

# Settlor-Authorized Fiduciary Indifference to Trust Purposes and the Interests of Beneficiaries

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## I. INTRODUCTION

The confluence of Uniform Trust Code (UTC) sections 105(b), 801, and 1008(a)(1) (Triplex) is that the terms of a trust cannot relieve a trustee of either (1) “the duty . . . to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries<sup>1</sup> or (2) “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.”<sup>2</sup> Is a settlor thereby precluded from providing, *for the beneficiaries’ sake*, that in certain circumstances, a trustee may *ignore* purposes of the trust and interests of the beneficiaries?

## II. MOTIVATION

A settlor, *S*, wants a professional trust-service provider, *T*, to act as trustee of an irrevocable trust and to reduce her standard fee in light of the allocation of a discrete administrative function to *H*, a nonbeneficiary holder of a power to direct the trustee. *S* reasons that *H* will accept full fiduciary responsibility for the directed function<sup>3</sup> and that *T* should therefore reduce her fee for the directed function to zero.<sup>4</sup> Assuming she can make the relevant price differentiation, *T* will evaluate whether

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<sup>1</sup> UNIF. TRUST CODE §§ 105(b)(2), 801 (UNIF. LAW COMM’N 2010); *see also id.* § 103(8) (defining “interests of the beneficiaries”).

<sup>2</sup> *Id.* § 1008(a)(1); *see id.* § 105(b)(10).

<sup>3</sup> I.e., *S* intends *H* to act in a fiduciary capacity, subject to the same duties and liabilities that a trustee would have in performing the directed function without direction. For the common law’s countenance of fiduciary administrative powers granted *nomination* to nontrustees, *see, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. b. (AM. LAW INST. 2007) and J. E. PENNER, THE LAW OF TRUSTS ¶ 3.20 (8th ed. 2012).

<sup>4</sup> Market incentives for price differentiation are discussed as a policy rationale for features of the UDTA in James P. Spica, *From Strength to Strength: A Comment on Morley and Sitkoff’s Making Directed Trusts Work*, 44 ACTEC L.J. 215, 215–18 (2019).

to cut her fee by asking in what circumstances she can be liable for doing just what *S* would have her do—*follow directions*. To the extent *T* can be liable to beneficiaries for doing exactly as directed by *H* when *H* is acting within her authority under the trust, or for doing *nothing* when directions are not forthcoming, the request that *T* reduce her professional fee is a request that she forgo compensation for risk or, equivalently, for effort that she will have to mount—in the way of vigilance over *H*—to avoid risk.<sup>5</sup>

Anticipating *T*'s calculation, *S* adopts trust terms (Protections) expressly negating *T*'s duty to (1) second guess *H* for any reason when *H* is acting within her authority under the trust, (2) monitor *H* or report on *H*'s activities, (3) prompt *H* when *H* is quiescent, (4) take over for *H* in any circumstance, etc. Can *T* safely rely on these Protections?

### III. INTERPRETATION

The Uniform Directed Trust Act (UDTA) would sanction the Protections to some extent.<sup>6</sup> But in a UTC state that has not enacted the UDTA, it has to be reckoned that the Protections purportedly license *T*'s indifference to affected trust purposes and interests of the beneficiaries:<sup>7</sup> to advance the beneficiaries' economic interests in administrative efficiency, *S* has presumed to make *T* fiduciary-care-free in respect of exercises and nonexercises of *H*'s power. And *T*'s reliance on the Protections may itself constitute “reckless indifference” within the meaning of section 1008(a)(1),<sup>8</sup> for “a trustee who relied on the presence of a trustee exemption [i.e., 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.”<sup>9</sup>

That is a problem if section 801 imposes a “positive” duty<sup>10</sup> to pursue trust purposes or interests of beneficiaries that is independent of, and, therefore, may *conflict with*, the duty to administer the trust “in accordance with its terms.”<sup>11</sup> In that case, *T* may be liable to a claim that (1) although an improvident direction of *H*'s was not contrary to the

<sup>5</sup> *Id.* at 216.

