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# The Nonfiduciary “Trust”

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*This article identifies and details the emergence in an increasing number of states of a new trust law that rejects the fundamental tenets of traditional trust law. This alternative concept of the trust liberates the trustee from any meaningful accountability to the beneficiary, the very core concept of traditional trust law. In short, these states are enabling the creation of what might be described as a “nonfiduciary trust.”*

## I. INTRODUCTION

When we identify a person, an object, a relationship, or a concept, the word we use connotes certain characteristics. These are not spelled out and do not have to be. There is a shared understanding. At the margin, there may be disagreement as to certain of the characteristics. However, there are core elements that are undisputed. In the event that there is disagreement as to the core elements, then communication becomes considerably less efficient, the prospect of misunderstandings and disappointed expectations becomes very real, and the costs and adverse consequences of reliance on a particular understanding grow exponentially.

In the case of the “trust,” the characteristics associated with the concept have not remained stable. One need only consider the collapse of the traditional rule against perpetuities, which limited the outer limits of the lifespan of the trust.<sup>1</sup> Likewise, the widespread enactment of statutes permitting self-settled discretionary asset protection trusts is a direct repudiation of the long-established principle that the settlor could not resort to a discretionary trust of which he is a beneficiary to shield his assets from future creditors.<sup>2</sup>

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<sup>1</sup> See JEFFREY A. SCHOENBLUM, 2021 MULTISTATE GUIDE TO ESTATE PLANNING tbl.9 (2020), for a state-by-state analysis.

<sup>2</sup> The recognition of self-settled asset protection trusts continues apace. Approximately one-third of all states have now enacted such statutes. See Steven J. Oshins, *The 11th Annual DAPT State Rankings Chart Released!*, ULTIMATE EST. PLANNER (May 1, 2020), <https://ultimateestateplanner.com/2020/05/01/the-11th-annual-dapt-state-rankings-chart-released/> [<https://perma.cc/JQ3N-28U4>].

Still, these developments do not represent a direct challenge to the core characteristics of the trust. In the English Court of Appeals decision, *Armitage v. Nurse*,<sup>3</sup> then-Lord Justice Millett sought to define what these characteristics were:

[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. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the 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, but in my opinion it is sufficient . . . .

It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. What is true of a contract must be equally true of a settlement. It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and willful misconduct on the other.<sup>4</sup>

Importantly, the decision recognizes the ability of the settlor in the trust instrument to waive certain central duties that are imposed in default: duties of skill and care, prudence and diligence. While the trustee can be excused from observing these duties, the trustee cannot act fraudulently and cannot act in bad faith or engage in willful misconduct.

In the United States, academics have grappled with the question as well as to the essence of the trust concept. Whether the trust is conceptualized as a gratuitous transfer with acceptance of certain obligations by the trustee,<sup>5</sup> or whether it is likened in large part to a contract between settlor and trustee for the benefit of the beneficiaries,<sup>6</sup> there must

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<sup>3</sup> [1997] 2 All ER 705 (Ct. App.) 1, 5 (appeal taken from Wales) (Eng.).

<sup>4</sup> *Id.* at 5.

<sup>5</sup> See Austin W. Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 270 (1917); Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540-41 (1949).

<sup>6</sup> See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995). For a critique, see Frederick R. Franke, Jr., *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract*, 36 ACTEC L.J. 517, 536 (2010).

be some irreducible core duties that make a trust a trust. Indeed, Professor John Langbein addressed this in his article *Mandatory Rules in the Law of Trusts*.<sup>7</sup> In the article, Professor Langbein essentially agreed with Lord Justice Millett. His first principle is that the default rules of trust law can only be overridden if they are beneficiary-serving:

The deeper lesson from this example is that, even though most rules of trust law (such as the duties to diversify and to invest prudently) are default rules rather than mandatory rules, it does not follow that the settlor is free to authorize any conceivable departure from the default rules. A default rule is one that the settlor can abridge, but only to the extent that the settlor's term is “for the benefit of [the] beneficiaries.” The requirement that there be benefit to the beneficiaries sets outer limits on the settlor's power to abridge the default law. Trust law's deference to the settlor's direction always presupposes that the direction is beneficiary-regarding.<sup>8</sup>

A second mandatory principle identified by Professor Langbein relates to fiduciary duty and is explained as follows:

Oddly, however, although the various fiduciary rules are default rules, the settlor may not abrogate them in their entirety, because eliminating all fiduciary duties would make the trust illusory. To illustrate: If I am the owner of Blackacre, I am allowed to give Blackacre to T, or to make T the beneficiary of a trust of Blackacre. What the rule forbids me from doing is effecting that transfer by means of an illusory trust, a trust nominally for the benefit of B, rather than T. A purported trust to T as trustee for B, pursuant to trust terms providing that T shall owe B no fiduciary duties, would be illusory because B could not enforce a trust that is shorn of fiduciary duties. T could, therefore, deal with the trust property as though it had been transferred to T beneficially . . . .

What the mandatory rule forces me to do is to spell out that my intent is to allow T to take beneficially. The concern is I may not understand that, by eliminating all fiduciary duties, I

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<sup>7</sup> John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. UNIV. L. REV. 1105 (2004).

