary regime is entirely distinct from a cotrusteeship for purposes of determining each "separate trustee's" authority and liability, separate trustees are statutorily disabled from accepting one another's fiduciary duties, interpretive difficulties are avoided by the requirement of an express reference to the statute, and the regime overlies whatever facility for directed trustees and excluded cotrustees may already exist under the adapting jurisdiction's version of the Code. Thus, fiduciary responsibility for a given res may involve two or more separate trustees, viz., a separate "resultant trustee" and either a separate investment trustee or one or more separate discretionary distributions trustees, and any of those separate trusteeships may itself comprise a cotrusteeship or be subject to the direction of a trust protector.

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Because the author of this Article has lately been appointed the American Bar Association Advisor to the National Conference of Commissioners on Uniform State Laws' Drafting Committee on Divided Trusteeship, it bears mentioning that the views expressed in the Article are the author's and not those of either the American Bar Association or the Uniform Law Commission.

I. INTRODUCTION

Under an express trust,[1] the *sine qua non* of fiduciary obligation, and, hence, potential liability for breach of trust, is the trustee's acceptance.[2] Maitland puts the matter succinctly:

> You will find it laid down as an elementary rule that no one can be compelled to undertake a trust. Until a man has accepted a trust he is not a trustee. You, without my knowledge, convey land unto and to the use of me and my heirs upon trust for X. . . . I do not think that in strictness any active renunciation can be expected of me

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* Julius Caesar, the opening of whose *Commentarii de bello Gallico* the title of this Article mimics (*see, e.g.*, CAESAR, THE GALLIC WAR bk. I, at 2 (H.J. Edwards trans., Harvard Univ. Press 1986)), could not have referred, by "*onus fiduciae*," "*onus fideicommissi*," or any other term, to fiduciary duties analogous to those of the trustee of a modern trust because the law governing trusts is the historical innovation of the English Court of Chancery. *See, e.g.*, SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 18 (3d ed. 2011); J.E. PENNER, THE LAW OF TRUSTS ¶¶ 1.1-1.11 (8th ed. 2012); S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 19–20 (2003); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 133–38 (1997); F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 23–34 (A.H. Chaytor & W.J. Whittaker eds., 1929) (photo. reprint 1984). The term "*fiducia*" had currency in Roman law, but it was associated with what we should now call mortgages and agencies rather than uses. *See, e.g.*, BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 151 (1962); W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 431–33 (3d ed. 1963). The *fideicommissum* (which was unenforceable during the Republic) involves a transfer agent or a tenant, rather than (what we should call) a *trustee*. *See* NICHOLAS, *supra*, at 167–69. So, confessedly, as used in the title of this Article, "*onus fiduciae*" is an anachronism based on English cognates associated with the modern law of trusts. To add grammatical insult to anachronous injury, the gender of the nominative is allowed to be dominated here by that of the genitive in order to sharpen the allusion to Caesar and the spirit of conquest.

[1] An express trust is a trust intentionally created by the exercise of powers implicit in the settlor's (or settlors') ownership of the *res*, as opposed to a constructive trust, which is created by operation of law. *See, e.g.*, SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 4-5 (3d ed. 2011); J.E. PENNER, THE LAW OF TRUSTS ¶¶ 2.2-2.8 (8th ed. 2012).

[2] *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. a (2007); GARDNER, *supra* note 1, at 30–31, 186–87; PENNER, *supra* note 1, ¶¶ 2.10, 10.51.

> any more than I can be compelled to answer a letter in which you propose to sell me a horse. If, when I hear of the trust I simply do nothing, then I am no trustee, I thereby disclaim the estate.[3]

But the legal implications of a trustee's acceptance go beyond the description of her duties contained in the nominating trust instrument: "equity will regard the trustee as having, further to his explicit obligations under the terms of the trust, a special kind of overarching *fiduciary* relationship to the beneficiaries."[4] That relation is informed by legal obligations to which the trustee's acceptance subjects the trustee willy-nilly. As the Uniform Trust Code (UTC) has it: "Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this [Code]."[5]

What is more, the settlor's ability to limit the trustee's liability for breaches of those inherent obligations is constrained by the concept of trust itself:

> [T]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them, which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. . . . The duty of trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts . . . . [A] trustee who relied on the presence of a trustee exemption [that is, exculpatory] clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.[6]

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[3] F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 55 (A.H. Chaytor & W.J. Whittaker eds., 1929) (photo. reprint 1984).

[4] PENNER, *supra* note 1, ¶ 2.10.

[5] UNIF. TRUST CODE § 801 (amended 2006), 7C U.L.A. 587 (2006).

[6] Armitage v. Nurse, [1998] Ch. 241 at 253–54 (Eng.).

The index of the "irreducible core of obligations"[7] within the UTC is the list of UTC provisions whose effects it is not within the settlor's election to alter.[8] The provision quoted above,[9] UTC section 801, that "the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries"[10] is on the list. UTC section 1008 is also on the list.[11] Section 1008 provides:

> A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it [ ] relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.[12]

Thus, the most egregious quality of fiduciary misconduct the settlor can exculpate is negligence or perhaps, gross negligence (a conception famously disparaged by Baron Rolfe (later Lord Cranworth) as ordinary negligence "with the addition of a vituperative epithet").[13] But that leaves open the question of how far the settlor can limit the *quantity* of a trustee's duties. Although fiduciary misconduct of a certain *quality* is beyond the settlor's power to exculpate, such misconduct evidently assumes a breach of trust.[14] If a breach of trust is conceptually independent of the negligence, recklessness, or bad faith with which it may be committed, the settlor would seem to have two strings to her bow in protecting a given nominee trustee, *NT*, from liability to trust beneficiaries: the settlor can exculpate breaches of trust committed by *NT* to the extent permitted by UTC section 1008 and she can limit the breaches it will be possible for *NT* to commit by clearly limiting the fiduciary functions *NT* is expected to perform.

If the settlor can effectively provide, for instance, that *NT* shall have no duty whatsoever regarding investment of the trust assets, it simply

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[7] *Id.*

[8] *See* UNIF. TRUST CODE § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014).

[9] *See id.* § 105(b)(2), 7C U.L.A. 224.

[10] *Id.* § 801 (amended 2006), 7C U.L.A. 587 (2006).

[11] *See id.* § 105(b)(10) (amended 2006), 7C U.L.A. 224 (Supp. 2014).

[12] *Id.* § 1008(a)(1) (amended 2006), 7C U.L.A. 654 (2006).

[13] Wilson v. Brett, (1843) 152 Eng. Rep. 737 (Ex.) 739; 11 M. & W. 113, 116.

[14] *See* UNIF. TRUST CODE § 1008(a)(1), 7C U.L.A. 654.

will not be possible for *NT*, whatever she may do, to commit a breach of the duty of impartiality[15] (or any other conventionally recognized fiduciary duty) to the trust beneficiaries *in respect of the trust's investments*. By hypothesis, *NT* does not have any such duty. In that case, presumably, even an allegation that *NT* violated the duty of impartiality regarding the trust's investments "*with reckless indifference to the purposes of the trust* [*and*] *the interests of the beneficiaries*,"[16] would not avail an injured beneficiary.[17] For the relevant provisions of the trust, *NT* would argue, do not "relieve[] a trustee of liability for breach of trust,"[18] within the meaning of UTC section 1008; rather they make it impossible for *NT* to *commit* the alleged breach by preventing *NT* from ever acquiring any duty to the beneficiaries regarding the matter in question.

This possibility is of interest to a settlor who is determined to confer on her beneficiaries the benefit (as she conceives it) of a particular division of labor among cofiduciaries in circumstances in which one nominee trustee avowedly distrusts the integrity or efficacy of another nominee fiduciary or in which the settlor wants to eliminate any risk of duplication of fiduciary fees. Let us call a nominee trustee who avowedly distrusts the integrity or efficacy of another nominee fiduciary, or who is being asked to cut her fee in light of the desiderated division of labor, a "loath nominee trustee." The *loath nominee trustee* does not want to be left holding the fiduciary bag when an innocent beneficiary is harmed by the misconduct of a cofiduciary whose resources are not sufficient to make the beneficiary whole. She is loath to be yoked with a cofiduciary she distrusts in an arrangement that may involve joint-and-several liability. And she is loath to forego fees for vigilance she has to exercise,

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[15] *See id.* § 803 cmt., 7C U.L.A. 600; UNIF. PRUDENT INVESTOR ACT § 6 (1994), 7B U.L.A. 36 (2006); *see also* RESTATEMENT (THIRD) OF TRUSTS §§ 76(2)(c), 90 (2007); GARDNER, *supra* note 1, at 129–38; PENNER, *supra* note 1, ¶¶ 2.18, 10.2-10.5.

[16] UNIF. TRUST CODE § 1008(a)(1), 7C U.L.A. 654 (emphasis added).

[17] Although, depending on the circumstances, an allegation that *NT* violated the duty of impartiality regarding the trust's investments *in bad faith* might allow a court to hold that *NT* had, by her conduct, *assumed* the role of trustee in respect of trust investments (the provisions of the trust notwithstanding) and thereby exposed herself to liability as trustee *de son tort*. *See, e.g.*, GARDNER, *supra* note 1, at 264–66; PENNER, *supra* note 1, ¶ 11.75.

[18] UNIF. TRUST CODE § 1008(a), 7C U.L.A. 654.

in any case, to avoid liability for failing to alert the settlor or a beneficiary to possible misconduct on the part(s) of her confrere(s).

Let us adopt another term of convenience by saying that from the point of view of a given loath nominee trustee, *LNT*, any situation in which an innocent and litigious trust beneficiary is harmed by the misconduct of one of *LNT*'s cofiduciaries whose resources are not sufficient to make the beneficiary whole is an instance of "cofiduciary misadventure." *LNT* wants systemic protection from liability for cofiduciary misadventure. Our question is whether the settlor can provide that protection by effectively limiting the *range* of *LNT*'s "irreducible obligations"[19]—to consult the purposes of the trust and the interests of the beneficiaries[20]—by parsing fiduciary functions. Can the settlor effectively provide that *LNT*'s fiduciary duties to the beneficiaries in respect of the *res* pertain to *LNT*'s specific fiduciary functions under the trust instrument, and *only* to those functions, so that it will be impossible for *LNT* to commit a breach of trust with respect to any fiduciary function other than her own?

No doubt a transfer of property to a single trustee, *T*, "in trust, income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *B*" coupled with *T*'s acceptance[21] (without more) entails legal obligations on the part of *T*, *virtute officii*,[22] to perform certain discrete, if peripherally overlapping, trustee functions: administrative functions, such as securing the property in question,[23] keeping records,[24] and investing so much of the property as may be "liquid";[25] and dispositive functions, such as making periodic distributions of net income.[26] We may also assume that a certain minimal set of obligatory

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[19] Armitage v. Nurse, [1998] Ch. 241 at 253–54 (Eng.).

[20] *See* UNIF. TRUST CODE § 1008(a)(1), 7C U.L.A. 654.

[21] *See supra* notes 2–3 and accompanying text.

[22] That is, *qua* trustee. *See* PENNER, *supra* note 1, ¶ 3.15.

[23] *See* UNIF. TRUST CODE § 809, 7C U.L.A. 606; *see also* RESTATEMENT (THIRD) OF TRUSTS § 76(2)(b) (2007); GARDNER, *supra* note 1, at 125–26.

[24] *See id.* § 810(a), 7C U.L.A. 607; *see also* RESTATEMENT (THIRD) OF TRUSTS § 83.

[25] UNIF. PRUDENT INVESTOR ACT § 2(a) (1994), 7B U.L.A. 20 (2006); *see also* RESTATEMENT (THIRD) OF TRUSTS §§ 76(2)(c), 90; GARDNER, *supra* note 1, at 129–38; PENNER, *supra* note 1, ¶¶ 2.18, 10.2-10.5.