<sup>6</sup> *See id. passim*; Jane Ditelberg, *Am I My Brother's Keeper: Willful Misconduct and the Directed Trustee under the Uniform Directed Trust Act*, 44 ACTEC L.J. 215 (2019).

<sup>7</sup> *Cf. supra* Part I.

<sup>8</sup> UNIF. TRUST CODE § 1008(a)(1) (UNIF. LAW COMM'N 2010).

<sup>9</sup> *Armitage v. Nurse*, [1998] Ch. 241 at 253–54 (Eng.).

<sup>10</sup> R. P. Austin, *Moulding the Content of Fiduciary Duties*, in TRENDS IN CONTEMPORARY TRUST LAW 153, 159 (A. J. Oakley ed., 1996) (“[T]he positive side of fiduciary duties [is] usually expressed as the duty to act in good faith . . .”).

<sup>11</sup> *See* UNIF. TRUST CODE §§ 105(b)(2), 801.

terms of the trust, *T* knew<sup>12</sup> that it constituted a breach of a duty of *H*'s, so that despite the Protections, compliance was a breach of *T*'s duty to pursue relevant purposes of the trust and interests of the beneficiaries; (2) given that in complying, *T* relied on the Protections, *T*'s breach was committed with reckless indifference;<sup>13</sup> and, therefore, (3) *T* cannot be relieved of liability for her compliance with *H*'s direction.<sup>14</sup> On this interpretation (Interpretation 1), the Protections are unenforceable as a violation of section 105(b).<sup>15</sup>

#### IV. AMPHIBOLY

The Comment to section 801 is ambiguous: it says the section “confirms that a primary duty of a trustee is to follow the terms and purposes of the trust,”<sup>16</sup> but having articulated “primary duty” with the *indefinite* article, the Comment does not indicate whether section 801 also confirms any *other* “primary duty” of the trustee. And the Comment suggests that “the purposes and particular terms of the trust can on occasion conflict”<sup>17</sup> without indicating whether such conflict is liable to be normative, in the sense of being a conflict between independent duties, rather than merely interpretive.<sup>18</sup> It is possible that the conjunction “terms and purposes of the trust” is merely a hendiadys meaning *the terms of the trust properly interpreted in light of the trust's purposes*, which would allow interpretive but not normative conflict between purposes and terms. But the Comment does not require such a reading.

#### V. COUNTER-INDICATIONS

A 2005 amendment to the Comment to section 105 suggests (1) that the expressions “purposes of the trust” and “terms and purposes of the trust and the interests of the beneficiaries” are synonymous and (2) that settlors can *determine* the interests of beneficiaries *by means of* express terms.<sup>19</sup> And there was an even clearer contradiction of Interpretation 1 in the Comment to former section 808;<sup>20</sup> for although that section pro-

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<sup>12</sup> “[A] person has knowledge of a fact if . . . [f]rom all the facts and circumstances known to the person at the time in question, the person has reason to know it.” *Id.* § 104(a).

<sup>13</sup> *Armitage*, Ch. 241 at 254.

<sup>14</sup> See UNIF. TRUST CODE § 1008(a)(1) (UNIF. LAW COMM'N 2010).

<sup>15</sup> See *id.* § 105(b)(2).

<sup>16</sup> *Id.* § 801 cmt. (amended 2018).

<sup>17</sup> *Id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* § 105 cmt. (amended 2004, 2005 & 2018) (referring to section 103(8)'s definition of “interests of the beneficiaries”).

<sup>20</sup> See *id.* § 808 cmt. (indicating former UTC section 808 subsections (b)–(d) were deleted in 2018 in light of the UDTA).

vided that a nonbeneficiary holder of a power to direct is “presumptively a fiduciary”<sup>21</sup> and that a trustee must comply with an exercise of such a power “unless . . . the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the [power holder] owes to the beneficiaries,”<sup>22</sup> the Comment said, “[t]he provisions of this section [808] may be altered in the terms of the trust. See Section 105. *A settlor can provide that the trustee must accept the decision of the power holder without question.*”<sup>23</sup> If that is true, the terms of *S*’s trust can relieve *T* of any duty to second guess *H* in the exercise or nonexercise of *H*’s power to direct (at least when *H* is acting within her authority under the trust).<sup>24</sup> Unfortunately, the Comment did not explain how this latitude is reconciled with the Triplex.

