

**SETTLOR-AUTHORIZED FIDUCIARY
INDIFFERENCE TO TRUST PURPOSES AND THE
INTERESTS OF BENEFICIARIES UNDER THE
UNIFORM TRUST CODE**

James P. Spica*

Author's Synopsis: Almost twenty years after the promulgation of the Uniform Trust Code, the Uniform Directed Trust Act touched on a latent ambiguity in the UTC's specification of a trustee's "fundamental obligation." The resolution of that ambiguity is doctrinally knotty; the UDTA cuts the knot by means of a "Legislative Note"; this Article suggests how the knot might rather be untied.

I. INTRODUCTION	124
II. MOTIVATION	125
III. INTERPRETATION	126
IV. AMPHIBOLY	130
A. The Defense of Reasonable Reliance	132
B. Legislative History of Section 105	133
C. Legislative History of Section 808	134
V. SELF-FRUSTRATION	135
VI. CORRECTION	136
VII. CONSERVATION OF OBLIGATION	141
VIII. CONSTRUCTION	142
IX. CONCLUSION	144

* James P. Spica, Attorney, Chalgian & Tripp Law Offices, Southfield, Michigan, is an ACTEC Fellow, a Uniform Law Commissioner, and a sometime American Bar Association Advisor to the ULC. He is the principal author of several Michigan statutes, including the Personal Property Trust Perpetuities Act (2008 Mich. Pub. Act 148). He clerked for Hon. Richard C. Wilbur on the United States Tax Court (1985) and taught jurisprudence, taxation, and trusts and estates as an Assistant/Associate Professor of Law at the University of Detroit Mercy (1989–2000, tenured 1996). This Article expands upon observations made in his recently published article, James P. Spica, *Settlor-Authorized Fiduciary Indifference to Trust Purposes and the Interests of Beneficiaries*, 45 ACTEC L.J. 73 (2019).

I. INTRODUCTION

A Uniform Trust Code (UTC) state that is enacting the Uniform Directed Trust Act (UDTA) is advised by the Uniform Law Commission (ULC) to modify UTC section 105(b)(2):

A state that has enacted the Uniform Trust Code . . . should . . . delete Section 808(b) through (d), and add “subject to [insert cite to Uniform Directed Trust Act Sections 9, 11, and 12],” to the beginning of subsection (b)(2) of Section 105. Section 105(b)(2) prescribes the mandatory minimum fiduciary duty of a trustee, which is superseded with respect to a directed trustee by [the UDTA].¹

That modification cuts a Gordian knot in the interpretation of a pair of UTC section 105(b)’s imperatives: the imperatives are (1) that the terms of a trust cannot relieve a trustee of “the duty [described in section 801] to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries,”² and (2) that the terms of a trust cannot relieve a trustee of “liability [as described in section 1008(a)(1)] for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”³ The interpretive “knot” is tied with these strands by asking whether a settlor is precluded by them from providing, *for the beneficiaries’ sake*,⁴ that in certain circumstances, a trustee may *ignore* purposes of the trust and interests of the beneficiaries.

It is easy to locate (as is done in Part II of the Article) a rationale for such a provision that is germane to the UDTA and to articulate (as is done in Part III) an independent-positive-duties reading of UTC section 801 on which the modification of section 105(b)(2) prescribed in the Legislative Note quoted above would be necessary (in a UTC state) for the enactment of the UDTA. But we shall also see (beginning in Part IV) that given what

¹ UNIF. DIRECTED TRUST ACT § 9 legislative note (UNIF. LAW COMM’N 2017); *see also* UNIF. TRUST CODE § 105 legislative note (UNIF. LAW COMM’N amended 2018).

² UNIF. TRUST CODE § 105(b)(2); *see id.* § 801; *see also id.* § 103(8) (defining “interests of the beneficiaries” as “the beneficial interests provided in the terms of the trust”).

³ *Id.* § 1008(a)(1); *see id.* § 105(b)(10).

⁴ It is an independent imperative of UTC section 105(b) that the terms of a trust (*sc.*, the terms of an express trust other than a charitable trust or a noncharitable “purpose trust,” *see infra* note 65) must “be for the benefit of [the trust’s] beneficiaries.” *Id.* § 105(b)(3).

we shall call “conservation of aggregate fiduciary responsibility,” section 801 will bear an alternative, subordination-to-terms interpretation (specified in Part VI) that is favored (as discussed in Part IV) by the form of UTC section 1006 and the legislative histories of both section 105(b)(2) and the subsections of former section 808 that the UDTA displaces (in a UTC state), by policy considerations (described in Part V), and by a canon of statutory construction (adduced in Part VII) that is expressly incorporated in the UTC. On the favored interpretation, a UTC state that has not enacted the UDTA already allows a settlor, in the circumstances we are about to describe, to authorize a trustee simply to mind her own business in the sense contemplated by the default rules of the UDTA and, indeed, allows a settlor to do that more resolutely than the UDTA does.

II. MOTIVATION

Let us suppose that a settlor, *S*, wants a certain professional trust-service provider, *T*, to act as trustee of an irrevocable trust and to reduce her standard fee in light of the allocation, under the terms of the trust, of a discrete administrative function (discretionary distributions, for example, or trust investments) to *H*, a nonbeneficiary holder of a power to direct the trustee. *S* reasons that *H* will accept fiduciary responsibility for the directed function⁵ and that, because following directions is less onerous than exercising discretion, *T* should reduce her standard fee for the directed function.⁶ Assuming she can make the relevant price differentiation, *T* will evaluate whether to cut her fee by asking in what circumstances she can be liable for doing what *S* would have her do—*follow directions*. To the extent following a direction from *H* when *H* is acting within her authority under the terms of the trust will effectively insulate *T* from liability (if *H*'s direction is prejudicially improvident), *T* can take *S*'s division of

⁵ We may assume that the terms of the trust describe *H* as holding her power to direct *T* “in a fiduciary capacity, subject to all of the same duties and liabilities that a trustee would have in the exercise of the same power if that trustee were the sole trustee of the trust and not subject to direction by any nonbeneficiary.” As to the common law’s countenance of fiduciary administrative powers granted *nominatim* to nontrustees, see, e.g., RESTATEMENT (THIRD) OF TRUSTS § 75 cmt. b (AM. LAW INST. 2007); J.E. PENNER, THE LAW OF TRUSTS ¶ 3.20 (8th ed. 2012); JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 877 (3d ed. 2004).