[26] *See* UNIF. TRUST CODE § 801, 7C U.L.A. 587; *see also* RESTATEMENT (THIRD) OF TRUSTS § 76(2)(d); PENNER, *supra* note 1, ¶ 2.19.

administrative and dispositive fiduciary functions is necessary for the existence of the trust relation.[27]

But we know that a given *res* may be entrusted to more than one trustee at a given time[28] and that nontrustee fiduciaries, such as "trust protectors"[29] and the holders of "powers in trust,"[30] may supervene. So, our question becomes: When the *res* is entrusted to a set of cotrustees or other cofiduciaries, need the obligations to perform *all* of the functions that would be necessary to establish a trust relation between a single trustee and the beneficiaries be borne by *all* of the cofiduciaries involved? Or can the settlor restrict a given cofiduciary's irreducible obligations—to deal with the *res* for the beneficiaries' benefit in good faith and attentively[31]—to a single, or a proper subset of, discrete fiduciary function(s) by explicitly and *exclusively* assigning all other such functions to *other* cofiduciaries? If so, the settlor can protect *LNT* in *both* of the ways hypothesized above: not only can she exculpate breaches of trust to the extent permitted by UTC section 1008, she can actually limit the breaches it will be possible for *LNT* to commit.[32] That should make the loath nominee a lot less loath!

II. AUTHORIZED AND PERMITTED FIDUCIARY PARTITIONS UNDER THE UTC

There is some scope in the UTC for special allocations of fiduciary functions, both in arrangements expressly authorized by the Code and in possible arrangements not prohibited by UTC section 105's list of Code provisions whose effects the settlor cannot alter.[33] It will be convenient

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[27] *See, e.g.*, GARDNER, *supra* note 1, at 124–25 (indicating trustee's dispositive duty to respect beneficiaries' entitlements is essential to trust relation); PENNER, *supra* note 1, ¶ 10.60 (indicating trustee's administrative duty to inform is essential to trust relation).

[28] *See* UNIF. TRUST CODE § 703, 7C U.L.A. 566 (cotrustees).

[29] *Id.* § 808(b)-(d) & cmt., 7C U.L.A. 604–05; *see also* RESTATEMENT (THIRD) OF TRUSTS § 64(2) (2003).

[30] A "power in trust," sometimes called an "imperative power," is a power of appointment that will be exercised by a court in default of the holder's exercise. *See, e.g.*, JOHN A. BORRON JR. ET AL., THE LAW OF FUTURE INTERESTS § 877 (3d ed. 2003); PENNER, *supra* note 1, ¶ 5.13.

[31] *See* UNIF. TRUST CODE § 1008(a)(1), 7C U.L.A. 654.

[32] *See supra* text accompanying notes 14–15.

[33] *See* UNIF. TRUST CODE § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014).

for us to refer to the former arrangements as "authorized" and the latter as "permitted." So, for our purposes, the Code *authorizes* arrangements it actually describes and *permits* arrangements it does not prohibit.

A. Authorized Cotrusteeship

There is no scope for special allocations of fiduciary functions within the form of cotrusteeship *authorized* by the UTC.[34] Authorized cotrusteeship is a fiduciary condominium, or joint sovereignty, in which all cotrustees have coextensive fiduciary duties and powers.[35] That is why a vacancy in an authorized cotrusteeship need not be filled so long as at least one of the constituent trustees serving when the vacancy occurs continues to serve thereafter.[36] Suppose there is a reduction, by attrition, in the number of cotrustees serving in an *n*-member authorized cotrusteeship and that the reduction is between *n* and one. Because each cotrustee has exactly the same duties and powers as every other member of the cotrusteeship, the reduction has no effect (apart from simplifying fiduciary coordination) on the fiduciary duties and powers supporting the beneficiaries' equitable interests in the *res*. For the same reason, the reduction does not augment the duties of any constituent trustee who continues to serve after the reduction, which is why such a trustee is not expected to reiterate acceptance.

So, having accepted *the whole trust* on becoming an authorized cotrustee, each cotrustee is in a position, if deprived of confreres, to act as *sole* trustee. Furthermore, an authorized cotrustee generally "must participate in the performance of a trustee's function,"[37] "may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly,"[38] "shall exercise reasonable care to [] prevent a cotrustee from committing a serious breach of trust[], and compel a cotrustee to redress a serious breach of trust."[39] Accordingly,

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[34] *See id.* § 703(c), 7C U.L.A. 566 (2006).

[35] *See id.*

[36] *See id.* §§ 703(b), 704(b), 7C U.L.A. 566, 570.

[37] *Id.* § 703(c), 7C U.L.A. 566.

[38] *Id.* § 703(e) , 7C U.L.A. 566.

[39] *Id.* § 703(g) , 7C U.L.A. 566.

> [c]otrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach . . . [or if] a nonparticipating cotrustee . . . failed to exercise reasonable care [] to prevent a cotrustee from committing a serious breach of trust, or [] to compel a cotrustee to redress a serious breach of trust.[40]

An authorized cotrustee may have a right to seek contribution from other cotrustees in case of liability for breach.[41] But, again, *LNT*'s greatest anxiety is cotrustee misadventure, which by hypothesis, involves a recreant or unfortunate cofiduciary whose resources are not sufficient to make a harmed beneficiary whole.[42] Neither that anxiety, nor any of *LNT*'s lesser anxieties regarding possible cofiduciary misconduct, can be assuaged by the settlor's creating an authorized cotrusteeship. Such a cotrusteeship contemplates a plurality of trustees, each of whom ultimately has all of the fiduciary responsibilities to the beneficiaries in respect of the *res*, and any one of whom, in some circumstances at least, may be liable for a breach of trust committed by any of the others. Put another way, the settlor cannot protect *LNT* from potential liability for cofiduciary misadventure by creating an authorized cotrusteeship, because fiduciary functions are acquired by authorized cotrustees *in common*.

B. Authorized Directed Trusteeship

The settlor may, however, be able to segregate fiduciary functions, thereby providing the desiderated protection for *LNT*, by means of the "powers to direct"[43] *authorized* by UTC section 808(b).[44] We have so far assumed that *LNT* is destined for a trusteeship, but section 808 raises the distinct possibility that *LNT* could be cast as a nontrustee holder of one or more authorized powers "to direct certain actions of the trustee."[45] Thus, the authorized directed trusteeship entails three logical possibilities for *LNT*'s deployment: (1) *LNT* is cast as a nontrustee holder of authorized powers to direct a trustee; (2) *LNT* is cast as a trustee subject

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[40] *Id.* § 1002 cmt., 7C U.L.A. 646.

[41] *See id.* § 1002(b), 7C U.L.A. 646.

[42] *See supra* text accompanying notes 14–20.

[43] UNIF. TRUST CODE § 808, 7C U.L.A. 604.

[44] *See id.* § 808(b), 7C U.L.A. 604.

[45] *Id.*

to authorized direction by a cotrustee or a nontrustee; or (3) *LNT* is cast as a trustee holder of authorized powers to direct a cotrustee.

1. Nontrustee Holder of Authorized Powers to Direct

Not all of the logical possibilities may be practicable. Assume, for instance, the fiduciary functions the settlor intends *LNT* to perform comprise nearly all traditional trustee functions and that *LNT*'s intended fiduciary colleague (a protégé of the settlor, let us say, whom the settlor affectionately calls Whiz-kid, *WK*) is supposed, for instance, to be responsible only for the hedge-fund component of an asset allocation determined under the prudent investor rule.[46] On those facts, casting *LNT* as the nontrustee holder of authorized powers to direct *WK* as trustee is likely to fail of its intended effect: confronted with an instance of cofiduciary misadventure, a court, observing the concentration of ordinary trustee functions in the nominal power holder (and the hypothesized inadequacy of *WK*'s resources),[47] could reasonably be expected to find that, despite the settlor's efforts to dissemble, *LNT* is really a trustee.

In that case, if the innocent, litigious beneficiary was harmed by *WK* in connection with the execution of one of *LNT*'s functions, the court's account of *LNT*'s exposure might be that *WK* is really a cotrustee, over whom *LNT* must "exercise reasonable care to [] prevent . . . from committing a serious breach of trust,"[48] or that *WK* is really *LNT*'s settlor-nominated agent,[49] whose actions *LNT*, as trustee, is bound to monitor and if necessary, supervise.[50] On the other hand, if the beneficiary was harmed by *WK* in connection with the execution of one of *WK*'s functions, the court's account of *LNT*'s exposure might be either that *WK* is really a cotrustee or that *WK* is really the holder of authorized powers to direct *LNT*, who, as the real trustee, "does have overall responsibility for seeing that the terms of the trust are honored."[51]

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[46] *See* UNIF. PRUDENT INVESTOR ACT § 1 (2004), 7B U.L.A. 15–16 (2006).

[47] *See supra* note 42 and accompanying text.

[48] UNIF. TRUST CODE § 703(g), 7C U.L.A. 566.

[49] *See* Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP. TR. & EST. L. J. 319, 328 (2010).

[50] *See* UNIF. TRUST CODE § 807(a)(3), 7C U.L.A. 602–03.

[51] *Id.* § 808 cmt., 7C U.L.A. 605.

Perhaps the most important thing to note about the preceding speculation is that it *must be speculation* because of the dearth of decided cases involving nontrustee holders of nonappointive powers to direct the actions of trustees.[52] Such power holders, regularly referred to as trust protectors,[53] are widely discussed by commentators,[54] but we know very little about them:

> Unfortunately, trust law in this country shows virtually no appellate experience with these questions, and negligible legal development of the protector concept and principles for similar roles. The difficulties of interpretation and uncertainties about fiduciary responsibility are aggravated by the novelty and diversity of drafting practices and the lack of serious testing in practical experience or in courts elsewhere in the common-law world.[55]

Our lack of instructive experience with trust protectors in the law makes every risk of their use worth weighing and the weight of every such risk uncertain. The upshot is that *LNT*'s anxieties regarding *WK*'s possible misconduct likely will *not* be assuaged by the settlor's casting *LNT* as the nontrustee holder of authorized powers to direct *WK* as trustee in the case we have so far discussed, the case in which *LNT*'s fiduciary functions comprise nearly all traditional trustee functions and *WK* is supposed to be responsible only for peripheral administration

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[52] Of course, a power of appointment over trust assets is a "power to direct certain actions of the trustee" within the meaning of UTC section 808(b). *Id.* § 808(b), 7C U.L.A. 604. And there is no shortage of decided cases involving the holders of powers of appointment. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 46 cmt. c (2003); PENNER, *supra* note 1, ¶¶ 3.12-3.13. But as our hypothetical case involving *LNT* and *WK* suggests, powers of appointment are merely a special case of the powers more broadly described in section 808. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 64 reporter's notes on § 64 cmts. b-d at 469 (2003).

[53] UNIF. TRUST CODE § 808 cmt, 7C U.L.A. 604–05.

[54] *See, e.g.*, GARDNER, *supra* note 1, at 197; Ausness, *supra* note 49, *passim*; David Hayton, *English Fiduciary Standards and Trust Law*, 32 VAND. J. TRANSNAT'L L. 555, 579–90 (1999).

[55] RESTATEMENT (THIRD) OF TRUSTS § 64 reporter's notes on § 64 cmts. b-d at 469–70 (2003).

(such as the hedge-fund component of an asset allocation determined under the prudent investor rule).