## VI. SELF-FRUSTRATION

A “Legislative Note” to the UDTA advising modification of UTC section 105(b)(2)<sup>25</sup> indicates that the Uniform Law Commission has lately concluded that such a reconciliation is at least doubtful.<sup>26</sup> We can grant that much based on Parts III and IV above. But to that extent, Interpretation 1 involves us in the paradox that trust beneficiaries should *suffer* for being equity’s “darling[s],”<sup>27</sup> “the spoilt child[ren] of English jurisprudence”;<sup>28</sup> for on Interpretation 1, our regard for beneficiaries’ “beneficial interests”<sup>29</sup> is so great that we cannot allow *S* to confer *the benefit* (as she conceives it) of a division of administrative labor among professionals without multiplying fiduciary responsibility and, thereby, the cost of administration.<sup>30</sup>

That seems perverse given that if *S* has her way, the trust beneficiaries will be owed exactly the quantum of fiduciary duty they would be owed if *T* were not subject to direction.<sup>31</sup> Why should we read the Triplex in such a way as to tax the beneficiaries’ interests (by the amount of

<sup>21</sup> *Id.* § 808(d) (deleted in 2018).

<sup>22</sup> *Id.* § 808(b) (deleted in 2018).

<sup>23</sup> *Id.* § 808 cmt. (emphasis added).

<sup>24</sup> See James P. Spica, *Used Not Only as Directed: Michigan’s Adaptation of the Uniform Directed Trust Act*, 64 WAYNE L. REV. 339, 371–72 (2019).

<sup>25</sup> UNIF. DIRECTED TRUST ACT § 9 legislative note (UNIF. LAW COMM’N 2017).

<sup>26</sup> For a more detailed discussion of grounds for that conclusion, see Spica, *supra* note 24, at 372–77.

<sup>27</sup> FREDERIC WILLIAM MAITLAND, *Trust and Corporation*, in MAITLAND SELECTED ESSAYS 141, 173 (H. D. Hazeltine et al. eds., 1936).

<sup>28</sup> *Id.*

<sup>29</sup> See UNIF. TRUST CODE §§ 103(8), 105(b)(2) (UNIF. LAW COMM’N 2010).

<sup>30</sup> See *supra* Parts II–III.

<sup>31</sup> See *supra* note 3.

*T*'s standard fee for the directed function)<sup>32</sup> just because *S* wants to secure for her beneficiaries the benefit (as she conceives it) of professional administration and thinks that the best person to perform the directed function is not also the best person to perform the residuum of trustee functions?

## VII. CORRECTION

We have the alternative of denying that section 801 imposes any duty to pursue trust purposes or interests of beneficiaries that can conflict with the duty to administer the trust in accordance with its terms; for the section can be understood according to traditional concepts as imposing (1) “a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust”<sup>33</sup> and (2) a duty to administer the trust, if it has beneficiaries,<sup>34</sup> “solely in the interest of the beneficiaries.”<sup>35</sup> The trust’s purposes are mentioned,<sup>36</sup> on this view, apropos of the first duty and only because trust terms have to be interpreted to be followed<sup>37</sup> while interpretation necessarily involves the ascription of coherent purposes to the settlor.<sup>38</sup> And the second duty, the traditional “duty of loyalty,”<sup>39</sup> is, like its extension, the “duty of impartiality,”<sup>40</sup> traditionally *subject* to the terms of the trust—it is not disloyal to remainder beneficiaries, for example, for a trustee to favor an income ben-

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<sup>32</sup> See *supra* text accompanying notes 3–5.

<sup>33</sup> RESTATEMENT (THIRD) OF TRUSTS § 76(1) (AM. LAW INST. 2007).