⁶ Market incentives for price differentiation among professional trust-service providers 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).

administrative labor seriously as a scheme of fiduciary-risk allocation; but to the extent *T* can be liable to beneficiaries⁷ for doing exactly as directed by *H* when *H* is acting within her authority, 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.⁸

In the limiting case, *S* wants *T* to reduce her standard fee for the directed function to *zero*, which requires *S* to shift the burden of initiative as well as the power of decision; for in that case, *T* wants to know not only that she cannot be liable for following *H*'s directions when *H* is acting within her authority under the trust, but also that she (*T*) cannot be liable for doing *nothing* about *H*'s function when *H* is quiescent. Thus, in the limiting case, *S* wants to assure *T* that she (*T*) (1) will have no duty to second guess *H* when *H* is acting within her authority, (2) will not be liable for complying with an exercise or nonexercise of *H*'s power *regardless* of what may or may not comport with *H*'s duties to trust beneficiaries, (3) will have no duty to monitor *H* or report to others regarding *H*'s activities, and (4) will have no duty to prompt *H* when directions are not forthcoming or to take over any of *H*'s responsibilities in any circumstance; *T*'s charge, *S* wants to assure *T*, is to do as *H* directs regarding the subject of *H*'s power and, otherwise, to do *absolutely nothing* regarding that subject. Accordingly, *S* adopts a set of trust terms (Protections) that expressly provide *T* these several assurances. Can *T* safely rely on these Protections?

III. INTERPRETATION

The UDTA would sanction the Protections to some extent.⁹ But in a UTC state that has not enacted the UDTA (or in one that has enacted the UDTA without making the advised modification to UTC section

⁷ The possibility that *T* could be liable *to beneficiaries* of the trust depends on our stipulation (in the text) that the trust in question is irrevocable; for “while a trust is revocable [within the meaning of the UTC], rights of the trust beneficiaries are subject to the control of, and *the duties of the trustee are owed exclusively to, the settlor.*” UNIF. TRUST CODE § 603(b) (emphasis added); *see also id.* § 103(14) (defining adjective “revocable” as predicated of trusts within UTC).

⁸ *See Spica, supra* note 6, at 216.

⁹ *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 *passim* (2019).

105(b)(2)),¹⁰ it has to be reckoned, in light of section 105(b)'s strict enforcement of sections 801 and 1008(a)(1),¹¹ that the Protections purport to license *T*'s indifference to affected purposes of the trust and interests of the beneficiaries: to advance the beneficiaries' economic interests in administrative efficiency, *S* has presumed to make *T* fiduciary-care-free in respect of the trustee function governed by *H*'s power. And there is a fairly intuitive sense in which *T*'s reliance on the Protections might be said to constitute "reckless indifference" within the meaning of section 1008(a)(1):¹² "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."¹³

That is potentially a problem if the confluence of sections 105(b) and 801 imposes a "positive" duty¹⁴ to pursue purposes of the trust or interests of the beneficiaries that may be independent of the duty to administer the trust "in accordance with its terms."¹⁵ If so, it will be possible for the respective duties to conflict; and if they do, and an executed direction of *H*'s turns out to have been prejudicially improvident, *T* is liable to a claim that (1) although the direction was not contrary to the terms of the trust, *T* knew¹⁶ that it constituted a breach of a fiduciary duty of *H*'s so that despite the Protections, compliance was a breach of *T*'s positive duty to pursue

¹⁰ See *supra* note 1 and accompanying text.

¹¹ See *supra* notes 2–3 and accompanying text.

¹² See *supra* note 3 and accompanying text.

¹³ *Armitage v. Nurse*, [1998] Ch. 241 at 253–54 (Eng.) (emphasis added). The Protections presumably need not be cast strictly in the form of exculpatory provisions, i.e., in a form that assumes a breach of trust (see UNIF. TRUST CODE § 1008(a)(1) (UNIF. LAW COMM'N amended 2018)), in order for the court's equation of reliance and recklessness to hold: it is hard to see why the court should treat a term purporting to relieve the trustee of an ineradicable duty differently, for this purpose, than a term purporting to relieve the trustee of liability for a breach of such a duty.

¹⁴ "[C]onflict and profit rules take no account of the positive side of fiduciary duties, usually expressed as the duty to act in good faith for the benefit of the principal." R. P. Austin, *Moulding the Content of Fiduciary Duties*, in *TRENDS IN CONTEMPORARY TRUST LAW* 153, 159 (A. J. Oakley ed., 1996).

¹⁵ UNIF. TRUST CODE § 105(b)(2); see *id.* § 801.

¹⁶ For purposes of the UTC, "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).

relevant purposes of the trust and the interests of the beneficiaries;¹⁷ (2) given that in complying, *T* was relying on the Protections, *T*'s breach of trust was necessarily committed with reckless indifference;¹⁸ and, therefore, (3) *T* cannot be relieved—by the Protections or any other term of the trust—of liability for loss resulting from her compliance with *H*'s direction.¹⁹ On this independent-positive-duties interpretation of section 801, the Protections are unenforceable in these circumstances as a violation of section 105(b).²⁰

There is undoubtedly some support in case law and the academic literature for the idea that a trustee has an ineradicable, “positive” duty to pursue the interests of the beneficiaries. “The foundational positive duty is stipulated as a duty to seek the ‘best interests’ of the beneficiaries, which would seem to correlate with a right to have one’s interests served.”²¹

While a temporary express ouster of almost all accountability can be stipulated for in special circumstances, an exemption [i.e., exculpatory] clause cannot oust the trustees’ duties to act in good faith. If the settlor’s fully informed consent be obtained a clause can exempt the trustees from liability for negligence, whether or not a great or marked departure from the normal standard of conduct, *but not from liability for dishonesty which is taken to include acting deliberately with reckless indifference to the interests of the beneficiaries.*²²

What interests us, however, is the possible *independence* of such a duty from the concomitant duty to administer the trust in accordance with its terms. That a positive duty to pursue the interests of the beneficiaries should be *subject to* the settlor’s ability to determine the interests of the beneficiaries by means of express provisions in the trust instrument is inimical to the independent-positive-duties interpretation of section 801;

¹⁷ See *supra* text accompanying notes 14–15.

¹⁸ See *Armitage*, Ch. 241 at 254.

¹⁹ See UNIF. TRUST CODE § 1008(a)(1).

²⁰ See *id.* § 105(b)(2), (10).

²¹ Joshua Getzler, *Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39, 42 (Andrew S. Gold & Paul B. Miller eds., 2014).