But what if the burden of fiduciary functions is shifted the other way? What if it is *WK* whose functions comprise the core of traditional trustee functions and *LNT* whose functions are peripheral? In that case, *LNT*'s anxieties regarding cofiduciary misadventure likely *will* be assuaged by the settlor's casting *LNT* as a nontrustee holder of authorized powers to direct *WK* as trustee. *LNT* will have fiduciary duties to consult the purposes of the trust and the interests of the beneficiaries,[56] but those duties are presumably limited to the matters on which *LNT* is empowered to direct *WK*. There is nothing to suggest that the holder of an authorized power to direct a trustee may be jointly and severally liable with the directed trustee for breaches unrelated to the power holder's power.[57] Nor is there anything to suggest that such a power holder may acquire the directed trustee's duties without first either being designated as a trustee and accepting the trust[58] or becoming a trustee *de son tort*.[59]

So, we have located one circumstance in which the settlor can provide *LNT* systemic protection from liability for cofiduciary misadventure by parsing fiduciary functions to limit the breaches it will be possible for *LNT* to commit. The settlor can do that by casting *LNT* as the nontrustee holder of authorized powers to direct *WK* as trustee provided the functions *LNT* is expected to perform do not comprise too much of the core of traditional trustee functions. We cannot say how much of that core is *too* much—given the lack of instructive authority.[60] But we have the case in which the nominal trustee is responsible only for the hedge-fund component of an asset allocation determined under the prudent investor rule as a point that probably lies on the wrong side of the line.[61]

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[56] *See* UNIF. TRUST CODE § 808(d), 7C U.L.A. 604.

[57] *See id.* § 1002, 7C U.L.A. 646.

[58] *See id.* § 701, 7C U.L.A. 561.

[59] *See supra* note 17 (discussing concept of trustee *de son tort*).

[60] *See* RESTATEMENT (THIRD) OF TRUSTS § 64 reporter's notes on § 64 cmt. b-d at 469–70 (2003).

[61] *See supra* text accompanying notes 47–53.

2. Trustee Subject to Authorized Direction by Cotrustee or Nontrustee

In order to cover the lot, we shall assume hereafter that the functions *LNT* is expected to perform comprise too much (however much that is) of the core of traditional trustee functions for *LNT*'s anxieties regarding *WK*'s possible misconduct to be assuaged by the settlor's casting *LNT* as a nontrustee holder of authorized powers to direct *WK* as trustee. What, then, if the settlor reverses the formal roles and casts *LNT* as a trustee subject to authorized direction by *WK*, whom the settlor casts either as a cotrustee or as a nontrustee?

We have already noted that the authorized version of the power to direct assumes that the directed trustee has "overall responsibility for seeing that the terms of the trust are honored."[62] Hence, the directed trustee must act as directed by the power holder "*unless* the attempted exercise [of the power to direct] 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."[63] And the trustee *knows*, for this purpose, whatever "from all the facts and circumstances known to [her] at the time in question, [she] *has reason to know*."[64] So, a trustee subject to an authorized power to direct is ultimately the authorized power holder's fiduciary keeper.

LNT does not want to be *WK*'s keeper. No doubt, *LNT* would prefer being subject to *WK*'s authorized direction to being simply yoked to *WK* as a cotrustee, for authorized direction gives *LNT* the excuse of compulsion in any case short of *WK*'s manifest contravention of the terms of the trust or knowledge on *LNT*'s part, of a serious breach of one of *WK*'s fiduciary duties. Ultimately, though, an authorized power in *WK* to direct *LNT* cannot be used to separate *WK*'s fiduciary functions from *LNT*'s so as to limit the breaches it will be possible for *LNT* to commit: under an authorized power to direct, *LNT* remains liable to confront a claim that she should have refused to act on a given direction of *WK*'s that harmed

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[62] UNIF. TRUST CODE § 808 cmt., 7C U.L.A. 605; *see also supra* text accompanying note 51.

[63] *Id.* § 808(b), 7C U.L.A. 604 (emphasis added).

[64] *Id.* § 104(a)(3), 7C U.L.A. 427 (emphasis added).

the innocent, litigious beneficiary, because the direction was patently contrary to the terms of the trust or *WK*'s fiduciary obligations.

3. Trustee Holder of Authorized Powers to Direct a Cotrustee

The logical possibility of the settlor's casting *LNT* as a trustee with authorized powers to direct *WK* in the latter's capacity as an authorized cotrustee merely provides *WK* the excuse of compulsion in any case short of *LNT*'s manifest contravention of the terms of the trust or knowledge of a serious breach of one of *LNT*'s fiduciary duties.[65] The settlor wants to assuage *LNT*'s anxieties regarding cofiduciary misadventure, not *WK*'s—as far as we know, *WK* is nothing loath. *LNT*'s being able to direct *WK* regarding *LNT*'s functions may increase *LNT*'s ability to do as she sees fit within her own fiduciary province, but *LNT* is not worried (as far as we know) about *WK*'s interfering with *LNT*'s functions—she's worried about liability for something *WK* does within the fiduciary province assigned by the settlor to *WK*. *LNT*'s being able to direct *WK* regarding *WK*'s functions would merely increase *LNT*'s responsibility within *WK*'s province.

Therefore, the logical possibility of casting *LNT* as a trustee with authorized powers to direct *WK* is without practical significance for our hypothetical settlor. Rather than segregating fiduciary functions in such a way as to limit the breaches it will be possible for *LNT* to commit, this tack knits *LNT*'s and *WK*'s functions more closely together and, therefore, increases *LNT*'s anxieties regarding possible liability for cofiduciary misadventure.

C. Permitted Cotrusteeship

The UTC sections describing an authorized cotrusteeship and the joint-and-several liability of authorized cotrustees, sections 733 and 1002(b) respectively, do not appear in UTC section 105's list of Code provisions whose effects the settlor cannot alter.[66]Thus, authorized cotrusteeship is (within the UTC) a default arrangement for multiple trustees, an arrangement over which "the terms of the trust prevail."[67] So,

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[65] *See id.* § 808(b), 7C U.L.A. 604.

[66] *See id.* § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014).

[67] *Id.* § 105(b), 7C U.L.A. 224; *see also id.* § 703 cmt. (amended 2006), 7C U.L.A. 567 (2006) (cross-referencing to *id.* § 105, 7C U.L.A. 428–29).

we can ask whether there is a *permitted* form of cotrusteeship through which the settlor can provide *LNT* systemic protection from liability for cofiduciary misadventure by parsing fiduciary functions so as to limit the breaches it will be possible for *LNT* to commit.

Clearly there is such a form, but it is so contrary to the authorized cotrusteeship and the assumptions of the common law regarding cotrustees[68] that its delineation will require considerable resolution on the part of the settlor (or the person drafting the settlor's trust instrument). The settlor might, for instance, (1) expressly allocate investment trustee functions, discretionary dispositive trustee functions, and the residuum of administrative trustee functions to each of several cotrustees; (2) provide that each cotrustee other than cotrustee *A* shall irrevocably delegate to *A* and *A*'s successor(s) all trustee functions expressly allocated to *A*, each cotrustee other than cotrustee *B* shall irrevocably delegate to *B* and *B*'s successor(s) all functions expressly allocated to *B*, and so on;[69] and (3) state that no cotrustee shall participate, *qua* trustee (as opposed to agent), in the functions delegated to another cotrustee pursuant to the trust instrument.

As we have seen however, joint participation in a breach of trust is just one of the bases of joint-and-several liability among authorized cotrustees.[70] So, it would also be necessary for the settlor to provide that a trustee has no duty to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust.[71] Furthermore, it would be necessary for the settlor to provide that a trustee has no duty to monitor or supervise a delegate (at least when the delegate is a

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[68] *See id.* § 703 cmt., 7C U.L.A. 567 (referring to Restatements (Second) and (Third) of Trusts); RESTATEMENT (THIRD) OF TRUSTS § 81 cmts. d-e (2007); PENNER, *supra* note 1, ¶¶ 11.45-11.46.

[69] The authorized trusteeship provisions of UTC section 703 acknowledge the possibility of irrevocable delegations of functions among cotrustees. *See* UNIF. TRUST CODE § 703(c), 7C U.L.A. 566–68 (stating that trustee delegations of trustee functions are presumptively revocable).

[70] *See id.* § 1002 cmt., 7C U.L.A. 646; *see also supra* text accompanying note 40.

[71] *See id.* § 703(g), 7C U.L.A. 566 (imposing authorized cotrustee's duty to look after other cotrustees); *see also id.* § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014) (demonstrating that section 703(g) is not on UTC section 105's list of provisions settlor cannot alter).

trustee).[72] Finally, in order to prevent a permitted cotrustee from reacquiring delegated functions through cotrustee attrition,[73] the settlor would have to provide that a vacancy in any cotrusteeship must be filled regardless of how many constituent trustees may continue to serve in their respective, function-specific capacities after the vacancy occurs.[74]

The problem with the settlor's creating such a fiduciary regime is neither intelligibility nor practicality. As the proposal that composes Part III of this Article attests, a system of unblended trust relations pertaining to discrete trustee functions can be coherently set out. And though an attempt to slice trustee functions too finely might predictably threaten both coherence and practicality, we are entitled to assume at least as much granularity in trustee functions as the UTC's authorized cotrusteeship provisions assume.[75] The problem with the regime is its novelty. What we noted above apropos of trust protectors surely applies as well to a permitted cotrusteeship involving irrevocable delegations or any other permitted arrangement for partitioning responsibility among cotrustees: "[t]he difficulties of interpretation and uncertainties about fiduciary responsibility are [bound to be] aggravated by the novelty and diversity of drafting practices and the lack of serious testing in practical experience or in courts elsewhere in the common-law world."[76]

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[72] *See id.* § 807(a)(3) (amended 2006), 7C U.L.A. 602–03 (2006) (defining scope of trustee's duty to review agent's actions); *see also id.* § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014) (demonstrating that section 807(a)(3) is not on UTC section 105's list of provisions settlor cannot alter).

[73] *See id.* §§ 703(b)-(c), 704(b) (amended 2006), 7C U.L.A. 566, 570 (2006); *supra* text accompanying notes 36–37.

[74] *See* UNIF. TRUST CODE §§ 703(b), 704(b), 7C U.L.A. 566, 570 (setting out the vacancy provisions governing authorized cotrusteeship); s*ee also id.* § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014) (demonstrating that sections 703(b) and 704(b) are not on UTC section 105's list of provisions settlor cannot alter).

[75] *See id.* §§ 703(c), (e) (amended 2006), 7C U.L.A. 566 (2006) (describing performance and delegation of trust functions among authorized cotrustees).

[76] RESTATEMENT (THIRD) OF TRUSTS § 64 reporter's notes on § 64 cmts. b-d at 469–70 (2003).

D. Permitted Directed Trusteeship

Like the UTC sections that describe an authorized cotrusteeship and the joint and several liability of authorized cotrustees,[77] the UTC provision that describes an authorized power to direct a trustee, section 808,[78] does not appear in UTC section 105's list of Code provisions whose effects the settlor cannot alter:[79] the authorized power to direct is a default arrangement for the control of trustees over which "the terms of the trust prevail."[80] Thus, as with cotrusteeship,[81] we can ask whether there is a *permitted* form of the power to direct through which the settlor can provide *LNT* systemic protection from liability for cofiduciary misadventure by parsing fiduciary functions in such a way as to limit the breaches it will be possible for *LNT* to commit.

1. Imbricated Trustee-Protectorships

A permitted form of the power to direct a trustee can be substituted for irrevocable delegation in the context of the permitted cotrusteeship described above.[82] The authorized version of the power to direct assumes (1) that the directed trustee has "overall responsibility for seeing that the terms of the trust are honored,"[83] and (2) that the directed trustee may refuse—and the injured beneficiary predictably will claim, *should have refused*—to act as directed "if the attempted exercise [of the power to direct] 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."[84] Nevertheless, "[a] settlor can provide that the trustee *must* accept the decision of the power holder *without question*."[85]

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[77] *See* UNIF. TRUST CODE § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014); *see also supra* text accompanying note 66.