<sup>8</sup> *Id.* at 1112 (footnote omitted). Of course, what is for the benefit of the beneficiary may be disputed. Professor Langbein's own views on this have been vigorously disputed. See, e.g., Lee-ford Tritt, *The History, Impact, and Future of the Benefit-of-the-Beneficiary Rule*, KOREN EST. TAX & PERS. FIN. PLAN UPDATE 3, 10-11 (Dec. 2014/Jan. 2015) (stating that the Benefit-of-the-Beneficiary Rule serves to place a limit on the normal deference to the grantor's intent where provisions will not benefit the beneficiary).

am effectively making T, rather than B, the donee. By forbidding me from eliminating all fiduciary duties, the rule protects me and my intended beneficiary (whether T or B) by requiring me to make my transfer in a forthright manner.<sup>9</sup>

The third and final principle spelled out by Langbein is one of the trustee's good faith:

A trust whose terms authorize bad faith performance, like a trust that denies enforceable duties, would be illusory. In a recent case in which it refused to enforce an exculpation clause that would have authorized bad faith trusteeship, the Delaware Supreme Court observed: "A trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property" to the trustee.<sup>10</sup>

Synthesizing the analysis of Lord Justice Millett and Professor Langbein, we might, therefore, conclude that a trust's "irreducible core" is as follows:

1. The beneficiary must be able to enforce certain duties owed him or her by the trustee.
2. While the default fiduciary duties owed by the trustee to the beneficiary may be waived by the trust instrument, there must be at least some duties owed by the trustee to the beneficiary.
3. The trustee must act in good faith and not in bad faith or with willful misconduct.
4. The trustee must be held liable to the beneficiaries when the trustee acts in bad faith or with willful misconduct.

The Uniform Trust Code<sup>11</sup> has been enacted in a majority of states.<sup>12</sup> While some of the enacting states have altered certain of the provisions of the UTC, on the whole, the UTC represents trust law in a

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<sup>9</sup> Langbein, *supra* note 7, at 1122-23.

<sup>10</sup> *Id.* at 1124 (footnote omitted). There are several other valuable contributions as to the essence of the trust concept. For an example, see Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004), which approaches the trust from an organizational law perspective.

<sup>11</sup> UNIF. TRUST CODE (UNIF. L. COMM'N 2000) [hereinafter UTC].

<sup>12</sup> See *Trust Code*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d> [https://perma.cc/XN3D-PR23].

majority of states. Consideration of section 105 of the UTC, which sets forth the mandatory, nonwaivable rules of the UTC, establishes that these mandatory, nonwaivable rules of the UTC are in accord with the principles set forth above. Thus, with respect to beneficiaries, the UTC imposes "the requirement that a trust and its terms be for the benefit of its beneficiaries . . . ." <sup>13</sup> Under the UTC, it is not possible to have a trust if the trustee does not have certain fiduciary duties: "[A] settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity." <sup>14</sup> UTC section 801 requires "the trustee [to] administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries . . . ." Thus, the trustee cannot be exculpated from acts "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries . . . ." <sup>15</sup>

The theme of this article is that regardless of the common law, scholarly analysis, and law reform efforts represented by the UTC, <sup>16</sup> trust legislation in a number of states has now made it possible to have a "trust" without satisfying any of the aforesaid requirements. This, it is maintained, is a revolutionary development. It is now possible to have what may be described as a "nonfiduciary trust." In addition to the states in which such legislation has been enacted, other states are likely to recognize and give effect to such legislation. Under general principles of conflict of laws, the governing law of a trust is that of the jurisdiction in which it is administered. <sup>17</sup> Thus, other states likely will recognize the nonfiduciary trust, unless doing so is considered a violation of a particular state's public policy. <sup>18</sup>

Even if not recognized in all respects in other states, the very existence of such "trust" laws in a number of states challenges the traditional conception of the trust. It raises the issue whether the concept of the trust can tolerate within its bounds the nonfiduciary trust or whether it should be deemed a different concept altogether from the traditional trust, deserving of its own legal recognition and development independent of trust law. It is true that all legal concepts evolve and alter over time. However, at some point the distance between the old and new

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<sup>13</sup> UTC § 105(b)(3).

<sup>14</sup> *Id.* § 105 cmt.

<sup>15</sup> *Id.* § 1008(a)(1).

<sup>16</sup> Provisions even more protective of beneficiary interests have been adopted by the Restatement (Third) of Trusts.

<sup>17</sup> See JEFFREY SCHOENBLUM, *MULTISTATE AND MULTINATIONAL ESTATE PLANNING* §§ 17.02[B], 17.03[C] (2014 ed.).

<sup>18</sup> *Id.* § 15.07[K]. Public policy is a ready escape device for a court not wishing to abide by its own choice of law rules. Nevertheless, it is generally applied only in extreme cases.

conceptions are so great that retaining both under the same rubric threatens to rob the concept of any meaning. This is certainly a risk with respect to the concept of the trust in light of these more recent statutory enactments validating the nonfiduciary trust.