²² David Hayton, *The Irreducible Core Content of Trusteeship*, in TRENDS IN CONTEMPORARY TRUST LAW, *supra* note 14, at 47, 62.

for that interpretation asserts that a positive trustee duty to pursue the interests of the beneficiaries or, perhaps, such a duty to pursue the purposes of the trust can *conflict* with, and, on the right facts, *trump*, the duty to administer the trust in accordance with its terms.²³

The independent-positive-duties interpretation seems a plausible description of the result under the UTC, given section 105(b)'s enforcement of sections 801 and 1008(a)(1), if a provision in what would otherwise be a trust instrument purports to relieve the “trustee”—the sole transferee of legal title to “trust property” and sole “fiduciary”—of any duty to act in good faith (or of liability even for breach of trust committed in bad faith). In that case, the arrangement intended by the nominal settlor is not a trust; for there is no beneficiary of the arrangement who is meant to have rights *in personam* against the nominal trustee concerning the “trustee’s” rights *in rem* as the legal owner of the *res*.²⁴

[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.²⁵

That axiom of common-law analysis is expressed within the UTC by section 105(b)'s enforcement of sections 801 and 1008(a)(1) with the effect that the nominal trustee in our faux-trust hypothetical is left, in spite of the offending provision of the “trust” instrument—either because there is a resulting trust²⁶ or because the instrument in question is allowed to limp along on a reading that ignores the offending provision—with a duty to administer a real trust in good faith and in accordance with the interests of beneficiaries.²⁷

²³ See *supra* text accompanying notes 14–20.

²⁴ See PENNER, *supra* note 5, ¶ 2.1; J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 134 (1997).

²⁵ *Armitage v. Nurse*, [1998] Ch. 241 at 253–54 (Eng.).

²⁶ I.e., the equitable analogue of an implied legal reversion. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 7 (AM. LAW INST. 2007); JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* §§ 116, 327.1, 414 (Roland Gray ed., 4th ed. 1942).

²⁷ See UNIF. TRUST CODE § 105(b)(2) (UNIF. LAW COMM’N amended 2018).

But as a description of a trustee's "fundamental obligation"²⁸ in the atmosphere of conventionally enforceable trust terms, the independent-positive-duties interpretation of section 801 is deeply implausible: we should be quite surprised to learn, for example, that a refusal by the undirected sole trustee of an irrevocable "education trust" to make expressly authorized distributions for college tuition could be justified, under the UTC, by a showing that the trustee has come honestly to believe that modern educational institutions are harmful, on balance, to the moral and intellectual development of young people! We expect the duty to pursue the interests of beneficiaries in good faith to trump a "trust" term that vitiates the trust relation by its purported protection of an undirected sole "trustee" or group of "cotrustees," but we do not expect that duty to trump a provision that clearly expresses the settlor's intent that what is patently a relation of trust should benefit her beneficiaries in any particular way that is "lawful, not contrary to public policy, and possible to achieve."²⁹

IV. AMPHIBOLY

The ULC Comment to section 801³⁰ neither confirms nor denies the correctness of the independent-positive-duties interpretation: the Comment says that section 801 "confirms that a *primary duty* of a trustee is to follow *the terms and purposes of the trust* and to do so in good faith,"³¹ 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, such as an independent duty to consult the interests of beneficiaries. Similarly, the Comment suggests that "the

²⁸ *Id.* Art. 8 general comment.

²⁹ *Id.* § 105(b)(3).

³⁰ "[T]he Comments to any Uniform Act, may be relied on as a guide for interpretation." *Id.* § 106 cmt. (citing *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code) and *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act)); *see also, e.g.*, Harry Wilmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 970 (1940). For the proposition that decisions of foreign courts interpreting a given uniform act should be considered by courts in states that have enacted that act, *see, e.g.*, Robert S. Summers, *Statutory Interpretation in the United States*, in *INTERPRETING STATUTES: A COMPARATIVE STUDY* 407, 427-428 (D. Neil MacCormick & Robert S. Summers eds, 1991).

³¹ UNIF. TRUST CODE § 801 cmt. (emphasis added).

purposes and particular terms of the trust can on occasion conflict”³² without indicating whether such conflict is liable to be normative, being a contest between independent duties of the trustee, rather than merely interpretive, as when something expressed in the trust instrument conflicts with what otherwise seem to be the trust’s purposes.³³ “If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition . . . to modify or terminate the trust.”³⁴

As far as we can learn from the Comment to section 801, then, it is possible that the purposes of a trust and the trust’s terms can conflict normatively in the way postulated by the independent-positive-duties interpretation, but it is also possible that the conjunctive “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*,³⁵ which would allow interpretive but not normative conflict between purposes and terms.³⁶ Likewise it is possible that the “interests of the beneficiaries” within the meaning of section 801³⁷ are so much a function of the “terms and purposes of the trust” that a duty to pursue the one just *is* a duty to pursue the other so that there can be no question of normative conflict. But it is also possible (as far as we can learn from the Comment) that the trustee’s duty to pursue the interests of the beneficiaries is *another* “primary duty”

³² *Id.*

³³ Interpretive conflict can create doubt about what the trustee should do by creating doubt about whether express terms of a trust accurately reflect the settlor’s intention (when the trustee acknowledges the intent of the settlor as her guide). This is the sort of conflict that the “principle of charity,” for example, addresses: “‘Charity’ as a principle of interpretation . . . is the principle on which we decline to take persons to mean statements in which they recognizably misspeak themselves.” GREGORY VLASTOS, *SOCRATES, IRONIST AND MORAL PHILOSOPHER* 236 (1991). Normative conflict, on the other hand, when it is possible, will create doubt about what the trustee should do because of antinomy—because the confluence of the terms of the trust and applicable law subject the trustee to mutually exclusive trustee duties. This is the sort of conflict that moral intuitionists, for example, believe is characteristic of ethical reasoning: “Intuitionist theories [] have two features: first they consist of a plurality of first principles *which may conflict to give contrary directives in particular types of cases*; and second, they include no explicit method, no priority rules, for weighing these principles against one another.” JOHN RAWLS, *A THEORY OF JUSTICE* 34 (1971) (emphasis added).

³⁴ UNIF. TRUST CODE § 801 cmt.

³⁵ See *infra* notes 45, 67–69 and accompanying text.

³⁶ See *supra* note 33.

³⁷ See *supra* note 2 and accompanying text.

of the trustee³⁸ that may be independent of, and, therefore, potentially conflict with, the duty to administer the trust in accordance with its “terms and purposes.” In each case, the Comment to section 801 fails to rule out either the possibility that would militate against the independent-positive-duties interpretation or the possibility that would support it.

A. The Defense of Reasonable Reliance

UTC section 1006 is a defense: “A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary *for a breach of trust* to the extent the breach resulted from the reliance.”³⁹ As a defense, the section simply *assumes* a breach—“a violation of a duty the trustee owes to a beneficiary”⁴⁰—without telling us anything about what *constitutes* a breach. Logically, therefore, the section cannot weigh directly in favor of or against the independent-positive-duties interpretation: that interpretation is a theory about what constitutes a breach of trust, given section 105(b)’s strict enforcement of section 801, and is therefore logically prior to the question of what defenses might be available if such a breach should occur.