[78] *See id.* § 808 (amended 2006), 7C U.L.A. 604 (2006).

[79] *See id.* § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014).

[80] *Id.* § 105(b), 7C U.L.A. 224; *see also id.* § 808 cmt. (amended 2006), 7C U.L.A. 605 (2006) (cross-referencing section 105).

[81] *See supra* text accompanying note 67.

[82] *See supra* text accompanying notes 68–74.

[83] UNIF. TRUST CODE § 808 cmt., 7C U.L.A. 605.

[84] *Id.*

[85] *Id.* (emphasis added).

For convenience, let us call a cotrustee who, under the terms of the governing trust instrument, has no duty either to prevent another cotrustee from committing a breach of trust, or to compel another cotrustee to redress a breach of trust and a vacancy in whose trusteeship must be filled regardless of how many of her cotrustees may continue to serve after the vacancy occurs a "permitted cotrustee."[86] Let us also call the holder of a power to direct a trustee a "trust protector," regardless of whether she is a trustee with respect to the *res* in question.[87] Finally, let us call the sway a given trust protector has over a given directed trustee when the settlor has provided that the directed trustee "must accept the decision of the [trust protector] without question"[88] an "imperious direction."

We can then imagine the settlor's creating a closed system of imbricated permitted cotrustee-protectorships concerning a given *res* by providing that permitted cotrustee *A* and *A*'s successor(s) shall be imperiously directed as to trust investments by permitted cotrustee *B* or *B*'s successor(s) and as to discretionary distributions by permitted cotrustee *C* or *C*'s successor(s); permitted cotrustee *B* and *B*'s successor(s) shall be imperiously directed as to discretionary distributions by permitted co-trustee *C* or *C*'s successor(s) and as to the residuum of trustee functions other than trust investments and discretionary distributions by permitted cotrustee *A* or *A*'s successor(s); and permitted cotrustee *C* and *C*'s successor(s) shall be imperiously directed as to trust investments by permitted cotrustee *B* or *B*'s successor(s) and as to the residuum of trustee functions other than trust investments and discretionary distributions by permitted cotrustee *A* or *A*'s successor(s).

This arrangement should segregate trustee functions as effectively as the permitted cotrusteeship involving irrevocable delegations described in Part II, section C.[89] And the problem with it is the same: the arrangement is contrary to the authorized cotrusteeship and the assumptions of the common law regarding cotrustees,[90] so that "[t]he difficulties of

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[86] *See supra* text accompanying notes 71–74.

[87] *See* UNIF. TRUST CODE § 808(b)-(c), 7C U.L.A. 604 (indicating that the holder of a power to direct a trustee may be a cotrustee of the directed trustee).

[88] *Id.* § 808 cmt., 7C U.L.A. 604.

[89] *See supra* text accompanying notes 68–74.

[90] *See* UNIF. TRUST CODE § 703 cmt., 7C U.L.A. 567 (cross-referencing Restatements (Second) and (Third) of Trusts); RESTATEMENT (THIRD) OF TRUSTS § 81 cmts. d-e (2007); PENNER, *supra* note 1, ¶ ¶ 11.45-11.46.

interpretation and uncertainties about fiduciary responsibility are [bound to be] aggravated by the novelty and diversity of drafting practices and the lack of serious testing in practical experience or in courts elsewhere in the common-law world."[91]

2. Nonfiduciary Power Holders

We have so far assumed that *LNT* is destined, if not for a trusteeship, at least for a *fiduciary* role in the settlor's plans.[92] But the Official Comment to UTC section 808 suggests the possibility that *LNT* could be cast as a *nonfiduciary* holder of a power to direct.[93] The comment says, "a settlor could provide that the holder of the power [to direct a trustee] is not to be held to the standards of a fiduciary."[94] As this suggestion implies, though the settlor cannot relieve a "trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries,"[95] there is no similar rule in the UTC limiting the settlor's ability to exculpate the holder of a power to direct a trustee.

Still, we have to assume that the suggestion that the settlor can relieve the holder of a power to direct a trustee of fiduciary obligations[96] is intended as a strict (that is, exclusive) alternative to the possibility that "[a] settlor can provide that the trustee must accept the decision of the power holder without question."[97] At its logical conclusion, the *combination* of those possibilities would vitiate the trust relation. We can imagine, for instance, that the settlor (1) nominates her protégé, *WK*, as the nominal trustee; (2) designates *LNT* (and perhaps others) as the holder(s) of powers to direct *WK* as to absolutely *all* trustee functions; (3) provides that *WK* must accept *LNT*'s (and the other power holders') decisions without question; and (4) provides that *LNT* (and the other power holders) shall not be liable for any loss that results from the

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[91] RESTATEMENT (THIRD) OF TRUSTS § 64 reporter's notes on § 64 cmts. b-d at 469–70 (2003).

[92] *See supra* text accompanying notes 47–61.

[93] *See* UNIF. TRUST CODE § 808 cmt., 7C U.L.A. 605.

[94] *Id.*

[95] *Id.* § 1008(a)(1) (amended 2006), 7C U.L.A. 654 (2006).

[96] *See id.* § 808 cmt., 7C U.L.A. 605.

[97] *Id.*

exercise of a power to direct *WK*. Such an arrangement could not sensibly be referred to as a trust. Assuming a court would allow the arrangement (whatever it is) to stand, then so long as *WK* does nothing on her own initiative, there would be no one against whom a nominal beneficiary could bring a claim for breach of trust.[98]

In light of this potential threat to coherence, some states that have adopted the UTC have ruled out nonfiduciary powers to direct.[99] But where these powers are permitted, their use must be especially liable to the difficulty we have repeatedly noticed concerning "uncertainties about fiduciary responsibility, [the aggravation of] novelty and diversity in drafting practices,"[100] and so on. Happily, *LNT* is not interested (as far as we know) in avoiding fiduciary liability all together. She is interested in avoiding liability for cofiduciary misadventure.[101] Thus, *LNT* would only be interested in the device of the nonfiduciary power to direct if it were the only available means of parsing fiduciary functions in such a way as to limit the breaches it will be possible for *LNT* to commit.

But that is not the case. We have discovered effective alternatives for parsing fiduciary functions in (1) an authorized power to direct a trustee when the functions *LNT* is expected to perform do not comprise too much of the core of traditional trustee functions,[102] and (2) an indefinite range of possible permitted cotrusteeships, which we illustrated by one scheme involving irrevocable delegations,[103] and another involving imbricated permitted cotrustee-protectorships.[104]

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[98] *See* Armitage v. Nurse, [1998] Ch. 241 (Eng.) (listing the minimum requirements for the existence of the trust relation); *supra* text accompanying note 27.

[99] *See* MICH. COMP. LAWS § 700.7103(n) (2012) (labeling the holder of power to direct trustee a "trust protector"); *id.* § 700.7809(1)(b) (2010) (prescribing a trust protector's fiduciary duties); *id.* § 700.7105(h) (including section 7809(1)(b) on list of Michigan trust code provisions settlor cannot alter).

[100] RESTATEMENT (THIRD) OF TRUSTS § 64 reporter's notes on § 64 cmts. b-d at 469–70 (2003).

[101] *See supra* text accompanying notes 19–20.

[102] *See supra* text accompanying notes 60–61.

[103] *See supra* text accompanying notes 68–76.

[104] *See supra* text accompanying notes 86–91.

E. Motivations for a Statutory Model of Separate Trusteeships Based on Segregated Trustee Functions

The problem with all of those alternatives is the same as that with nonfiduciary powers to direct a trustee, *viz*., lack of instructive experience. Again:

> trust law in this country shows . . . negligible legal development of the protector concept and principles for similar roles. The difficulties of interpretation and uncertainties about fiduciary responsibility are aggravated by the novelty and diversity of drafting practices and the lack of serious testing in practical experience or in courts elsewhere in the common-law world.[105]

The lack of instructive experience is one of two reasons for a state that has adopted the UTC (or any common law jurisdiction for that matter) to adopt a statutory model for parsing fiduciary functions to limit the breaches it will be possible for a given trustee to commit. The other reason is that adopting such a statutory model provides the adopting jurisdiction an opportunity to regulate the segregation of trustee functions (in light of the range of possible permitted arrangements) in order to spare settlors, beneficiaries, and the jurisdiction's courts the effects of excessively complicated schemes of fiduciary coordination.

What follows in Part III of this Article is a proposed statutory model for the segregation of fiduciary functions that expressly allows settlors to partition trusteeship into separately acceptable, unblended trust relations pertaining to investment, dispositive discretions, and the residuum of trustee functions. The resulting fiduciary regime is entirely distinct from a cotrusteeship for purposes of determining each separate trustee's authority and liability. And separate trustees are statutorily disabled from accepting one another's fiduciary duties.

III. THE STATUTORY PROPOSAL

The proposal comprises a new section 703a and ancillary amendments to a few of the adopting jurisdiction's existing UTC provisions. (For ease of comprehension, amendments to existing provisions appear

[105] RESTATEMENT (THIRD) OF TRUSTS § 64 cmt. b-d at 469–70.

below as "redlined" changes, but the provisions of the new section, section 703a, appear in ordinary type.)

105. Default and Mandatory Rules.

[Whether there is a reference to the new section 703a in the adopting jurisdiction's list of provisions whose effects the settlor cannot alter, and how much of section 703a is incorporated by such a reference, will depend on the adopting jurisdiction's attitude towards control of the settlor's ability to segregate trustee functions.][106]

703. Cotrustees.

(a) Cotrustees who are . . .

(b) ~~If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.~~

~~(c)~~ A cotrustee must participate . . .

703a. Separate trustees.

(a) As used in this section:

(1) A "discretionary trust provision" is a trust provision that confers on a trustee a discretionary power to make distributions that is subject to section 814(a), regardless of whether the exercise of the power is subject to an ascertainable standard;

(2) A "separate distributions trustee" is a person, or a cotrusteeship described in section 703, that is designated by a separate trustees provision to exercise discretion under a discretionary trust provision;

(3) A "separate investment trustee" is a person, or a cotrusteeship described in section 703, that is designated by a separate trustees provision to perform the trustee investment function;

(4) A "separate resultant trustee" is a person, or a cotrusteeship described in section 703, that is designated to perform all trustee functions not

[106] *See infra* text accompanying note 107.

allocated by the separate trustees provision to a separate investment trustee or to any separate distributions trustee;

(5) A "separate trustee" is any separate resultant trustee, separate investment trustee, or separate distributions trustee;

(6) A "separate trustees provision" is a trust provision that complies with the requirements of this section, including that it designates, or provides a method of designating, (A) a separate resultant trustee and (B) a separate investment trustee or one or more separate distributions trustees;

(7) A "separate trusteeship" is the office of any separate trustee;

(8) As used in this section, "the trust" refers to the inclusive set of separate relations of trust to be separately accepted by the separate trustees under a given separate trustees provision; and

(9) Though a separate trustees provision may define the trustee investment function more narrowly or more broadly, that function generally includes determining for trust investment purposes the retention, purchase, sale, assignment, exchange, tender, or encumbrance of trust property and the investment and reinvestment of undistributed income and principal of the trust; management, control, and exercise of voting powers related directly or indirectly to any trust asset; and for nonpublicly traded investments or property for which there is no readily available market value, determining the methodology for valuing such property and the frequency of valuations.

(b) A trust instrument may include one or more separate trustees provisions. No more than one separate trustees provision shall apply in the administration of any given trust at any given time.

(c) No more than one separate investment trustee shall perform the trustee investment function of any given trust at any given time. There may be more than

one separate distributions trustee acting for any given trust at any given time. The separate investment trustee (if any) may be a separate distributions trustee.