An alternative view of the present situation might be that the developments under consideration are not a revolutionary repudiation of fundamental tenets of traditional trust law. Rather, they are nothing more than the rebalancing of trust law between property and contract, in this case in favor of contract.<sup>19</sup> That is, the statutory deviations addressed in this article do not reject explicitly the norms of trust law. They simply add to the list of those default rules that the settlor, trustee, and possibly trust advisers and protectors can navigate around. This enlargement of default rules brings the trust ever closer to a contract wherein the trustee agrees to manage certain assets for a purpose rather than a beneficiary. What then remains unique and nonwaivable about trust law, truly distinct from contract law, are (1) the requirement that legal title to property rest with the trustee and (2) the insulation of trust property from the claims of creditors of the trustee and very possibly the beneficiaries as well. The problem with this alternative view is that with even more essential elements of trust law denigrated as default rules only, the end result is the same. The concept of the "fiduciary trust," as a *sine qua non* of the "trust," is an abandoned relic.

However one characterizes these developments, a revolution or a lurch to contract, it would be a mistake to assume that they were carefully planned and considered law reform. The state enactments departing from traditional principles of trust law have been undertaken in an entirely haphazard matter, without any overarching goal or conception of the nonfiduciary trust. The legislation has been enacted in fits and starts, largely in response to the lobbying of attorneys and financial advisers, whose clients seek to purchase a foreign law that serves their particular interests and which law is unobtainable at home.

With respect to the states under consideration, their trust companies primarily profit from flat fees in exchange for affording a situs of administration that enables the trust to claim to be governed by favorable local law. These states do not have a stake in preserving the mandatory rules of the traditional trust. While the traditional trust remains available for their citizenry, these states offer a number of statutes as an alternative, that, when consolidated by enterprising professionals, embody the central components of the nonfiduciary trust.

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<sup>19</sup> See generally Sitkoff, *supra* note 10, at 628-32 (asserting that proprietary elements should be identified first to see how they blend with contractarian elements).

In order to more thoroughly examine this developing concept of the nonfiduciary trust, the statutes of four states in particular—Nevada, South Dakota, Delaware, and Tennessee—will be considered to show how they deviate from the core principles of traditional trust law and facilitate the creation of a nonfiduciary trust. As the legislation in these states is not comprehensive and cohesive, numerous questions remain unanswered. It is also fair to say that there are inconsistencies in the laws of certain of these states. Especially with respect to South Dakota, elements of traditional trust law have been retained. Nevertheless, even in that state, the departure from the “irreducible core” of the trust is evident and quite remarkable.

## II. NEGATION OF BENEFICIARY’S ABILITY TO ENFORCE THE TRUST—THE SILENT TRUST

As Lord Justice Millett explained in *Armitage v. Nurse*,<sup>20</sup> the beneficiaries must be able to enforce their beneficial interests or there cannot be a trust for the benefit of the beneficiaries. Consideration of the statutes of Nevada, South Dakota, Delaware, and Tennessee make clear that the beneficiaries of a trust can be kept completely in the dark as to the very existence of the trust and their beneficial interests in it.

Many states have similar provisions and, thus, have laid the foundations for a nonfiduciary trust.<sup>21</sup> The bottom line is that no other provision so thoroughly undermines the accountability of the trustee to a beneficiary and so jeopardizes the beneficiary’s equity interest as does the silent trust. Take Nevada Revised Statutes section 163.004. It provides that:

1. Except as otherwise provided by law, the terms of a trust instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries in any manner that is not illegal or against public policy, including, without limitation: (a) The right to be informed of the beneficiary’s interest for a period of time . . . .

Section 163.004 provides as well that: “4. The rule that statutes in derogation of the common law are to be strictly construed has no application to this section. This section must be liberally construed to give maximum effect to the principle of freedom of disposition and to the enforceability of trust instruments.”

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<sup>20</sup> [1997] 2 All ER 705 (Ct. App.) 5 (appeal taken from Wales) (Eng.).

<sup>21</sup> For a tabular analysis of these numerous state statutes, see NICOLE K. MANN & JANE ZHAO, SUMMARY OF STATE STATUTES ON SILENT TRUSTS (AM. L. INST. 2018), Westlaw SZ020 ALI-CLE 1087.



As stated, the statute applies “[e]xcept as otherwise provided by law . . .” Consideration of Nevada law reveals that no statute or case law provide otherwise. Less clear is Nevada’s limitation that the non-disclosure must be only “for a period of time.” No guidance is given as to an acceptable period of time. The language of the Nevada law appears to have been borrowed from Delaware. The comparable Delaware statute, title 12, section 3303(c) of the Delaware Code, does, in fact, define “for a period of time” as including any time measured by:

- (1) A period of time related to the age of a beneficiary;
- (2) A period of time related to the lifetime of each trustor and/or spouse of a trustor;
- (3) A period of time related to a term of years or specific date; and/or
- (4) A period of time related to a specific event that is certain to occur.