But section 1006 presumably cannot provide a back-door vindication of *T*’s reliance on the Protections *if* those Protections would otherwise be unenforceable as a violation of section 105(b)’s insistence on section 1008(a)(1) (as is entailed by the independent-positive-duties interpretation):⁴¹ in that case, *T* presumably cannot shelter under section 1006 by claiming that it was reasonable of her, having cut her fee for the directed function in light of the Protections, to rely on those Protections; for that would allow the Protections to relieve *T* of liability for what is, by hypothesis (i.e., assuming the independent-positive-duties interpretation is correct), a “breach of trust committed . . . with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”⁴² For that reason, we must count the absence of any qualification in the expression of section 1006 as internal evidence (within the UTC) against the independent-positive-

³⁸ See *supra* note 31 and accompanying text.

³⁹ UNIF. TRUST CODE § 1006 (emphasis added).

⁴⁰ *Id.* § 1001(a).

⁴¹ See *supra* Part III.

⁴² See *supra* note 3 and accompanying text; see also *supra* Part III. For the idea that internal contradiction is to be avoided in statutory interpretation, see, e.g., RUPERT CROSS, STATUTORY INTERPRETATION 88–92 (John Bell & George Engle eds., 3d ed. 2005); see also CARLETON KEMP ALLEN, LAW IN THE MAKING 403–04 (4th ed 1946) (regarding avoidance of anomaly in statutory interpretation).

duties interpretation: that reasonable reliance on express trust terms should be a sovereign defense to liability for breach of trust is simply not consistent with the idea that, in certain circumstances at least, a trustee may have an ineradicable duty *not to rely* on express trust terms that are inimical to purposes of the trust or interests of the beneficiaries.

B. Legislative History of Section 105

A 2005 amendment to the Comment to section 105 would seem to discount the possibility that a positive duty on the part of a trustee to pursue either purposes of the trust or interests of the beneficiaries could ever conflict with the trustee's concomitant duty to administer the trust in accordance with its terms.⁴³ For one thing, the amended Comment denies that there is any substantial difference between whatever is properly referred to as "the purposes of the trust," on the one hand, and whatever is properly referred to as "the terms and purposes of the trust and the interests of the beneficiaries," on the other:

Subsection (b)(2) is revised to make the language consistent with the corresponding duties in Sections 801 and 814(a), which require that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in good faith and *in accordance with the purposes of the trust*. The amendment adds that [the settlor] also cannot waive the obligation to act *in accordance with the terms of the trust and the interests of the beneficiaries*. The purpose of the amendment is to make the language consistent, not to change the substance of the section.⁴⁴

If (as the Comment suggests) section 105(b)(2) has the same substantive effect when the expression "terms and purposes of the trust and the interests of the beneficiaries" is substituted for the expression "purposes of the trust," then for purposes of section 105(b)(2), the two

⁴³ Cf. *supra* text accompanying note 23.

⁴⁴ UNIF. TRUST CODE § 105 cmt. (emphasis added). The amended Comment does not explain how the posited synonymy of the expressions in question is to be reconciled with the suggestion in the Comment to section 801 that "the purposes and particular terms of the trust can on occasion conflict." See *supra* note 32 and accompanying text. But we have already noted a candidate reconciliation *supra* in the text accompanying notes 35–36.

expressions refer to the same thing—the denotation of “purposes of the trust” includes, in addition to whatever might be distinguished as the trust’s *purposes*, whatever might be distinguished as the trust’s “terms” and whatever might be distinguished as “the interests of the beneficiaries.” That means that, as far as section 105(b)(2) is concerned, the duty to administer the trust *in accordance with its purposes* cannot conflict with a duty to administer the trust *in accordance with its terms or the interests of beneficiaries* because the former duty *includes* the latter—the duty to do the one just *is* the duty to do the other.⁴⁵

The amended Comment to section 105 similarly seems to rule out any conflict between a positive duty to pursue interests of the beneficiaries and the duty to administer the trust in accordance with its terms; for the Comment posits that a settlor can *determine* the interests of the beneficiaries *by means of* express terms of the trust:

Absent some other restriction, a settlor is always free to specify the trust’s terms to which the trustee must comply. Also, “interests of the beneficiaries” is a defined term in Section 103(8) meaning the beneficial interests *as provided in the terms of the trust, which the settlor is also free to specify*.⁴⁶

To the extent the terms of the trust *yield* the interests of the beneficiaries, the duty to administer the trust *in accordance with the interests of the beneficiaries* cannot conflict with a duty to administer the trust in accordance with its terms because the latter duty *informs* the former.

C. Legislative History of Section 808

There was an even clearer contradiction of the independent-positive-duties interpretation in the Comment to former section 808;⁴⁷ for although

⁴⁵ Analogously, e.g., dictates of the “law” referred to in the conventional expression “law and heraldry” cannot conflict with heraldic dictates because, conventionally, the expression “law and heraldry” just refers to *heraldic law* or *the laws of heraldry*. See THE SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, 952 (C. T. Onions ed., 3d ed. 1973) (entry for “hendiadys”). Neither the dictates of the relevant “law” nor those of the discipline “heraldry” is a proper subset of the conventional denotation.

⁴⁶ UNIF. TRUST CODE § 105 cmt. (emphasis added).

⁴⁷ See *id.* § 808 cmt. (indicating former UTC section 808 subsections (b)–(d) were deleted in 2018 in light of UDTA).

that section provided that a nonbeneficiary holder of a power to direct is “presumptively a fiduciary,”⁴⁸ and that a trustee must act in accordance 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 person holding the power owes to the beneficiaries of the trust*,”⁴⁹ 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*.”⁵⁰ If *that* is true, the terms of *S*’s trust can completely relieve *T* of the duty to second guess *H* in the exercise or nonexercise of the power to direct (at least when *H* is acting within her authority under the terms of the trust).⁵¹ Unfortunately, the Comment did not explain how *S*’s latitude to require *T* to accept *H*’s decisions “without question” is to be reconciled with section 105(b)’s strict enforcement, *regardless* of the terms of the trust, of sections 801 and 1008(a)(1).⁵²

V. SELF-FRUSTRATION

The Legislative Note to the UDTA quoted at the outset⁵³ indicates that the ULC has concluded that such a reconciliation is at least doubtful.⁵⁴ And we can grant that much based on the logical coherence of the independent-positive-duties interpretation, its plausibility as an account of the case in which a “trust” term vitiates the putative trust relation by overprotection of an undirected sole “trustee” or group of “cotrustees,” and the absence of any counter-indication in the Comment to section 801.⁵⁵ But apart from ignoring the counter-indications in the Comments to section 105 and former section 808 and in the unreserved expression of section 1006,⁵⁶ the independent-positive-duties interpretation involves us in the paradox that trust beneficiaries should *suffer* for being equity’s

⁴⁸ *Id.* § 808(d) (deleted 2018).

⁴⁹ *Id.* § 808(b) (deleted 2018) (emphasis added).

⁵⁰ *Id.* § 808 cmt. (emphasis added).