(d) While a separate trustees provision applies, the whole trusteeship of the trust is divided, along the lines created by the designation of separate trustees, into discrete sets of separately accepted fiduciary responsibilities, each set separately allocated to one or another of the trust's separate trustees.

(1) Except as provided in paragraph (2) of this subsection, the trust's separate trustees are not co-trustees in their relations to one another. Each separate trustee shall act as to [his or her or its] separate trustee function(s) upon [his or her or its] own authority without need of approval from any other separate trustee of the trust. The trust's separate trustees are not cotrustees for purposes of joinder of necessary parties in a proceeding for breach of trust, or for any other purpose not specifically described in paragraph (2) of this subsection.

(2) The trust's separate trustees are cotrustees only for purposes of:

(A) taking, holding, transferring, and defending title to trust property;

(B) determining venue and interested persons in proceedings concerning the trust;

(C) trust liability (if any) for income, property, or other taxes attributable to trust property; and

(D) the privileges and immunities of co-trustees to comment, to the trust's beneficiaries or settlor(s) or others, on one another's performance of fiduciary duties, which privileges and immunities separate trustees shall enjoy notwithstanding that each separate trustee is expressly relieved, by subsection (j) of this section, of any duty whatsoever to make any

such comment to the settlor(s) or any beneficiary of the trust.

(3) The trust's separate trustees are not co-trustees for purposes of the requirement in section 402 that the same person is not the sole trustee and sole beneficiary of a trust: if a trust has only one beneficiary, that beneficiary may not be a separate trustee of the trust unless the separate trustee in question comprises a cotrusteeship of which the beneficiary is a cotrustee and the trust instrument prohibits the beneficiary from serving alone.

(4) A separate trustee shall not accept the trust associated with, nor, except as provided elsewhere in this subsection, participate in or provide advice regarding the performance of, the separate trustee function(s) of any other separate trustee of the trust. Ministerial acts performed by one separate trustee in connection with the separate trustee function(s) of another separate trustee of the trust (such as confirming that an investment or distribution directive of another separate trustee has been carried out, recording and reporting the actions of another separate trustee or conferring with another separate trustee for purposes of administrative coordination or efficiency) shall not be deemed to constitute an acceptance of the trust associated with the separate trustee function(s) of the other separate trustee. While a separate trustees provision applies, the prohibition of this subsection against the acceptance by one of the trust's separate trustees of the trust associated with the separate trustee function(s) of any other of the trust's separate trustees shall constitute a legal disability.

(5) If a vacancy that is required to be filled under section 704 occurs in a separate investment trusteeship or a separate distributions trusteeship and prompt action is reasonably thought to be necessary to avoid injury to trust property, the separate

resultant trustee may elect, in spite of having no duty to do so, to act for the trust within the function(s) of the vacant separate trusteeship. A separate resultant trustee who acts pursuant to this paragraph shall not be deemed to have accepted the trust associated with the separate trustee function(s) of the vacant separate trusteeship. A separate resultant trustee who acts pursuant to this paragraph on a given occasion shall not thereby be obligated to act pursuant to this paragraph on any other occasion.

(e) The separate trustees provision shall include an express reference, by section number, to this section of this Code and shall indicate all of the following:

(1) that the trustee investment function shall be performed by the separate investment trustee (if there is one) or that one or more separate distributions trustees (if any) shall exercise discretion under one or more specified discretionary trust provisions;

(2) which of the trust's separate trustees shall perform the function of allocating between principal and income, for fiduciary accounting purposes, receipts and disbursements or distributions affected by the separate trustees' separate trustee functions;

(3) which of the trust's separate trustees shall be responsible for preparation and filing of tax and information returns for the trust and for responding on behalf of the trust to inquiries from governmental agencies;

(4) which of the trust's separate trustees shall be responsible for responding to attacks upon the trust's validity or purpose(s);

(5) which of the trust's separate trustees shall be responsible for determining whether at any time cash or other property will be loaned by the trust to one or more beneficiaries of the trust, which shall be responsible for determining whether at any time cash or other property will be loaned by the trust to one or

more business enterprises in which any beneficiary of the trust has an ownership interest, and which shall be responsible for determining whether at any time cash or other trust property will be loaned by the trust to one or more business enterprises in which the trust itself has an ownership interest; and

(6) In the case of a separate investment trustee, whether the separate investment trustee or the separate resultant trustee shall determine the trust's asset allocation for investment purposes.

(f) The separate resultant trustee shall be responsible for possession, custody, or control of the trust property within the meaning of section 809.

(g) Within [his or her or its] separate trustee function(s), a separate trustee:

(1) has all of the rights, privileges, powers, immunities, and duties of a trustee under [the adopting jurisdiction's] law, including those described in this Part 7 [Office of Trustee] and in Part 8 [Duties and Powers of Trustee] of this Code;

(2) is subject to control by the settlor(s) of a revocable trust or by a holder of a power to direct a trustee (if any) in the same circumstances an ordinary trustee or cotrusteeship would be; and

(3) is bound to seek or consider the advice of a designated trust advisor (if any) in the same circumstances an ordinary trustee or cotrusteeship would be.

(h) If a separate trustee comprises a cotrusteeship, then within that separate trustee's separate trustee function(s), those cotrustees have all of the rights, privileges, powers, immunities, and duties of cotrustees under [the adopting jurisdiction's] law, including those described in this Part 7 [Office of Trustee] of this Code.

(i) Each separate trustee has the duty to inform and report on [his or her or its] separate trustee function(s):

(1) to beneficiaries of the trust as described in section 813, provided, however, that no separate

trustee is required to provide any beneficiary any report that [he or she or it] knows will be duplicative of a report provided that beneficiary by another separate trustee of the trust; and

(2) to each other separate trustee of the trust as is reasonably necessary for the other separate trustee to perform [his or her or its] separate trustee function(s).

(j) A separate trustee has no duty whatsoever either to monitor or review the actions of any other separate trustee of the trust or to notify or warn any settlor or beneficiary of the trust of any possible breach of trust on the part of any other separate trustee of the trust. A separate trustee who elects, in spite of having no duty to do so, to notify or warn a settlor or beneficiary of the trust of a possible breach of trust on the part of another separate trustee shall not be deemed to have accepted the trust associated with the separate trustee function(s) of that other separate trustee, and a separate trustee who elects thus to notify or warn a settlor or beneficiary on a given occasion shall not thereby be obligated to do so on any other occasion.

(k) Absent clear and convincing evidence of collusion in a breach of trust:

(1) a separate trustee is not liable for the act or omission of any other separate trustee of the trust;

(2) a separate trustee in breach of a trustee duty of [his or her or its] separate trustee function(s) shall be the only separate trustee of the trust obligated to defend any action brought by a beneficiary of the trust regarding that breach;

(3) except as provided in paragraph (4) of this subsection, a separate trustee shall be liable to trust beneficiaries for breach of a trustee duty of [his or her or its] separate trustee function(s) as if the other separate trustee(s) of the trust were not in office; and

(4) a separate trustee may be liable concerning a trustee function of another separate trustee of the

trust only for [his or her or its] own act(s) or omission(s) in the performance of ministerial offices pursuant to that other separate trustee's instruction(s), and then only to the extent, and on the basis that, an agent of that other separate trustee would be liable for the same act(s) or omission(s).

704. Vacancy in Trusteeship; Appointment of Successor.

(a) A vacancy in a trusteeship occurs if:

(1) a person designated as a trustee . . .

(b) If one or more cotrustees remain in office, a vacancy in a cotrusteeship need not be filled. For this purpose, any separate trustee described in section 703a(a)(5) may comprise a cotrusteeship, but the relation between respective separate trustees serving under a given separate trustees provision described in section 703a(a)(6) is not itself a cotrusteeship. Thus, a ~~A~~ vacancy in a trusteeship must be filled if ~~the~~:

(1) it leaves a trust that is not subject to a separate trustees provision as of the time of the vacancy without any ~~has no~~ remaining trustee; or

(2) it leaves any of the several separate trusteeships governed by an operative separate trustees provision without any remaining trustee.

(c) A vacancy in a trusteeship . . .

IV. COMMENTARY

A. Optional Amendment of Section 105's Default and Mandatory Rules

The adopting jurisdiction's attitude towards control of settlors' options for segregating trustee functions may be *laissez faire* or paternalistic. At its extremity, the former attitude recommends that there be no reference at all to the new section 703a in the adopting jurisdiction's section 105(b) list of Code provisions whose effects the settlor cannot alter.[107] On this tack, section 703a merely provides interested settlors a safe harbor and a set of helpful hints on how to segregate trustee

[107] *See* UNIF. TRUST CODE § 105(b) (amended 2006), 7C U.L.A. 224 (Supp. 2014).

functions in such a way as to limit one fiduciary's potential liability for another's misconduct. The extremity of paternalism, on the other hand, recommends that every feature of section 703a that is designed to anticipate untoward complexity or interpretive quandaries should be emphasized by inclusion in the adopting jurisdiction's section 105(b) index.

Section 703a itself evinces *both* attitudes. It is *laissez faire*, for instance, in the ostensive, nonexclusive description of trustee investment functions provided in subsection (a)(9).[108] It is paternalistic, for instance, in requiring, in subsection (c), that only one separate investment trustee[109] can serve with respect to a given *res* at any given time,[110] and, in subsection (e), that a settlor who aims to set up separate trustees[111] must explicitly refer to section 703a in her separate trustees provision(s).[112] The adopting jurisdiction's legislature will have to decide on which, if any, of the paternalistic features of section 703a it wants to insist and then amend the jurisdiction's version of section 105(b) to refer to those features.

B. Deletion of Section 703's Iteration of the Authorized Cotrustee Vacancy Rule

As we have already noted, one basic feature of the UTC's *authorized* cotrusteeship is that having accepted *the whole trust* on becoming a cotrustee, each such cotrustee is in a position, if deprived of confreres, to act as *sole* trustee.[113] The fungibility of conventional cotrustees is inimical to systemic segregation of trustee functions.[114] So, cotrustee

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[108] *See supra* Part III. 703a(a)(9).

[109] *See supra* Part III. 703a(c).

[110] *See supra* Part III. 703a(a)(3).

[111] *See supra* Part III. 703(a)(5).

[112] *See supra* Part III. 703a(e).

[113] *See* UNIF. TRUST CODE §§ 703(b), 704(b) (amended 2006), 7C U.L.A. 566, 570 (2006); *supra* text accompanying note 34–36.

[114] *See supra* text accompanying notes 73–74. State legislatures attempting to provide increased immunity for cotrustees *inter se* sometimes lose sight of the basic feature of authorized cotrusteeships described in the text. North Carolina, for example, allows a settlor to exclude a cotrustee from participation in a given trustee function and provides that "the excluded [co]trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from . . . action taken by [any] cotrustee" participating in that excluded function. N.C. GEN. STAT. § 36C-7-703(e1)(1)(b) (2013). Yet, "[i]f one

vacancy has to be carefully dealt with in the proposal, and one of the things the requisite care reveals is that the repetition of exactly the same principle in both section 703(b) (on "Cotrustees")[115] and section 704(b) (on "Vacancy in Trusteeship")[116] is otiose. Thus, the proposal deletes the iteration of the principle in section 703(b) and amends the iteration in section 704(b).[117]

C. The New Section 703a's "Separate Trustees"

1. Nomenclature

a. "Separate Trustees Provision" and "Separate Trustee"

Formally, what the new section 703a does is *authorize* a separate trustees provision. A separate trustees provision is a trust provision that designates, or provides a method of designating, a separate resultant trustee and either a separate investment trustee or one or more separate distributions trustees.[118] Note the coordination of conjunctions: there *must* be a separate resultant trustee; there *may* be a separate investment trustee, though there need not be; and there *may* be several separate distributions trustees, though there need not be any; but there *must* be either a separate investment trustee or a separate distributions trustee.[119] So, there must be at least two separate trustees, one of whom is a separate resultant trustee. And the cast of new fiduciary characters is already complete, for the extension of the term "separate trustee"

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or more cotrustees remain in office, a vacancy in a trusteeship [subject to North Carolina law] need not be filled." *Id.* § 36C-7-704(b). The confluence of those provisions indicates that under the default rules of the North Carolina Trust Code, excluded-cotrustee protection is superficial. It is armor to be worn by a cotrustee who may be called on to fulfill all of the duties of an unexcluded cotrustee if circumstances become unfavorable to the segregation of trustee functions. *See supra* text accompanying notes 34–35. North Carolina's approach contrasts with the protection of separate trustees described in the statutory proposal in Part III of this Article, under which each separate trustee is disabled from participating (*qua* trustee) in the trustee function(s) of any other separate trustee *regardless* of vacancies. *See supra* Part III. 703a(d)(4) and *infra* text accompanying notes 206–12.