Presumably, a period of time related to a “specific date” in (3) above could be any date during the existence of the trust. Properly drafted, a Delaware trust of personal property can exist indefinitely, as there is no rule against perpetuities, at least with respect to personal property.<sup>22</sup> Thus, it could be a date in the next millennium. Likewise, a period of time related to a “specific event” pursuant to (4) above could relate to the termination of a dynastic trust hundreds of years later as that is “a specific event that is certain to occur.” Note also, that unlike Nevada’s provision “except as otherwise provided,” the Delaware law provides: “Notwithstanding this Code or any other provision of law . . .”<sup>23</sup> Thus, this is an absolute right granted to the grantor to deny beneficiaries knowledge of their interests during the existence of the trust.

Title 12, section 3303(d) of the Delaware Code does provide for a designated representative of the beneficiary being authorized to commence an action to obtain information about the trust. However, the governing instrument may provide otherwise. This is also true of Tennessee, as set forth in Tennessee Code Annotated section 35-15-303. Nevada does not even make provision for such designated representative of a beneficiary.

South Dakota Codified Laws section 55-2-13 allows the trust instrument to provide for no disclosure of information. It also allows for the trust instrument to specify that the settlor, trust adviser or trust protec-

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<sup>22</sup> See DEL. CODE ANN. tit. 25, § 503(a) (2021).

<sup>23</sup> *Id.* § 3303(a).

tor may in writing require nondisclosure of trust information, including the very existence of the trust.

One might wonder whether these provisions truly eliminate the need to provide an accounting, even an informal one. To return to South Dakota law, it does not even mention the word "accounting." Nevada law does provide for accountings. However, this requirement is easily bypassed. For example, Nevada Revised Statutes section 165.1207 provides that: "(5) A trustee is not required to provide an account to a beneficiary of an irrevocable trust while that beneficiary's only interest in the trust estate is a discretionary interest, as described in [Nevada Revised Statutes section] 163.4185."<sup>24</sup> Many of the trusts that are not revocable trusts, that migrate to Nevada or are created in Nevada, are irrevocable *discretionary* trusts. With respect to such trusts, this provision effectively eliminates the duty to provide an accounting. Moreover, if there is a "broad power of appointment," Nevada Revised Statutes section 165.1207(b)(2) provides that no accounting is required except to the power holder with respect to the interests subject to the power of appointment.

Even assuming at some point an interest vests and the interest is not discretionary, an accounting can readily be avoided under Nevada law. Specifically, the contents of the accounting can be specified by the trust instrument. In this regard, Nevada Revised Statutes section 165.1204(2) provides that the trustee of a nontestamentary trust "shall satisfy the duty to account by delivery of an account in the form, manner and to the persons as required by the terms and conditions stated in the trust instrument." In other words, the trust instrument determines who is entitled to receive an account and what information it will contain.

Tennessee law does not use the term accounting, preferring "report," so that it is understood that no particular format or formality is required.<sup>25</sup> Moreover, as noted above, Tennessee Code Annotated section 35-15-813(e) allows the trust instrument to excuse all reporting of any sort. It also provides, along the lines of South Dakota law, that the instrument may authorize the settlor, trust protector, or trust adviser to deny such information by notifying the trustee in writing.

With respect to revocable trusts, under South Dakota law the default is that no information has to be provided to the beneficiaries, unless the instrument specifies otherwise.<sup>26</sup> Under Tennessee law, Tennessee Code Annotated section 35-15-813(e)'s opt out provision applies to all trusts, including revocable trusts. Nevada, in Nevada Revised Statutes section 165.1207, covers revocable trusts by allowing an opt-out

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<sup>24</sup> NEV. REV. STAT. § 165.1207(b)(5) (2021).

<sup>25</sup> TENN. CODE ANN. § 35-15-813 cmt. (2021).

<sup>26</sup> See S.D. CODIFIED LAWS §§ 55-2-13, -14(2) (2021).

in the case of any “nontestamentary trust,” which would cover revocable trusts as well as irrevocable trusts. Likewise, title 12, section 3303(c) of the Delaware Code allows the “trust” instrument to provide that the beneficiary not be informed of the beneficiary’s interest “in the ‘trusts,’” without differentiation between revocable and irrevocable trusts.

The forgoing statutes should be contrasted with UTC section 813. While certain informational requirements can be sidestepped, UTC section 105(b) prohibits avoidance of the duty under UTC section 813(a) to respond to a beneficiary’s request for reports and other information related to the administration of an irrevocable trust. In addition, there can be no waiver of the duty under section 813(b)(2)-(3) to notify qualified beneficiaries who have attained age 25 of the existence of the trust, of the identity of the trustee, and of the beneficiaries’ right to request trustee’s reports.

### III. THE ELIMINATION OF ALL DUTIES OF THE TRUSTEE—THE DIRECTED TRUST

As set forth above, a central element of the trust concept is that the trustee owes some duties to the beneficiaries. These duties, at least under the UTC, must be fiduciary duties. Now, however, even the UTC allows for a directed trust.<sup>27</sup> Indeed, it incorporates the terms of the recently approved Uniform Directed Trust Act.<sup>28</sup> A directed trust is a trust whereby a trust advisor, advisory committee, or trust protector<sup>29</sup> is authorized to direct the trustee to take action with respect to the legal title the trustee holds.