⁵¹ *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).

⁵² *See* UNIF. TRUST CODE § 808 cmt. *passim*; *see also supra* Parts I, III.

⁵³ *See supra* note 1.

⁵⁴ For a discussion of grounds for that conclusion, *see* Spica, *supra* note 51, at 372–77.

⁵⁵ *See supra* Parts III–IV.

⁵⁶ *See supra* Part IV(A)–(C).

“darling[s],”⁵⁷ “the spoilt child[ren] of English jurisprudence”;⁵⁸ for on the independent-positive-duties interpretation, our regard for the beneficiaries’ “beneficial interests”⁵⁹ turns out to be so great that we cannot allow *S* to confer on her beneficiaries the *benefit* (as she conceives it) of a division of administrative labor among professionals without multiplying fiduciary responsibility and, thereby, the cost of administration.⁶⁰

That seems perverse given that if *S* has her way, the trust beneficiaries will be owed exactly the same quantum of fiduciary duty they would be owed if *T* were not subject to direction—*S* intends that *H* will accept full fiduciary responsibility for the directed function.⁶¹ The law does not require *S* to divide administrative labor, let alone to avail of professional expertise: the measure of fiduciary responsibility associated with the undirected trusteeship of a single natural person is evidently sufficient from the point of view of policy. Why, then, should we read the confluence of sections 105(b), 801, and 1008(a)(1) in such a way as to *tax* the beneficiaries’ interests (by the amount of *T*’s standard fee for the directed function)⁶² just because *S* (1) wants to secure for her beneficiaries the benefit (as she conceives it) of professional administration and (2) thinks that the best person to perform the directed function is not also the best person to perform the residuum of trustee functions?

VI. CORRECTION

One answer, of course, would be that the statute simply will not admit of an interpretation that avoids that result. But that is not so; for we can cleave to common law⁶³ conceptions in arguing that, properly understood,

⁵⁷ FREDERIC WILLIAM MAITLAND, *Trust and Corporation*, in *SELECTED ESSAYS* 141, 173 (H. D. Hazeltine et al. eds., 1936).

⁵⁸ *Id.*

⁵⁹ *See supra* note 2.

⁶⁰ *See supra* note 20 and accompanying text; *see also supra* Part II.

⁶¹ *See supra* note 5.

⁶² *See supra* Part II.

⁶³ The reference here is not to the former separation of the jurisdictions of the King’s or Queen’s Bench, on the one hand, and the Court of Chancery, on the other (as to which, see, e.g., F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 15–20 (A.H. Chaytor & W.J. Whittaker eds., rev. by John Brunyate, 2d ed. 1936)), but rather to judge-made rules and principles, legal *and* equitable, applicable in common law jurisdictions since the statutory unification of law and equity in England by the Judicature Acts 1873–75. *See, e.g.*, PENNER, *supra* note 5, ¶¶ 1.10–1.15 (discussing the unification of the jurisdictions in England). In this sense, “common law [is] contrasted with *statute law*” so that “equity is just another

UTC section 801 does *not* impose any duty to pursue purposes of the trust or interests of the beneficiaries that is sufficiently independent of the trustee's duty to administer the trust in accordance with its terms to be capable of conflicting with, let alone trumping, the latter duty. On this alternative, subordination-to-terms interpretation, section 801 is to 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"⁶⁴ and (2) a duty to administer the trust, if it has beneficiaries,⁶⁵ "solely in the interest of the beneficiaries."⁶⁶

The trust's purposes are mentioned,⁶⁷ on this view, apropos of the first duty and only because the terms of a trust have to be interpreted to be followed⁶⁸ while interpretation necessarily involves the ascription of coherent purposes to the settlor.⁶⁹ And the second duty, the traditional

form of common law." A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77, 77 (A.W.B. Simpson ed., 2d series 1973) (emphasis added).

⁶⁴ RESTATEMENT (THIRD) OF TRUSTS § 76(1) (AM. LAW INST. 2007); *see, e.g.*, HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 483 (Jill E. Martin ed., 13th ed. 1989) (discussing *Re Miller's Deed Trust* (1978) 75 L.S. Gaz. 454).

⁶⁵ 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) (UNIF. LAW COMM'N amended 2018). *See generally* PENNER, *supra* note 5, ¶¶ 9.1–9.30; Paul Matthews, *The New Trust: Obligations without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW, *supra* note 14, at 1 *passim*. Purpose trusts are also sometimes called "trusts of imperfect obligation." *See* PENNER, *supra* note 5, ¶ 9.18; MAURIZIO LUPOI, TRUSTS: A COMPARATIVE STUDY 124 (Simon Dix trans., 2000).

⁶⁶ RESTATEMENT (THIRD) OF TRUSTS § 78(1) (AM. LAW INST. 2007).

⁶⁷ I.e., in UTC section 801. *See supra* note 2 and accompanying text.

⁶⁸ 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).

⁶⁹ *See, e.g.*, MICHAEL DUMMETT, ORIGINS OF ANALYTICAL PHILOSOPHY 158 (1994) (discussing interpretation of "people's actions, non-linguistic as well as linguistic"); DONALD DAVIDSON, *Hume's Cognitive Theory of Pride*, in ESSAYS ON ACTIONS AND EVENTS 277, 290 (1980) (discussing interpretation of "human thoughts, speech, intentions, motives, and actions"); VLASTOS, *supra* note 33, at 236 (referring to interpretation of texts); ALLEN, *supra* note 42, at 261–62, 303 (discussing statutory interpretation). 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 CROSS, *supra* note 42, at 32–33, 57 (getting the fundamental point right apropos of statutory interpretation).

“duty of loyalty,”⁷⁰ is, like its extension, the “duty of impartiality,”⁷¹ traditionally *subject* to the terms of the trust: “The trustee must . . . exercise his ownership of the property according to the trust terms, and *in this way* the trustee’s exercise of his legal powers will enure to the benefit of the beneficiaries.”⁷² The relevant “interests of the beneficiaries”⁷³ are *instinct* in the terms of the trust because in addition to their having to be practicable, lawful, and congenial to public policy,⁷⁴ the terms of a trust have to be “*for the benefit of [the trust’s] beneficiaries.*”⁷⁵ And, of course, the settlor is not bound to benefit her beneficiaries equally—it is not an instance of fiduciary disloyalty to remainder beneficiaries, for example, for a trustee to favor an income beneficiary in making discretionary distributions when the terms of the trust require or permit the trustee to favor the income beneficiary.⁷⁶

It is not only appropriate but required by the duty of impartiality that a trustee’s treatment of beneficiaries, and the balancing of their competing interests, reasonably reflect any preferences and priorities that are discernible

⁷⁰ RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. LAW INST. 2007).

⁷¹ “The duty of impartiality is an extension of the duty of loyalty to beneficiaries.” *Id.* § 79 cmt. b.