<sup>34</sup> I.e., if the trust is neither a charitable trust nor a noncharitable “purpose trust,” the latter being an express, noncharitable trust lacking definite or definitely ascertainable beneficiaries. See, e.g., UNIF. TRUST CODE § 409(1); PENNER, *supra* note 3, ¶¶ 9.1–9.30; Paul Matthews, *The New Trust: Obligations without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW 1, *passim* (A.J. Oakley ed., 1996).

<sup>35</sup> RESTATEMENT (THIRD) OF TRUSTS § 78(1).

<sup>36</sup> See *supra* Part I.

<sup>37</sup> Compare Hobbes’ dictum that “all laws, written and unwritten, have need of interpretation.” THEODORE F. T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY vi (Harold Dexter Hazeltine ed., 1922) (quoting Thomas Hobbes).

<sup>38</sup> See, e.g., DONALD DAVIDSON, *Hume’s Cognitive Theory of Pride*, in ESSAYS ON ACTIONS AND EVENTS 277, 290 (1980) (regarding interpretation of “human thoughts, speech, intentions, motives, and actions”); GREGORY VLASTOS, SOCRATES, IRONIST AND MORAL PHILOSOPHER 236 (1991) (regarding interpretation of texts). For what seems to be a flatfooted misunderstanding of this fundamental point in the context of statutory interpretation, see Gerald C. MacCallum, Jr., *Legislative Intent*, in ESSAYS IN LEGAL PHILOSOPHY 237, 240–45 (Robert S. Summers ed., 1970); compare RUPERT CROSS, STATUTORY INTERPRETATION 32–33, 57 (John Bell & George Engle eds., 3d ed. 2005) (getting the point right).

<sup>39</sup> RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. LAW INST. 2007).

<sup>40</sup> *Id.* § 79 cmt. b. (“The duty of impartiality is an extension of the duty of loyalty to beneficiaries . . .”).

eficiary when the terms of the trust direct the trustee to favor the income beneficiary.<sup>41</sup>

On this alternative interpretation (Interpretation 2), if the Protections, interpreted in light of the trust's purposes, allow *T* to comply with *H*'s exercises and nonexercises of her (*H*'s) power *without question*, then, provided the Protections are "for the benefit of [the trust's] beneficiaries,"<sup>42</sup> *T* cannot commit a breach of trust—she cannot violate any duty she owes as trustee to any beneficiary of the trust<sup>43</sup>—by adhering to the Protections.

### VIII. CONCLUSION

Thus, Interpretation 2 avoids the policy paradox we have noted,<sup>44</sup> makes sense of the counter-indications in the UTC to Interpretation 1,<sup>45</sup> and allows a trust professional like *T*, in a UTC state that has not enacted the UDTA, to credit a division of administrative labor like *S*'s as a scheme of fiduciary-risk allocation.

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<sup>41</sup> "Except as limited by law or public policy (see § 29), the extent of the interest of a trust beneficiary depends upon the intention manifested by the settlor." *Id.* § 49; *see id.* § 50 cmt. f (noting role of beneficiary's "favored status"); *id.* § 78(1) (subordinating trustee's "duty to administer the trust solely in the interest of the beneficiaries" to what is "otherwise provided in the terms of the trust"); *id.* § 79 cmt. b (subordinating duty of impartiality to preferences and priorities discernible from terms of beneficial interests). *See also* UNIF. FIDUCIARY INCOME AND PRINCIPAL ACT § 201(a)(2) (UNIF. LAW COMM'N 2018) (describing fiduciary's duty to "administer a trust or estate impartially, except to the extent the terms of the trust manifest an intent that the fiduciary shall or may favor one or more beneficiaries").

<sup>42</sup> As is required by UNIF. TRUST CODE § 105(b)(3) (UNIF. LAW COMM'N 2010).

<sup>43</sup> *See id.* § 1001(a) (defining "breach of trust").

<sup>44</sup> *See supra* Part VI.

<sup>45</sup> *See supra* Part V.