The significance of the wide adoption of directed trusts by the states cannot be overstated. The trustee, traditionally obligated to act in accordance with the highest duty known to law,<sup>30</sup> may now be relegated to the posture of a factotum, an errand boy. A director can command the trustee with respect to investments, administration, distributions, or some or all of the above.

Does the trustee have any residual obligations to object to what the trustee perceives is conduct that violates the terms of the trust or nonwaivable duties of the trust law, such as the prohibition against bad faith conduct? The UTC states that the trustee does have such obligation,<sup>31</sup> but this is not a mandatory rule under UTC section 105 and can be waived. Indeed, several states, including, but not limited to, those under consideration, absolutely relieve the trustee of any such obliga-

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<sup>27</sup> UTC § 808.

<sup>28</sup> UNIF. DIRECTED TRUST ACT (UNIF. L. COMM’N 2017) [hereinafter UDTA].

<sup>29</sup> Hereinafter all of which are referred to as “director.”

<sup>30</sup> See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (AM. L. INST. 1959).

<sup>31</sup> See UTC § 105(b)(2).

tion, regardless of the apparent bad faith nature of the director's actions.<sup>32</sup>

If the trustee is simply an agent, then who owes the fiduciary duty to the beneficiaries? Consistent with the fundamental tenet of a trust, that the beneficiaries are owed a fiduciary duty, the UDTA, in validating directed trusts, simply shifts, in section 8, any duty of which the trustee is relieved, to the director. In other words, for there to be a valid directed trust, the UDTA requires some actor to owe the requisite fiduciary duty to the beneficiaries. Were this not the case, neither the trustee nor any substitute for the trustee would owe any fiduciary duties at all to the beneficiaries. With no person owing the beneficiaries any duties, there would be nothing for the beneficiaries to enforce and their interests would have little or no value.

In the scenario just described, the trustee would have bare naked legal title. Arguably, the director would be regarded as the true economic owner in this scenario. As Professor Langbein states,<sup>33</sup> the "trust" ought to be regarded as illusory. Extrapolating from this characterization, the director, arguably, should be regarded as the donee of a deemed power of appointment both in terms of law and taxation, although the precise nature and parameters of this power of appointment remain in doubt.

Another characterization might be that the director owes a contractual obligation to abide by the terms of the trust agreement. In other words, contract law, not trust law, might determine the liability of the director for failing to abide by the terms of the contract. Arguably, there might also be exposure to equitable remedies in a suit by a beneficiary directly against the director, just as the beneficiary would be able to sue a third party when the trustee was unable or unwilling to do so with respect to a trust that is not a directed trust.<sup>34</sup>

In states that had previously enacted the UTC, but have not yet enacted the revision incorporating the UDTA,<sup>35</sup> UTC section 808(d)

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<sup>32</sup> Todd A. Flubacher & Cynthia D.M. Brown, *If You Can't Beat 'Em, Join 'Em*, TRS. & ESTS., Nov. 2018, at 1, 3 (including Alaska, Idaho, Indiana, Kentucky, New Hampshire, Ohio, and Wyoming); see ALASKA STAT. § 13.36.196 (2021); IDAHO CODE § 15-7-501(2) (2021); IND. CODE § 30-4-3-9(b) (2021); KY. REV. STAT. ANN. § 286.3-275 (West 2021); N.H. REV. STAT. ANN. § 564-B:8-808(b) (2021); OHIO REV. CODE ANN. § 5815.25(b) (West 2021); WYO. STAT. ANN. § 4-10-717 (2021).

<sup>33</sup> See Langbein, *supra* note 7, at 1124.

<sup>34</sup> See GEORGE GLEASON BOGERT ET AL., *BOGERT'S THE LAW OF TRUSTS AND TRUSTEES* § 869 (2020).

<sup>35</sup> As of April 25, 2021, thirteen states have enacted the UDTA: Arkansas, Colorado, Connecticut, Georgia, Indiana, Maine, Michigan, Nebraska, New Mexico, Utah, Virginia, Washington, and West Virginia. See *Directed Trust Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org> [<https://perma.cc/NQ2N-7KRD>].

still controls. It states that the person who has a power to direct “is *presumptively* a fiduciary.”<sup>36</sup> Ordinarily, a presumption can be overcome. If so, the provision allows for a situation in which neither the trustee nor the director is a fiduciary.

Counterpoised against an all-powerful director who, as a nonfiduciary under UTC section 808(d), may override the trustee, is the Comment accompanying UTC section 105: “[A] settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity.” While the Comment to UTC section 105 suggests a limit on the extent to which a trustee may shed fiduciary duties, the UTC Comment does not reference directors. Perhaps, the reference to “trustee” should be read as including the director of a directed trustee? Unfortunately, the Comment’s failure to address the issue leaves the matter unresolved. Furthermore, the authority of the Comment itself is unresolved and may vary from state to state.<sup>37</sup>

Unlike the ambiguity of former section 808 of the UTC, the states under discussion allow the director, generally, to be a nonfiduciary. However, in Nevada and South Dakota there appears some reluctance to do so completely. Especially with respect to South Dakota, the statute reflects an intent to have at least one adviser or trust protector serve in a fiduciary capacity.<sup>38</sup>