⁷² PENNER, *supra* note 5, ¶ 2.17 (emphasis added).

⁷³ I.e., the interests referred to in UTC sections 105(b)(2) and 801 and defined, for the UTC’s purposes, in section 103(8). *See supra* note 2 and accompanying text.

⁷⁴ *See* UNIF. TRUST CODE §§ 105(b)(3), 404 (UNIF. LAW COMM’N amended 2018); RESTATEMENT (THIRD) OF TRUSTS §§ 29–30 (AM. LAW INST. 2003); HANBURY & MAUDSLEY, *supra* note 64, at 317–26. We have already noted that in itself (i.e., without regard to the UDTA), the UTC assumes that a settlor’s attempt to shield a trustee from liability for complying with the exercise or nonexercise of a power to direct the trustee (when the power holder is acting within her authority under the terms of the trust) is not against public policy. *See supra* note 50 and accompanying text.

⁷⁵ UNIF. TRUST CODE §§ 105(b)(3), 404; *see* RESTATEMENT (THIRD) OF TRUSTS § 27(2) (AM. LAW INST. 2003).

⁷⁶ “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.” RESTATEMENT (THIRD) OF TRUSTS § 49 (AM. LAW INST. 2003); *see 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”); *see also id.* § 50 cmt. f (noting the potential role of beneficiary’s “favored status” in interpretation of discretionary provision).

from the terms, purposes, and circumstances of the trust and from the nature and terms of the beneficial interests.⁷⁷

To that extent, the characteristic method of common law adjudication, *viz.*, analogy and distinction,⁷⁸ tends to refute an independent-positive-duties conception of the trustee's ineradicable duties; for it is difficult to see how *S*'s Protections can be distinguished, for present purposes, from a trust provision permitting the trustee to give precedence in making discretionary distributions to the desires or needs of an income beneficiary over those of remainder beneficiaries.⁷⁹ A trustee operating under the latter provision is invited by it to ignore the effects of certain distributions on (1) discrete purposes of the trust (e.g., the settlor's manifest intent to benefit remainder beneficiaries, in certain circumstances, rather than the income beneficiary's estate or the creditors of the income beneficiary's estate) and (2) discrete interests of beneficiaries (i.e., those of remainder beneficiaries).⁸⁰ And like the precedence provision, which is evidently for the benefit of the income beneficiary in question, the Protections are clearly for the benefit of *S*'s beneficiaries: *S*'s motivation throughout has been to relieve her beneficiaries' beneficial interests in the *res* of the economic burden of *T*'s standard fee for the directed function.⁸¹ Presumably the fact that *in the abstract* (before actual conduct by *H*

⁷⁷ *Id.* § 79 cmt. b (internal cross-reference omitted) (emphasis added); 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").

⁷⁸ See, e.g., ALLEN, *supra* note 42, at 298–300; RUPERT CROSS, PRECEDENT IN ENGLISH LAW 24–26, 182–88 (3d ed. 1977); A.G. Guest, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE 176, 190–91 (A.G. Guest ed., 1st series 1968); A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE, *supra*, 148, 158, 171–72. As to the antiquity of this characteristic of common law adjudication and its independence of the relatively recent doctrine of precedent, see, e.g., H.F. JOLOWICZ, LECTURES ON JURISPRUDENCE 226–30 (J.A. Jolowicz ed., 1963).

⁷⁹ See *supra* note 76 and accompanying text.

⁸⁰ Cf. *supra* text accompanying notes 10–11.

⁸¹ See *supra* Part II. Again, *S* is not bound to benefit her beneficiaries equally, see *supra* note 76 and accompanying text, but we may note that as a matter of fiduciary accounting, the cost of trustee fees is ordinarily allocated equally to principal and income, which means that the burden affects both income and remainder beneficiaries. See UNIF. FIDUCIARY INCOME AND PRINCIPAL ACT §§ 501(a)(1), 502(a)(1) (UNIF. LAW COMM'N 2018).

threatens the interest of any particular trust beneficiary), *S* intends the Protections to benefit *all of the trust beneficiaries*, whereas the precedence provision is all along intended to benefit a proper subset of affected beneficiaries (the income beneficiary) at the expense of another proper subset (the remainder beneficiaries), makes it *harder*, not easier, to distinguish these cases for our purposes.

So, we have available to us a subordination-to-terms interpretation of section 801, according to which the force of the section's references to good faith, purposes of the trust, and interests of the beneficiaries⁸² is adverbial—indicating *the manner in which* the trustee is required to administer the trust *in accordance with its terms*. On this interpretation, if the Protections are properly understood in light of the trust's purposes as requiring or allowing *T* to comply with *H*'s exercises and nonexercises of her (*H*'s) power *without question*, then, because the Protections are “for the benefit of [the trust's] beneficiaries” within the meaning of section 105(b)(3),⁸³ *T* cannot commit a breach of trust—she cannot violate any duty she owes as trustee to any beneficiary of the trust⁸⁴—by adhering to the Protections.⁸⁵

⁸² See *supra* note 2 and accompanying text.

⁸³ See UNIF. TRUST CODE § 105(b)(3) (UNIF. LAW COMM'N amended 2018); see also *supra* note 75 and accompanying text.

⁸⁴ See UNIF. TRUST CODE § 1001(a) (defining “breach of trust”).

⁸⁵ See *supra* note 77 and accompanying text. The strategy of the subordination-to-terms interpretation is not peculiar to law: there may be a motivation within any normative system—any system characterized by rules of conduct—to avoid antinomy by distinguishing between justifications for rules of conduct, on the one hand, and justifications of particular acts that are subject to the rules, on the other, and restricting the role of a particular consideration to one of these discrete levels of justification. The subordination-to-terms interpretation of section 801 restricts direct appeals to the interests of trust beneficiaries to claims about the enforceability of express trust terms; to the extent enforceable terms dictate trustee behavior, the justification for any particular act of a trustee subject to the terms is not that the act is in the best interests of the beneficiaries, but that the act complies with the terms of the trust. See *supra* notes 70–77 and accompanying text. On this interpretation, an attempt by a trustee directly to maximize the interests of trust beneficiaries can be a breach of trust if it violates enforceable terms of the trust. There are fairly precise analogies in moral theory as, for example, an interpretation of Aristotle's *Nicomachean Ethics* according to which a direct attempt to maximize scope for the desideratum of *theoria* (philosophical reflection) can be condemned morally if it violates moral rules justified by their tendency to maximize scope for *theoria*; to the extent such moral rules dictate behavior, the justification for any particular act subject to the rules is, not that the act increases scope for *theoria*, but that it complies with the rules. See J.L.