[115] *See* UNIF. TRUST CODE § 703(b), 7C U.L.A. 566.

[116] *See id.* §§ 703(b), 704(b), 7C U.L.A. 566, 570.

[117] *See infra* text accompanying notes 206–09.

[118] *See supra* Part III. 703a(a)(6).

[119] *See supra* Part III. 703a(a)(6).

includes only separate resultant trustees, separate investment trustees, and separate distributions trustees.[120]

It is important to note that none of these new fiduciary characters, the separate trustees governed by a given separate trustees provision, need be a single legal person. Section 703a(a)(2)-(4) tells us that any separate resultant trustee, separate investment trustee, or separate distributions trustee may be a cotrusteeship.[121] Furthermore, a separate trustee may be subject to a power to direct or an obligation to consult a trust advisor "in the same circumstances an ordinary trustee or cotrusteeship would be."[122] And because the cotrustees that compose a cotrusteeship comprised by a separate trusteeship[123] "have, *inter se*, all of the rights, privileges, powers, immunities, and duties of [ordinary] cotrustees under the [adopting jurisdiction's]"[124] version of the Code, those cotrustees may be subject to authorized or permitted delegation or direction *inter se*.[125] Thus, the proposal *overlies* whatever facility for directed trustees and excluded cotrustees already exists (prior to the adoption of the new section 703a) under the adopting jurisdiction's version of the UTC.

b. "Separate Resultant Trustee"

A separate resultant trustee is a separate trustee designated to perform all trustee functions that are not allocated by the separate trustees

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[120] *See supra* Part III. 703a(a)(5). This will be a convenient point at which to emphasize again that the rigidity of anything described in section 703a is merely apparent to the extent it is not reflected in the adopting jurisdiction's post-adoption version of section 105(b). *See supra* text accompanying notes 107–12. Whether, for instance, a trust provision under which the settlor purports to appoint a separate resultant trustee, a separate investment trustee, a separate distributions trustee, and a separate special collections trustee, is a separate trustees provision within the meaning of section 703a will depend on whether the adopting jurisdiction wants to restrict the settlor's ability to separate trustee functions to the three categories delineated in the definition of "separate trustee"—investment, dispositive discretions, and the residuum of trustee functions. *See supra* Part III. 703a(a)(2)-(4). In that case, the definition of "separate trustee" will be incorporated in the adopting jurisdiction's post-adoption version of section 105(b).

[121] *See supra* Part III. 703a(a)(5).

[122] *Supra* Part III. 703a(g)(2)-(3).

[123] *See supra* Part III. 703a(a)(7) ("a 'separate trusteeship' is the office of any separate trustee").

[124] *Supra* Part III. 703a(h).

[125] *See supra* Part II.B.-D.1.

provision to a separate investment trustee or to any separate distributions trustee.[126] Thus, the separate resultant trustee's functions are determined by elimination, a process that logically entails: (1) that there will only be one separate resultant trustee in respect of any given *res* at any given time (though, again, the separate resultant trustee may comprise a cotrusteeship and may be subject to powers to direct) and (2) that the separate resultant trustee cannot also be either a separate investment trustee or a separate distributions trustee.

c. "Separate Investment Trustee" and "Trustee Investment Function"

A separate investment trustee is a separate trustee designated by the separate trustees provision to perform the trustee investment function.[127] The proposal only allows there to be one separate investment trustee performing the trustee investment function with respect to any given *res* at any given time,[128] and only one separate trustees provision can apply with respect to any given *res* at any given time.[129] But the settlor can define the trustee investment function as broadly or as narrowly as she pleases.[130]

This feature creates some authorized latitude for a settlor who is content to relegate at least a proper subset of ordinary trustee investment functions to the separate resultant trustee.[131] The prohibition against multiple separate investment trustees is based on the commonsense idea that the interests of trust beneficiaries are likely to suffer if the settlor attempts to slice the trustee investment function too finely. And the settlor can avail of multiple separate trusts, cotrusteeships, or powers to direct in order to deal with special asset-class problems. But her ability to define the separate investment trustee's function as broadly or as narrowly as she pleases allows the settlor to make a division of labor at the level of separate trustees within the trustee investment function. She might, for instance, limit the separate investment trustee's functions to

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[126] *See supra* Part III. 703a(a)(4).

[127] *See supra* Part III. 703a(a)(3).

[128] *See supra* Part III. 703a(c).

[129] *See supra* Part III. 703a(b).

[130] *See supra* Part III. 703a(a)(9).

[131] *See supra* Part III. 703a(a)(9) (cataloging some representative trustee investment functions).

alternative investments (including, perhaps, private equity, hedge funds, commodities, and emerging-market or BRIC equity investments) and leave responsibility for other investment decisions concerning the *res* to the separate resultant trustee.

d. "Separate Distributions Trustee" and "Discretionary Trust Provision"

A separate distributions trustee is a separate trustee designated by the separate trustees provision to exercise discretion under a discretionary trust provision.[132] A discretionary trust provision is a trust provision that gives a trustee a discretionary distribution power described in Code section 814(a),[133] ("Discretionary Powers: Tax savings") regardless of whether the trustee's discretion is subject to an ascertainable standard.[134] Section 703a(c) tells us that there may be multiple separate distributions trustees acting with respect to any given *res* at any given time.[135] Thus, there can be as many separate distributions trustees as there are discretionary trust provisions in the governing trust instrument.

Section 703a(c) also tells us that the separate investment trustee (if there is one) may be a separate distributions trustee.[136] So, the same legal person or cotrusteeship can occupy more than one separate trusteeship. As noted above, the same legal person or cotrusteeship cannot be, at the same time, with respect to the same *res*, both the separate resultant trustee and either the separate investment trustee or a separate distributions trustee. But the proposal leaves open the possibility that a given separate investment trustee may also be, at the same time, with respect to the same *res*, a separate distributions trustee. This means that a separate trustees provision designating separate trustees of all three kinds may govern as few as two legal persons or cotrusteeships. So, for example, the settlor's protégé, *WK*, may be both the separate investment trustee and the only separate distributions trustee, while the settlor's bank may be the separate resultant trustee.

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[132] *See supra* Part III. 703a(a)(2).

[133] *See* UNIF. TRUST CODE § 814(a) (amended 2006), 7C U.L.A. 620 (2006).

[134] *See supra* Part III. 703a(a)(1); *see also* UNIF. TRUST CODE § 103(2), 7C U.L.A. 413 (defining "ascertainable standard").

[135] *See supra* Part III. 703a(c).

[136] *See supra* Part III. 703a(c).

As with the trustee investment function, the settlor is free to relegate the dispositive discretions associated with as many separate discretionary trust provisions as she likes to the separate resultant trustee. Suppose, for example, that *WK* is both the separate investment trustee and the only separate distributions trustee; *WK*'s function as the separate distributions trustee is tied to a single discretionary trust provision for the benefit of the settlor's only special-needs beneficiary, *SNB*; and there are several discretionary trust provisions pertaining to the *res* at the time in question. In that case, the separate resultant trustee (the settlor's bank in our example above) will exercise dispositive discretions under all of the discretionary trust provisions other than the one for the benefit of *SNB*.

e. "The Trust"

A trust is a set of legal relations, like property,[137] a power of appointment,[138] or a contract, but is *not* property (legal or equitable),[139] a power of appointment,[140] or a contract.[141] Properly understood, all legal relations are relations between persons.[142] And each such relation is ultimately analyzable in terms of one or more discrete relations between

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[137] The term "property" is used here in its strict sense to refer to legal interests in determinate things, not to the things themselves. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 28–29 (Walter W. Cook ed., 1964).

[138] Powers of appointment are not classically regarded as property. *See, e.g.*, RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 58 (1979); Laurence M. Jones, *The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland*, 18 MD. L. REV. 93, 96 (1958). *Cf.* BORRON, *supra* note 30, § 1272, at 270 (3d ed. 2004) (acknowledging the historical point, but suggesting that with respect to the rule against perpetuities, at least, there need be no objection to treating a power of appointment as a property interest); JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 474.2 (Roland Gray ed., 4th ed. 1942) (anticipating Borron).

[139] *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); GARDNER, *supra* note 1, at 17–18; J.E. PENNER, THE IDEA OF PROPERTY IN LAW 133–38, 142 (1997) (hereinafter *Idea of Property in Law*). As to the peculiar nature of the equitable property constituting a beneficial interest in a trust, *see, e.g.*, MAITLAND, *supra* note 3, at 17–18; PENNER, *supra* note 1, ¶ 2.1; Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?*, 92 B.U. L. REV. 919, 921–25 (2012).

[140] *See, e.g.*, GARDNER, *supra* note 1, at 153–55; PENNER, *supra* note 1, at ¶¶ 3.14-3.17.

[141] *See, e.g.*, *Idea of Property in Law*, *supra* note 139, at 134–35.

[142] *See, e.g.*, HOHFELD, *supra* note 137, at 14, 72, 93.

exactly two persons.[143] On that understanding, a trust is always an aggregate of the legal relations between each beneficiary who has equitable title to the *res* and each trustee who has legal title to it.[144] So, for a philosopher or a lawyer capable of Hohfeldian precision, the first part of the proposal's special definition of "the trust," according to which "'the trust' refers to the inclusive set of separate relations of trust,"[145] is trivial. For such an adept, what matters is the second part of the definition: "as used in this section, 'the trust' refers to the inclusive set of separate relations of trust *to be separately accepted by the separate trustees under a given separate trustees provision.*"[146]

2. Divided Trusteeships in Unity of Legal Title

That the respective trustee functions allocated to the separate trustees under a given separate trustees provision are to be *separately accepted* by the respective separate trustees is the essence of the proposal. Section 703a(d) provides that while a separate trustees provision applies in the administration of a given *res*, the aggregate obligations of trusteeship regarding that *res* are divided, "along the lines created by the designation of separate trustees, into discrete sets of separately accepted fiduciary responsibilities."[147]

Except as expressly provided in section 703a(d)(2),[148] a trust's separate trustees are *not* cotrustees (a) in their relations *inter se*, (b) for purposes of joinder of necessary parties in a proceeding for breach of trust, or (c) for purposes of the requirement in UTC section 402 ("Requirements for Creation") that the same person is not the sole trustee and sole beneficiary of a trust.[149] The latter point means that if the trust, as defined in section 703a(a)(8),[150] has only one beneficiary, that beneficiary cannot be a separate trustee thereof, "unless the separate trustee in question

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[143] *See id.*

[144] *See* PENNER, *supra* note 1, ¶ 2.1.

[145] *Supra* Part III. 703a(a)(8).

[146] *Supra* Part III. 703a(a)(8) (emphasis added).

[147] *Supra* Part III. 703a(d).