There is certainly no such reluctance demonstrated by the Delaware statute. In Delaware, trust advisers are generally regarded as fiduciaries. However, they are not required to be. Thus, title 12, section 3313(a) of the Delaware Code provides that when such persons are empowered to direct, consent, or disapprove of a fiduciary’s actions, they shall be considered “fiduciaries when exercising such authority provided, however, that the governing instrument may provide that any such adviser (including a protector) shall act in a nonfiduciary capacity.” The trustee is also not liable for following the trust adviser’s direction. The trustee is only liable for its own “willful misconduct.”<sup>39</sup> Under Delaware law, there is no duty to monitor, provide advice, or communicate with the beneficiaries or anyone else that the trustee might have acted differently than as directed.<sup>40</sup>

Under Delaware law, a trust adviser includes a trust protector. There seem to be no limits to the powers of the trust protector. The

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<sup>36</sup> UTC § 808 (emphasis added).

<sup>37</sup> In another context, the right of the trustee to withhold information from beneficiaries, the commentary of the UTC has been deemed non-binding. *See, e.g.,* Wilson v. Wilson, 690 S.E.2d 710, 716 (N.C. Ct. App. 2010).

<sup>38</sup> S.D. CODIFIED LAWS § 55-1B-4 (2021).

<sup>39</sup> DEL. CODE ANN. tit. 12, § 3313(b).

<sup>40</sup> *Id.* § 3313(e)(3).

relevant provision states that the trust protector "shall have all of the power and authority granted to the protector by the terms of the governing instrument . . . ." <sup>41</sup> These powers may be exercised in a nonfiduciary capacity if the instrument so provides.

The situation in Nevada is more anomalous. Under Nevada Revised Statutes section 163.554 a trust adviser or protector may be a fiduciary if "acting in a fiduciary capacity." Nowhere in the Nevada Revised Statutes is "acting in a fiduciary capacity" defined. One approach taken by some drafters of Nevada-situated trusts is simply to state in the trust instrument that "the trust adviser is not acting in a fiduciary capacity." The assumption is that even if the trust adviser is performing acts that would otherwise be determined to be "fiduciary" in nature, they can be made non-fiduciary by a simple declaration.

A deeper dive into the Nevada statute, however, does call this assumption into question and suggests that Nevada law may not have totally abandoned the notion that someone has to owe the beneficiaries a fiduciary duty. Under Nevada law, a trust adviser means either a "distribution trust adviser or investment trust adviser." <sup>42</sup> Under Nevada Revised Statutes section 163.5551, an investment trust adviser is not considered a fiduciary if "the instrument provides otherwise." This clearly establishes that the trust instrument can classify the investment trust adviser's acts as done in a non-fiduciary capacity. Importantly, there is no similar provision regarding a distribution trust adviser. This appears to be an inadvertent omission. There seems no reason why the statute would draw this distinction between the classification of acts of an investment trust adviser and a distribution adviser, and would not acknowledge in the statute this difference in treatment, after recognizing the possibility that both may act in a non-fiduciary capacity. Still, the distinction in language between investment trust adviser and distribution trust adviser might be read as implying that a simple declaration in the trust instrument cannot magically convert a distribution trust adviser into a non-fiduciary and, thereby, leave no one accountable to the beneficiaries with respect to their beneficial interests.

When it comes to a trust protector, the statute simply offers this definition: "any person whose appointment is provided for in the instrument." <sup>43</sup> Nevada Revised Statutes section 163.554 provides that a fiduciary is "any other person, including an investment trust adviser, trust protector or a trust committee which is acting in a fiduciary capacity . . . ." However, the statute itself does not state when a trust protector is acting in a fiduciary capacity. Importantly, in the case of a trust protec-

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<sup>41</sup> *Id.* § 3313(f).

<sup>42</sup> NEV. REV. STAT. § 163.5545 (2021).

<sup>43</sup> *Id.* § 163.5547.

tor the contrast in Nevada statutory language that exists with respect to investment trust advisers and distribution trust advisers does not exist. Thus, a simple statement in the trust instrument that a trust protector is not a fiduciary may suffice. Still, the failure to include language in the statute authorizing a declaration that a trust protector is acting in a non-fiduciary capacity creates some uncertainty as to whether the trust instrument itself can determine the status of a trust protector as a non-fiduciary.<sup>44</sup>

Tennessee has enacted the UTC, but with significant changes. The person who is directed, typically the trustee, is an excluded fiduciary.<sup>45</sup> As a result, there is no liability for carrying out the direction, even if it is beyond the director's scope of authority.<sup>46</sup> Under Tennessee Code Annotated section 35-15-1202, a trust adviser or trust protector, other than a beneficiary, is a fiduciary with respect to each power granted to said person.<sup>47</sup> However, all this can be overridden by the trust agreement. These are only default rules. Specifically, Tennessee Code Annotated section 35-15-105(b) lists the mandatory rules of the Code. Section 35-15-1202 is not included, making it a mere default rule.<sup>48</sup>