VII. CONSERVATION OF OBLIGATION

The subordination-to-terms interpretation provides a very plausible description of a trustee's "fundamental obligation"⁸⁶ in the atmosphere of conventionally enforceable trust terms, but confronted with a term that vitiates the trust relation by its purported protection of an undirected sole "trustee" or group of "cotrustees," the subordination-to-terms interpretation is obviously liable to prove too much: if a provision in what would otherwise be a trust instrument purports to relieve the "trustee"—the sole transferee of legal title to "trust property" and sole "fiduciary"—of any duty to act in good faith (or of liability even for breach of trust committed in bad faith), we should not be prepared to enforce the provision, under the UTC, upon a showing (1) that the "settlor" was convinced that the person named as "trustee" is uniquely qualified to perform all trustee functions for the "trust beneficiaries" and (2) that that person demanded complete civil immunity as a condition for accepting the "trust"; for, as we have already noted, the arrangement described by the nominal settlor in that case is simply not a trust.⁸⁷

So, it turns out that the merits and demerits of the two interpretations of section 801 that we have mooted here are strictly reciprocal: the independent-positive-duties interpretation yields what is clearly the right result under the UTC, given section 105(b)'s enforcement of sections 801 and 1008(a)(1), in case a "trust" term vitiates the putative trust relation by its purported protection of an undirected sole "trustee" or group of "cotrustees," but that interpretation provides a very implausible account of a trustee's duty to follow conventionally enforceable trust terms;⁸⁸ whereas the subordination-to-terms interpretation provides a highly satisfactory account of the latter kind, but is liable to yield what is clearly the *wrong* result if a "trust" term vitiates the putative trust relation by overprotection of an undirected sole "trustee" or group of "cotrustees." This reciprocity between mutually exclusive interpretations no doubt indicates that the UTC is ill served by its attempt to control the protection that express trust terms can afford trustees by adverting, in section 105(b)(2), to a provision (*viz.*, section 801) that prescribes a trustee's duty to comply with express trust terms.

Ackrill, *Aristotle the Philosopher* 139–41 (1981). "If this is so, then of course there cannot, at bottom, be any conflict between morality and [the pursuit of *theoria*]." *Id.* at 140.

⁸⁶ UNIF. TRUST CODE Art. 8 general cmt.

⁸⁷ See *supra* notes 24–27 and accompanying text.

⁸⁸ See *supra* notes 28–29 and accompanying text.

What is important for our purposes, though, is to decide which of the two disparate functions—ensuring a minimum of fiduciary obligation to trust beneficiaries *regardless* of trust terms, on the one hand, and ensuring that permissible trust terms are followed, on the other—with which the UTC burdens the same string of words (“in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries”)⁸⁹ is actually implicated in our case involving *S*, *H*, and *T*.⁹⁰ And we have already clearly answered that question: again, if *S* has her way, her trust beneficiaries will be owed exactly the same quantum of fiduciary duty they would be owed if *T* were not subject to direction; for *S* intends that *H* will accept full fiduciary responsibility for the directed function⁹¹—the case displays what may be called “conservation of aggregate fiduciary responsibility.”⁹² Our concern is, therefore, not with the function of the burdened string of words (i.e., the words common to sections 105(b)(2) and section 801) that ensures a minimum of fiduciary obligation to trust beneficiaries—*S*’s conservation of aggregate fiduciary responsibility meets that function; our concern is with the function that ensures fiduciary adherence to permissible trust terms. And it is the subordination-to-terms interpretation that provides a satisfactory account of *that* function.

VIII. CONSTRUCTION

Thus, we may say that given conservation of aggregate fiduciary responsibility (in the sense described above), the common law principles that inform the subordination-to-terms interpretation of section 801 favor that interpretation as a conception of a trustee’s ineradicable duties over the alternative conception implicit in the independent-positive-duties interpretation.⁹³ To that extent, canons of statutory construction recommend the subordination-to-terms interpretation *as an interpretation of section 801’s application in cases displaying conservation of aggregate fiduciary*

⁸⁹ UNIF. TRUST CODE § 105(b)(2); *see id.* § 801.

⁹⁰ I.e., the situation described *supra* Part II.

⁹¹ *See supra* note 5 and text accompanying note 61.

⁹² Spica, *supra* note 6, at 218. We need not assume that the law governing the construction (i.e., meaning and effect) of *S*’s trust terms *requires* the conservation of aggregate fiduciary responsibility remarked in the text: it may be a contingent feature of our hypothesized facts that *S* wants *H* to assume full fiduciary responsibility for the directed function.

⁹³ *See supra* notes 79–81 and accompanying text.

responsibility. That is because, although it is marginally innovative,⁹⁴ the UTC is largely a codification of common law,⁹⁵ and the practical necessity that judges must understand legislation that modifies an aspect of the common law *in light of* what is being modified makes interpretation of such legislation conservative in the sense that “[t]he presumption is for a minimum change to be effected by legislation in a common law area.”⁹⁶ “[N]o statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.”⁹⁷

[T]he legislature is deemed to act with an understanding of common law in existence before the legislation was enacted. Moreover, statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law. In other words, *where there is doubt regarding the meaning of such a statute, it is to be given the effect which makes the least rather than the most change in the common law*. This Court will presume that the Legislature

⁹⁴ UNIF. TRUST CODE prefatory note.

⁹⁵ I.e., in the acceptance indicated *supra* note 63. See UNIF. TRUST CODE § 106 cmt.; see generally John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 *passim* (2007).

⁹⁶ CROSS, *supra* note 42, at 43–44; see also KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 119 (2013) (indicating that “[a]mong other substantive canons . . . statutes that alter the common law should be strictly construed”). See generally ALLEN, *supra* note 42, at 378–80. As to the antiquity of this form of conservatism, see, e.g., S. E. THORNE, *The Equity of a Statute and Heydon’s Case*, in ESSAYS IN ENGLISH LEGAL HISTORY 155, 161–62 (1985).

⁹⁷ Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 304–05 (1959) (citations omitted); see also, e.g., Heaney v. Borough of Mauch Chunk, 322 Pa. 487, 490 (1936) (stating that “[s]tatutes in derogation of the common law must be construed strictly and only such modification of the law will be recognized as the statute clearly and definitely prescribes”); Buradus v. Gen. Cement Prods. Co., 356 Pa. 349, 349 (1947) (stating that “in the absence of express declaration, the law presumes that the [statute] did not intend to make any change in the common law”); State v. Sanchez, 204 Conn. 472, 479 (1987) (stating that presumption against elimination of common-law right by statute “can be overcome only if the legislative intent is clearly and plainly expressed”).

of this state is familiar with the principles of statutory construction.⁹⁸

The UTC actually *codifies* this canonical respect for the common law; for UTC section 106 provides that the common law⁹⁹ “supplement[s] [the UTC], except to the extent modified by [the UTC] or another statute of [the enacting state].¹⁰⁰ Thus, when “there is doubt regarding the meaning of [the UTC],”¹⁰¹ especially as to whether or to what extent the UTC has altered the common law, the constructive presumption is conservative.