[148] *See supra* Part III. 703a(d)(2).

[149] *See* UNIF. TRUST CODE § 402(a)(5) (amended 2006), 7C U.L.A. 481 (2006); *see also id.* § 105(b)(1) (amended 2006), 7C U.L.A. 224 (Supp. 2014) (including section 402(a)'s requirements for creation of trust among UTC provisions settlor cannot alter).

[150] *See supra* Part III. 703a(a)(8).

comprises a cotrusteeship of which the beneficiary is a cotrustee and the trust instrument prohibits the beneficiary from serving alone."[151]

This requirement is no more than conceptual coherence demands, for as we have seen, a separate trustees provision creates separate relations of trust between the separate trustees it governs and the beneficiaries of "the trust."[152] And a relation of trust is always ultimately analyzable in terms of a set of discrete legal relations, each of which is between exactly two persons.[153] An arrangement in which a single "beneficiary" in respect of some *res* is also the sole "trustee" thereof cannot be a trust, or any other sort of legal relation, because it cannot be a *relation*—to say otherwise would quickly involve us in the absurdity of imagining that a person may possibly owe a legal obligation *to herself*. To postulate, for example, that a given natural person is both the separate investment trustee and the only beneficiary of "the trust" in question entails that there is *no trust at all* with respect to what would otherwise be the trustee investment function pertaining to the *res*. So, the requirement of section 703a(d)(3)[154] merely prevents section 703a from threatening the conceptual coherence that the Code insists on by including the requirements of section 402 in section 105's list of provisions whose effects the settlor cannot alter.[155]

Conceptual coherence also demands unity of title among separate trustees. A trustee is a person who holds legal title to a *res* to which at least one other person, a beneficiary, holds equitable title.[156] This means that for every trustee there is a beneficiary who has rights *in personam* against the trustee concerning the trustee's rights (*qua* trustee) *in rem*.[157] If a separate trustee is a trustee at all, she must be a legal owner of the *res* with respect to which she has a separate trustee function.[158] Hence the

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[151] *Supra* Part III. 703a(d)(3).

[152] *See supra* notes 118–25 and accompanying text.

[153] *See supra* notes 143–46 and accompanying text.

[154] *See supra* Part III. 703a(d)(3).

[155] *See* UNIF. TRUST CODE § 105(b)(1) (amended 2006), 7C U.L.A. 225 (Supp. 2014); *id.* § 402(a)(5) (amended 2006), 7C U.L.A. 481 (2006).

[156] *See supra* notes 144–45 and accompanying text.

[157] *See* PENNER, *supra* note 1, ¶ 2.1; *Idea of Property in Law*, *supra* note 139, at 134.

[158] *See* PENNER, *supra* note 1, ¶ 2.1, *Idea of Property in Law*, *supra* note 139, at 134; s*ee also*, *e.g.*, JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 541 (8th ed. 2009); GARDNER, *supra* note 1, at 4–5, 30–31.

first exception to the general rule that separate trustees within the meaning of section 703a are *not* cotrustees *inter se*—separate trustees are treated as cotrustees for purposes of "taking, holding, transferring, and defending" legal title to the *res*.[159]

Thus, each separate trustee accepts common legal title to the *res in trust* with respect to, and *only* with respect to, her separate trustee function(s) as described in the governing separate trustees provision and in section 703a.[160] A separate investment trustee accepts common title to the *res* for purposes of performing the trustee investment function described by the governing separate trustees provision, as informed by section 703a, for the benefit of the beneficiaries of "the trust."[161] A separate distributions trustee accepts common title to the *res* for purposes of administering the discretionary trust provision(s) indicated in the governing separate trustees provision for the benefit of those beneficiaries affected by the indicated discretionary trust provision(s). A separate resultant trustee accepts common title to the *res* for purposes of performing all trustee functions not allocated by the governing separate trustees provision either to the separate investment trustee (in case there is one) or to any separate distributions trustee.

3. Limited Assimilation to Cotrusteeship for Purposes Other Than Unity of Title

Section 703a(d)(2) provides four additional exceptions to the general rule that separate trustees within the meaning of section 703a are *not* cotrustees *inter se*.[162] In addition to being treated as cotrustees for purposes of taking (holding, transferring, etc.) title to the *res*,[163] separate trustees are cotrustees for purposes of "determining venue and interested persons in proceedings concerning the trust."[164] There is nothing about the institution of separate trustees that should make the question of where

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[159] *Supra* Part III. 703a(d)(2)(A).

[160] Here, it will be well to remind ourselves, again, that the extent to which section 703a may be *contradicted* by the governing separate trustees provision will depend on the extent to which section 703a's imperatives are reflected in the adopting jurisdiction's post-adoption version of section 105(b). *See supra* note 120.

[161] *See supra* Part III. 703a(d).

[162] *See supra* Part III. 703a(d)(2)(A)-(D).

[163] *See supra* Part III. 703a(d)(2)(A).

[164] *Supra* Part III. 703a(d)(2)(B).

a given separate trustee may sue or be sued more complicated than the same question apropos of cotrustees, so the proposal identifies the former question with the latter. Treating separate trustees as cotrustees for purposes of notice of proceedings involving "the trust" ensures that each separate trustee of a given *res* will have notice of proceedings against any other separate trustee thereof, notwithstanding that separate trustees are *not* cotrustees for purposes of joinder of necessary parties.[165]

Separate trustees are also cotrustees, for purposes of "trust liability [] for income, property, or other taxes attributable to trust property."[166] This provision is simply an acknowledgement within the proposal that in the first instance, liability to pay *ad valorem* property taxes and taxes on income attributable to property is ordinarily based on the ownership of underlying assets.[167] We should also note, however, that "other taxes attributable to trust property"[168] may include transfer taxes: the federal generation-skipping transfer tax, for instance, on the "taxable termination" of an interest in a trust, or a trust distribution that constitutes a "direct skip," is paid by the trustee.[169]

Finally, separate trustees are cotrustees, for purposes of the privileges and immunities of cotrustees to comment critically on one another's performances of fiduciary duties.[170] This provision is a matter of balancing incentives, for as we shall see, and as section 703a(d)(2)(D) itself points out, separate trustees are expressly relieved of any duty to make any such comment to any settlor or beneficiary of "the trust."[171] The point of extending the relevant privileges and immunities to separate trustees is to avoid discouraging a well-intentioned separate trustee who wishes, in spite of having no duty to do so, to communicate criticism of another separate trustee's performance to the settlor or a beneficiary. But for section 703a(d)(2)(D), our hypothesized, well-intentioned separate

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[165] *See supra* Part III. 703a(d)(2).

[166] *Supra* Part III. 703a(d)(2)(C).

[167] *See, e.g.*, I.R.C. § 641(a)-(b) (imposing federal tax payable by trustees on income attributable to trust property); *see also id.* § 6012(b) (indicating types of trustees obligated to file returns). *Cf. id.* §§ 651-661 (delineating the pattern for transferring income tax incidents from trustees to beneficiaries based on trust distributions).

[168] *Supra* Part III. 703a(d)(2)(C).

[169] I.R.C. § 2603(a)(2).

[170] *See supra* Part III. 703a(d)(2)(D).

[171] *See supra* Part III. 703a(d)(2)(D) (cross-referencing 703a(j)).

trustee, *WIST*, might wonder whether there can be any privilege based on the recipient's (the settlor's or the trust beneficiary's) *interest* when there is no duty on *WIST*'s part to be forthcoming.[172]

It is important to note, however, that section 703a(d)(2)(D) does *not* say that an officious separate trustee *cannot* be liable for communicating a criticism of another separate trustee.[173] It says only that a separate trustee has as broad a privilege to convey criticism of another separate trustee to the settlor or a trust beneficiary as an ordinary trustee has to convey criticism of a cotrustee to the same audience.[174] Thus, a separate trustee who is inclined to comment unfavorably on another separate trustee's performance will have to bear in mind that it is presumably possible for a trustee to libel or slander a cotrustee—by making a communication with actual malice, for instance. Section 703a(d)(2)(D) does not eliminate that possibility.[175]

4. The Fiduciary Isolation of Separate Trustees

Section 703a(d)(4) places each separate trustee governed by a given separate trustees provision under a legal disability to accept the trust associated with, or participate (*qua* trustee) in, the separate trustee function(s) of any other separate trustee of "the trust."[176] Procuratorial acts performed by one separate trustee in connection with the separate trustee function(s) of another (examples of which are illustratively catalogued) are deemed not to constitute "acceptance of the trust associated with the separate trustee function(s) of the other separate trustee."[177] There is an emergency action provision in section 703a(d)(5), analogous to the provision for cotrustees in UTC section 703(d),[178] that allows the separate resultant trustee, in certain narrow circumstances, electively to act within the function(s) of a vacant separate investment

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[172] *See, e.g.*, Watt v. Longsdon, [1930] 1 K.B. 130 (Eng.).

[173] *See supra* Part III. 703a(d)(2)(D).

[174] *See supra* Part III. 703a(d)(2)(D).

[175] *See generally Watt*, 1 K.B. 130 (positing that malice vitiates privilege to communicate based on recipient's interest).

[176] *See supra* Part III. 703a(d)(4).

[177] *Supra* Part III. 703a(d)(4).

[178] *See* UNIF. TRUST CODE § 703(d) (amended 2006), 7C U.L.A. 566 (2006).

trusteeship or separate distributions trusteeship.[179] But the section emphasizes that a separate resultant trustee who elects to act in the circumstances described is neither (a) deemed to have accepted the trust associated with the vacant separate trusteeship, nor (b) thereby obliged to act in a similar way on any other occasion.[180]

5. Division of Labor

Section 703a(e) requires a separate trustees provision to refer to section 703a "by section number."[181] This constraint is intended to avoid interpretive questions about whether the settlor intended to create a separate trustees provision or to describe some other authorized or permitted fiduciary arrangement. Section 703a(e)'s other requirements all concern the division of labor. A separate trustees provision must indicate (a) "that the trustee investment function [is to be] performed by the separate investment trustee (if there is one) or that one or more separate distributions trustees [are to] exercise discretion under . . . specified discretionary trust provisions";[182] (b) "which of the trust's separate trustees [is to make] allocat[ions] between principal and income [] for fiduciary accounting purposes";[183] (c) which of the separate trustees is "responsible for prepar[ing] and filing . . . tax and information returns for the trust and for responding . . . to inquiries from governmental agencies";[184] (d) "which [separate trustee is] responsible for responding to attacks upon the trust's validity or purpose(s)";[185] (e) "which . . . [separate trustee is] responsible for determining whether at any time cash or other property will be loaned . . . to or [for the benefit of] beneficiaries";[186] and (f) "whether the separate investment trustee or the separate resultant trustee [is to decide on the] asset allocation for investment purposes."[187]

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[179] *See supra* Part III. 703a(d)(5).
[180] *See supra* Part III. 703a(d)(5).
[181] *Supra* Part III. 703a(a)(e).
[182] *Supra* Part III. 703a(e)(1).
[183] *Supra* Part III. 703a(e)(2).
[184] *Supra* Part III. 703a(e)(3).
[185] *Supra* Part III. 703a(e)(4).
[186] *Supra* Part III. 703a(e)(5).
[187] *Supra* Part III. 703a(e)(6).

Each requirement of section 703a(e)[188] regarding the division of labor among separate trustees[189] presents a question or questions for the settlor to answer. Section 703a(f), on the other hand, answers a question regarding the division of labor *for* the settlor.[190] This section provides that the separate resultant trustee has the responsibility for possession, custody, or control of the *res*.[191] This is another instance of paternalism within the proposal, in this case, based on the idea that the interests of trust beneficiaries are likely to suffer if the settlor attempts to divide up responsibility for custody and control of assets according to who is responsible for investing the assets or distributing them to beneficiaries.