Unlike the other states being considered, South Dakota law requires that there must be a fiduciary in the case of a directed trust when making investment decisions. An investment trust adviser is a fiduciary pursuant to South Dakota Codified Laws section 55-1b-1(6). It does not mean that all advisers must be fiduciaries. If one adviser is a fiduciary, the others do not have to be fiduciaries as well, if the governing instrument so provides.<sup>49</sup> The one who is a fiduciary is liable in the case of gross negligence or willful misconduct in the selection and monitoring of the others.<sup>50</sup>

In the case of distribution trust advisers, pursuant to South Dakota Codified Laws section 55-1b-1(7), it appears that all must be fiduciaries, unlike in the case of investment trust advisers. Meanwhile, under South Dakota Codified Laws section 55-1B-1(2), a trust protector is not deemed a fiduciary, except when exercising the authority of an investment trust adviser or distribution trust adviser. Effectively, then, for investment and distribution decisions, the trust protector is a fiduciary.

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<sup>44</sup> Compare S.D. CODIFIED LAWS § 55-1b-7 (2021), which *makes* a trust protector a fiduciary whenever exercising the authority of an investment trust adviser or a distribution trust adviser.

<sup>45</sup> TENN. CODE ANN. § 35-15-710 (2021).

<sup>46</sup> *Id.* § 35-15-1205(1).

<sup>47</sup> *Id.* § 35-15-1202(a).

<sup>48</sup> See *id.* § 35-15-1202 cmt. (confirming that this was the intention of the drafters).

<sup>49</sup> S.D. CODIFIED LAWS § 55-1b-4.

<sup>50</sup> *Id.*

Notwithstanding the foregoing, the requirement that there be a directed trust fiduciary is not very meaningful. If the very existence of the trust is not required to be revealed to the beneficiaries, then South Dakota is putting its trust in the good faith of the director to fulfill its fiduciary duty, a reliance not countenanced by traditional trust law. Moreover, it will be seen immediately below that there may not be a fiduciary duty of any sort actually owed to the beneficiaries of the trust. Nevertheless, this is one of two critical instances reviewed in this article demonstrating South Dakota's more limited departure from traditional trust norms than the other three states under review.

#### IV. UNCERTAINTY AS TO WHETHER THE TRUSTEE MUST ACT FOR THE BENEFIT OF THE BENEFICIARIES

One of the central principles of trust law is that the trustee has a duty to act for the benefit of the beneficiaries. For example, UTC section 105(b)(2) requires the trustee to act in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Section 105(b)(3) requires that a trust and its terms be for the benefit of the beneficiaries.

Notwithstanding the foregoing, several of the states under consideration appear to have altered the duty, be it a fiduciary or nonfiduciary duty. Under South Dakota law, the most restrained of the four states, the distribution trust adviser<sup>51</sup> and investment trust adviser<sup>52</sup> must act "in the best interests of the trust"; mention is not made of the best interests of the beneficiaries. The precise meaning of "best interests of the trust" are not spelled out. South Dakota Codified Laws section 55-1b-1(4) defines, as a "fiduciary," a trust adviser, trust protector, or trust committee, "who is acting in a fiduciary capacity for . . . a trust."

Admittedly, there are a few statutory provisions directing the trustee, but not a director, to act in the interests of the beneficiaries as well as the trust. For example, a trustee may change the name of the trust under South Dakota Codified Laws 55-1A-40 "if the trustee deems such action to be in the best interests of the trust and its beneficiaries." "The interests of the beneficiaries" appears only two other times in provisions relevant to the trustee. South Dakota Codified Laws section 55-3-20.1 provides that pending a final removal of a trustee, the court may order relief necessary "to protect the trust property or the interests of the beneficiaries." In addition, South Dakota Codified Laws section 55-5-8 provides that the trustee is not required to diversify investments if "the

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<sup>51</sup> *Id.* § 55-1B-6.

<sup>52</sup> *Id.* § 55-1B-10.



trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify.”<sup>53</sup>

The foregoing consideration of South Dakota law supports the conclusion that the drafters of the law regarded the interests of the trust and those of the beneficiaries as distinct. They appear to have regarded directors as owing duties to the trust and *not* to the beneficiaries. As for the trustee, his duties to the beneficiaries are prescribed in only a very few circumstances enumerated above.

Regarding Tennessee, Tennessee Code Annotated section 35-15-105(b)(2) does mandate that a trustee must act in accordance “with the terms and purposes of the trust and the interests of the beneficiaries.” Section 35-15-105(b)(3), however, provides that the trust and its terms be for the benefit of its beneficiaries “as the interests of such beneficiaries are defined under the terms of the trust . . . .” The interests of the beneficiaries are, therefore, defined by the instrument and may be, accordingly, quite minimal in scope. No specific minimal interests of the beneficiaries that are nonwaivable are set forth in the statute.