IX. CONCLUSION

There is doubt as to the meaning of UTC section 801 under section 105(b)’s enforcement in cases displaying conservation of aggregate fiduciary responsibility: the statutory language will bear *both* the independent-positive-duties interpretation,¹⁰² which is presumably the impetus for the Legislative Note to the UDTA that we began by quoting,¹⁰³

⁹⁸ Nation v. W.D.E. Elec. Co., 454 Mich. 489, 494–95 (1997) (citations omitted) (emphasis added).

⁹⁹ Again, in the acceptance indicated *supra* note 63. *See supra* note 95.

¹⁰⁰ UNIF. TRUST CODE § 106.

¹⁰¹ *See supra* note 98 and accompanying text.

¹⁰² *See supra* Part III.

¹⁰³ *See supra* note 1. It has been suggested that in a UTC state that has not enacted the UDTA, the source of a trustee’s duty to second guess the conduct of a *cotrustee* is the ineradicable duty of good faith: “[Section] 105(b) does make mandatory a cotrustee’s duty ‘to act in good faith.’ And in most cases, good faith would require a cotrustee to take reasonable steps to prevent or redress another cotrustee’s breach of trust even if the terms of the trust limit the cotrustee’s sphere of responsibility.” John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3, 58 n.210 (2019). In the situation we have in view, *mutatis mutandis*, that assertion begs the question (in the logical sense, *petitio principii*); for unless section 105(b) imposes a positive duty to pursue purposes of the trust or interests of the beneficiaries that may be independent of, and, therefore, potentially conflict with, the duty to administer the trust in accordance with its terms (as we hypothesized *supra* Part III), there is no reason why a trustee could not *in good faith* adhere to terms of the trust that, *for the benefit of the beneficiaries* (*see supra* notes 75, 81 and accompanying text), require or permit the trustee to mind her own administrative business. And our hypothetical facts involving *S*, *T*, and *H* neatly illustrate the relevant psychological state: *T* is thoroughly acquainted with *S*’s purpose in fashioning the Protections and with the benefit conferred on *S*’s beneficiaries thereby because it will have been she (*T*) who waived her professional fee for the directed function in light of the Protections. *See supra* Part II. To the extent that what the settlor wanted to occur for the sake of her beneficiaries is the touchstone, there can be no question of *T*’s acting in bad faith by adhering to the Protections.

and the subordination-to-terms interpretation,¹⁰⁴ which is favored in such cases by common law authorities on trustee obligation and settlor autonomy.¹⁰⁵ We have seen that these alternative interpretations are mutually exclusive,¹⁰⁶ that the legislative history is ambiguous,¹⁰⁷ and that because common law authorities favor a subordination-to-terms conception of trustee responsibility over an independent-positive-duties conception when conservation of aggregate fiduciary responsibility is observed, a canon of statutory construction that is expressly incorporated in the UTC¹⁰⁸ favors the subordination-to-terms interpretation of section 801 for that circumstance.¹⁰⁹

In that circumstance (i.e., given conservation of aggregate fiduciary responsibility), the subordination-to-terms interpretation avoids the paradox that a settlor like *S* (in our hypothetical) should be constrained by the law's anxiety to protect the beneficial interests of trust beneficiaries to *tax* her beneficiaries' beneficial interests with professional fees for vigilance that is, from point of view of policy, presumptively superfluous.¹¹⁰ That deployment of the subordination-to-terms interpretation also makes sense of the counter-indications to the independent-positive-duties interpretation that are to be found in the UTC.¹¹¹ It entails that the UDTA's Legislative Note regarding UTC section 105(b)(2)¹¹² is not strictly necessary, but it means that a UTC state that has not enacted the UDTA already allows a professional trust-service provider like *T* (in our hypothetical) to credit a division of administrative labor like *S*'s as a scheme of fiduciary-risk allocation.

In fact, a UTC state that has not enacted the UDTA arguably allows a professional trust-service provider like *T* to give *greater* credence to a division of administrative labor like *S*'s as a scheme of fiduciary-risk allocation than a state that has enacted the UDTA. That is because under the UDTA, "a directed trustee must not comply with a trust director's

¹⁰⁴ See *supra* Part VI.

¹⁰⁵ See *supra* notes 64–81 and accompanying text.

¹⁰⁶ See *supra* text accompanying notes 23, 82–85.

¹⁰⁷ See *supra* text accompanying notes 30–38.

¹⁰⁸ See *supra* notes 99–100 and accompanying text.

¹⁰⁹ See *supra* Part VIII.

¹¹⁰ See *supra* Part V.

¹¹¹ See *supra* Part IV(A)–(C).

¹¹² See *supra* note 1.

exercise or nonexercise of a power of direction . . . to the extent that *by complying the trustee would engage in willful misconduct*,”¹¹³ and conduct sufficient to trigger liability under that standard may consist entirely *in complying with* an exercise or nonexercise of a power of direction that the directed trustee did nothing, let alone anything amounting to “willful misconduct,” to procure.¹¹⁴ By contrast, as we have seen, the subordination-to-terms interpretation of section 801 yields that if *S*’s Protections are properly understood in light of the trust’s purposes as requiring or allowing *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” within the meaning of section 105(b)(3), *T* cannot violate any duty she owes as trustee to any beneficiary of the trust by adhering to the Protections.¹¹⁵ And the Protections assure *T* that she has no duty to second guess *H* when *H* is acting within her authority *regardless* of how egregious *H*’s exercise or nonexercise of her power may be.¹¹⁶

That indicates a more rational understanding of the principle of UTC section 801 under section 105(b)’s enforcement; for it means that given conservation of aggregate fiduciary responsibility, a settlor is as free to distribute the aggregate burden of administrative responsibility among multiple trust fiduciaries as she is to distribute the aggregate benefit of equitable enjoyment among multiple trust beneficiaries. If a settlor chooses to divide administrative labor among contemporaneously acting trustees and trust directors, then provided such arrangements are for the benefit of her beneficiaries¹¹⁷ and that they yield the same aggregate quantum of fiduciary obligation as would be owed to the beneficiaries if there were but one trustee who was not subject to direction, the settlor can also divide fiduciary risk of liability though that involves selectively authorizing directed trustees to ignore particular purposes of the trust and interests of the beneficiaries.

¹¹³ UNIF. DIRECTED TRUST ACT § 9(a)–(b) (UNIF. LAW COMM’N 2017) (emphasis added).

¹¹⁴ *See id.* § 9 cmt. b; *see also* Spica, *supra* note 6, at 216–18.

¹¹⁵ *See supra* notes 82–85 and accompanying text.

¹¹⁶ *See supra* Part II.

¹¹⁷ *See supra* note 75 and accompanying text.