There are obviously many potential fiduciary coordination problems that the proposal does not anticipate. One can easily imagine, for instance, a situation in which a separate distributions trustee, *SDT*, objects that a decision by the trust's separate investment trustee, *SIT*, to sell a particular asset, impairs *SDT*'s ability to fulfill the settlor's intent as expressed in the relevant discretionary trust provision, and *SIT* will not relent. Does *SDT* have to petition the probate court to instruct *SIT* or *vice versa*? A petition may be what the settlor would prefer in that case, but, in any case, the problem is not peculiar to separate trustees. Exactly the same situation can arise, for instance, if *SDT* and *SIT* are the only serving authorized cotrustees. The risk of a fiduciary impasse is too obvious, and the means of avoiding it too various, for the proposal to offer, let alone *dictate*, a preferred solution. One expects trust protectors with bivalent powers to direct separate trustees will often be deployed in this context, but the alternatives are legion. The only alternative that settlors aiming at separate trusteeships can be expected consistently to eschew is the anointment of a separate trustee as *primus inter pares*, for that is evidently retrograde to the proposal's tendency to isolate the respective functions of separate trustees.

6. Duties and Powers of Separate Trustees

Within her separate trustee function(s), "a separate trustee has all of the rights, privileges, powers, immunities, and duties of an ordinary

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[188] *See supra* note 120.

[189] *See supra* Part III. 703a(e).

[190] *See supra* Part III. 703a(f).

[191] *See supra* Part III. 703a(f).

trustee under [the adopting jurisdiction's]" version of the Code.[192] If she is only a separate distributions trustee (that is, not simultaneously a separate distributions trustee and a separate investment trustee), she does not have the powers described in the Code that pertain merely to the trustee investment function,[193] but she has all of the powers appropriate to the administration of the discretionary trust provision(s) that define(s) her separate function(s) under the separate trustees provision in question.[194] Each separate trustee has a duty to inform and report on her separate trustee function(s) to beneficiaries of the trust as described in Code section 813,[195] and to each other separate trustee of the trust as is reasonably necessary for the other separate trustee to perform her separate trustee function(s).[196] But a separate trustee has no duty to provide a beneficiary a report she "knows will be duplicative of a report provided [the] beneficiary by another separate trustee."[197] And a separate trustee has no duty whatsoever to monitor the actions of any other separate trustee or to notify or warn any settlor or beneficiary of a possible breach of trust on the part of any other separate trustee.[198]

As we have already seen, separate trustees have the same privileges and immunities cotrustees do to comment critically on one another's performance of fiduciary duties.[199] Accordingly, section 703a(j) contemplates that in spite of having no duty to do so, a separate trustee may elect to notify or warn a beneficiary of a possible breach of trust on the part of another separate trustee.[200] But section 703a(j) emphasizes that a separate trustee who elects to notify or warn a settlor or beneficiary of a possible breach of trust by another separate trustee is neither (a) "deemed to have accepted the trust associated with the separate trustee function(s)

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[192] *Supra* Part III. 703a(g)(1).

[193] *See, e.g.*, UNIF. TRUST CODE § 816(5) (amended 2006), 7C U.L.A. 627 (2006) (describing trustee's power to borrow money or pledge trust assets).

[194] *See supra* Part III. 703a(g)(1).

[195] *See* UNIF. TRUST CODE § 813, 7C U.L.A. 609–10.

[196] *See supra* Part III. 703a(i)(1)-(3).

[197] *Supra* Part III. 703a(i)(1).

[198] *See supra* Part III. 703a(a)(j).

[199] *See supra* text accompanying note 170.

[200] *See supra* Part III. 703a(j).

of that other separate trustee," nor (b) thereby obliged to notify or warn any settlor or beneficiary on any other occasion.[201]

This provision of the proposal is liable to draw a strong intuitive reaction, for it admits the possibility that a separate trustee who is *convinced* that another separate trustee of "the trust" has breached, or is *breaching*, a trustee duty to one of "the trust's" beneficiaries may, without fear of legal censure, simply choose to keep mum. It has to be remembered though, that by hypothesis, the settlor wanted—based on her own ideas of what would inure to the benefit of the intended beneficiaries—to give the separate trustee in question that particular immunity. Furthermore, the probity of the intuition is doubtful. We can imagine, for instance, a settlor's deciding—based on her own ideas of what will inure to the benefit of her intended beneficiaries—to place two different assets, *Asset α* and *Asset β*, under two separate trusts, each for the benefit of the same beneficiaries, under the same dispositive provisions; the settlor makes her bank, *Bank*, the trustee of *Asset α*, and her neighbor, *N*, the trustee of *Asset β*; and through information obtained either from the beneficiaries or by accident, *N* learns that *Bank* is likely in violation of the terms of the trust governing *Asset α*. If we can reconcile ourselves morally to *N*'s having a legal privilege, in *that* case, to decide simply to mind her own business, we shall have either to abandon the intuitive objection (on this point) to the separate trustees proposal or to explain why coownership of property should exercise so powerful an influence over our moral imaginations.

7. Liability of Separate Trustees

Section 703a(k) provides that in the absence of clear and convincing evidence of collusion in a breach of trust: a separate trustee is not liable for the act or omission of any other separate trustee;[202] a separate trustee in breach of a trustee duty of her separate trustee function(s) is the only separate trustee obliged to defend an action based on that breach;[203] and a separate trustee who is liable for a breach of trust is not entitled to contribution from any other separate trustee.[204] A separate trustee can be

[201] *Supra* Part III. 703a(j).
[202] *See supra* Part III. 703a(k)(1).
[203] *See supra* Part III. 703a(k)(2).
[204] *See supra* Part III. 703a(k)(3).

liable concerning a trustee function of another separate trustee only for her own ministerial acts or omissions in executing that other separate trustee's instructions and then only to the extent, and on the basis that, an *agent* would be liable.[205]

D. Amendment of Section 704's Cotrustee Vacancy Rule

The final provision of the proposal expressly makes the fungibility of conventional cotrustees,[206] which is inimical to systemic segregation of trustee functions,[207] inapplicable to separate trustees described in section 703a by amending UTC section 704(b).[208] Under the amendment, a vacancy in a trusteeship governed by a separate trustees provision must be filled if the vacancy leaves, not "the trust," but any *separate trusteeship* without any remaining trustee.[209] Thus, when a separate trustees provision is operative, the question is not whether there will be any *separate trustee* remaining after a given vacancy; the question is whether the vacancy will leave any separate trusteeship quite empty—in which case, the vacancy must be filled. A vacancy will leave a separate trusteeship quite empty unless the affected separate trusteeship comprises a cotrusteeship with at least one constituent trustee who continues to serve after the vacancy occurs[210]—and in that case, the vacancy need not be filled.

Suppose, for example, that *A*, *B*, *C*, and *D* are all natural persons serving as trustees under a given trust instrument; *A* and *B* are designated, by the governing separate trustees provision, to perform the trustee investment function as cotrustees; *C* is designated to exercise dispositive discretions under a discretionary trust provision for the benefit of the settlor's special needs beneficiary; and *D* is designated to perform the residuum of trustee functions. In this case, if only *A* ceases to serve as trustee, the vacancy will not have to be filled, because the cotrusteeship that the separate investment trustee comprises has a constituent trustee, *B*, who continues to serve after the vacancy occurs.

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[205] *See supra* Part III. 703a(k)(4).

[206] *See supra* text accompanying notes 73–74.

[207] *See supra* text accompanying notes 113–15.

[208] *See supra* Part III. 704(b).

[209] *See supra* Part III. 704(b).

[210] *See* UNIF. TRUST CODE §§ 703(b), 704(b) (amended 2006), 7C U.L.A. 566, 570 (2006).

The same is true, *mutatis mutandis*, if only *B* ceases to serve. But if both *A* and *B* cease to serve, then *regardless* of whether *C* or *D* continues to serve thereafter, at least one person has to be appointed to perform the trustee investment function. This vacancy has to be filled because the separate investment trusteeship has been left quite empty.

Under section 704(b) as amended,[211] the question of whether *C* or *D* continues to serve as trustee is irrelevant to the question whether a vacancy caused by *A*'s or *B*'s ceasing to serve needs to be filled. The question is irrelevant because as of the time of the vacancy, neither *C* nor *D* is in a position to perform the trustee investment function. As far as the governing separate trustees provision is concerned, neither *C* nor *D* has ever accepted coownership of the *res* in trust for the purpose of investing that *res* for the beneficiaries.

V. CONCLUSION

That neither *C* nor *D* (in the example above) has ever accepted coownership of the *res* in trust for the purpose of investing explains, not only why their continuing to serve is irrelevant, under the proposal, to the question of whether a vacancy in *A*'s or *B*'s trusteeship needs to be filled, but also why neither of them could be liable, under the proposal, for a breach of trust committed in the performance of the trustee investment function. Under the proposal's new section 703a, *C* and *D* are as strangers to the separate investment trusteeship of the *res*. They are coowners of that *res*, but for strictly separate fiduciary purposes that the proposal allows the settlor to divide from the trustee investment function down to the most fundamental level of fiduciary responsibility for an express trust, the level of acceptance.[212]

By means of the proposal, the settlor has made it *impossible*, during the continuance of the fiduciary arrangements contemplated by the separate trustees provision: (1) for either *C* or *D* to commit a breach of trust concerning the trustee investment function, (2) for *D* to commit a breach of trust concerning the discretionary trust provision for the settlor's special needs beneficiary, *SNB*, (3) for *C* to commit a breach of trust concerning the residuum of trustee functions prescinded from the discretionary trust provision for *SNB* and the trustee investment function,

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[211] *See supra* Part III. 704(b).

[212] *See supra* text accompanying notes 1–3.

and (4) for either *A* or *B* to commit a breach of trust concerning either the discretionary trust provision for *SNB* or the residuum of trustee functions prescinded from that discretionary trust provision and the trustee investment function.

Furthermore, the proposal has allowed the settlor to achieve so much fiduciary isolation of her trustees *without* her having either to forego, or to involve herself in the uncertainties attendant upon, merely *permitted* forms of cotrusteeship or the power to direct a trustee.[213] She has not had to *forego* such permitted forms, because the proposal overlies whatever facility for directed trustees and excluded cotrustees may already exist under the adopting jurisdiction's pre-adoption version of the UTC. She has not had to involve herself in the uncertainties attendant upon those permitted forms, because apart from the apparatus of dissection, the proposal deploys thoroughly conventional conceptions of trusteeship and fiduciary duty. Even if the adopting jurisdiction's attitude towards control of the apparatus of dissection is strictly *laissez faire*,[214] the new section 703a provides the settlor a safe harbor and a how-to manual.

In conclusion, let us identify our hypothetical "loath nominee trustee," *LNT*, (remembering her anxiety about "cofiduciary misadventure")[215] with the hypothetical, natural person *D* in our last example above, and the potential cofiduciary about whom *LNT* has (all along) had her doubts—the protégé the settlor affectionately calls "Whiz-kid," *WK*—with our hypothetical, natural person *A*. In that case, we see that *LNT* has agreed to serve under the settlor's separate trustees provision, notwithstanding that *WK* has also agreed to serve. And we may add that *LNT* (a highly skilled trusts and estates lawyer who occasionally acts as a professional trustee) has cheerfully agreed to forego any fee for monitoring or reviewing *WK*'s (or anyone else's) investment decisions regarding the *res*. Professionally, *LNT* does not much care *what WK* and her cotrustee get up to, because the jurisdiction whose law governs the settlor's trust has enacted the proposal that composes Part III of this Article—a legislative development very much to the settlor's liking.

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[213] *See supra* Part II.C.-D.

[214] *See supra* text accompanying note 107.

[215] *See supra* text accompanying notes 19–20.