Under Nevada law, a trust adviser, in exercising powers, must do so “in the best interest of the trust.”<sup>54</sup> Notice that there is no mention of the best interests of the beneficiaries. This is even true of a distribution trust adviser, whom the statute requires to act in the best interest of the trust, without even mentioning the best interests of the beneficiaries to whom he would be authorizing distributions by the trustee.<sup>54</sup>

As to what precisely are “the best interests of the trust,” no definition is offered by Nevada law. Likewise, no such definition is offered in the laws of the other states under consideration. Could there be interests of the trust that diverge from those of the beneficiaries? The best interests of the trust might, for example, be served where the trustee or director benefitted from a trust transaction that also benefitted the trust estate. In this case, there might well be no action for breach of a duty of loyalty not otherwise waived by the trust instrument.<sup>55</sup> Under traditional trust law, if the duty of loyalty had not been waived, the trustee might be held liable even though the transaction benefitting the trustee also benefitted the trust estate and, accordingly, the beneficiaries.<sup>56</sup>

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<sup>53</sup> NEV. REV. STAT. § 163.5557(2) (2021).

<sup>54</sup> See *id.* § 163.5557(3). As for the trustee, Nevada’s version of the Uniform Prudent Investor Act, Nevada Revised Statutes section 164.715, requires investing in the interest of the beneficiaries. There is no comparable provision with regard to distributions.

<sup>55</sup> See *Uzyel v. Kadisha*, 116 Cal. Rptr. 3d 244, 262 (Ct. App. 2010).

<sup>56</sup> This is the no-further-inquiry rule. Whether the rule is justified has been subject to considerable debate. Compare John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 943-44 (2005), with Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 549 (2005).

A second example would be one in which the beneficiaries wished to accelerate distributions and thereby terminate the trust. Under the Restatement (Third) of Trusts and the UTC, this is now a more likely possibility than in the past. That is because to one degree or another the *Claflin* doctrine has been weakened and the scope of equitable deviation has been expanded.<sup>57</sup> Premature termination of the trust would arguably never be in the interests of the trust. Thus, the trustee or director might be obliged, or at least permitted, to resist such efforts, even if doing so would benefit the interests of the beneficiaries.

A third example, achieved by a change of situs of administration, would be to extend the life of contingent trust interests by shifting situs to a state with a very liberal rule against perpetuities or no rule at all. By its terms, the trust might provide for successive trust interests so long as permitted by the rule against perpetuities. A move to a state with a strong no contest rule would also be justified as in the interests of the trust, even if detrimental to the interests of the contesting beneficiaries.

Yet another example would be discretionary distributions, that might otherwise be made, which would be withheld on the basis of maintaining and enhancing the trust estate. Accumulations might have detrimental consequences for certain or all of the beneficiaries. Nevertheless, in terms of the trust, the accumulations might save state taxes and permit the growth of the trust estate through reinvestment.

An extended term for a trust with a more substantial trust fund would very likely benefit trustees' commissions. Thus, one likely result of the trustee serving the interests of the trust, rather than the distinct ones of the beneficiaries, would be that the interests of the trustee would be benefitted as well. This suggests a built-in conflict of interest, but not one easily avoided to the extent that the trust itself is also benefitted.

The emphasis on the best interests of the trust should come as no surprise. The UTC recognizes that a trust can serve interests and purposes other than those of beneficiaries. This has been the case historically with respect to charitable trusts. It has now been extended to noncharitable trusts, in the form of purpose trusts.<sup>58</sup> The recognition that trusts can serve a purpose, rather than beneficiaries, undermines the core principle of trust law that the trustee must act in the best interests of beneficiaries. The states under consideration in this article simply carry this a step further by recognizing that even when there are beneficiaries, the trustee's obligations may run primarily to purposes of the trust.

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<sup>57</sup> See RESTATEMENT (THIRD) OF TRUSTS §§ 65-66 (AM. L. INST. 2003); UTC §§ 411-12.

<sup>58</sup> See UTC §§ 408-09.

The idea that the purposes of a trust may be served essentially gives a separate identity to the trust. The language of these statutes suggests a conception of the trust as an entity or person, consistent with federal tax law.<sup>59</sup> Of course, if there are beneficiaries, the purpose of the trust is arguably serving the interests of beneficiaries. However, there could be a mix of beneficiary interest and distinct trust purpose. In this mixed regime, the trust purpose might well take precedence, depending on the terms of the trust agreement.

#### V. THE TRUSTEE NEED NOT ACT IN GOOD FAITH AND REASONABLY

One other crucial core characteristic of the trust concept, as stated in the mandatory rule of the UTC section 105(b)(2) is that the trustee (or the directors acting in place of the trustee) must “act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” As a corollary, under UTC section 1008(1), the trustee cannot be exculpated by the trust instrument for “a breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiary.” Likewise, UTC section 814(a) requires the trustee to exercise a discretionary power in “good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”

The Restatements (Second) and (Third) of Trusts actually go further. Both state the law as requiring the trustee to do more than act in good faith. Essentially, the trustee must act in accordance with the standard set forth in the instrument and, if none is set forth, then the trustee must act reasonably. “Reasonableness” is an objective standard.<sup>60</sup> Furthermore, in certain circumstances, even when acting in good faith, reasonably, and with advice of counsel, the trustee’s conduct may be deemed a breach of trust.<sup>61</sup>

The laws of the four states under consideration, strikingly, do not include a reasonableness requirement, let alone any additional requirements. As to good faith, they take varied approaches. With the exception of South Dakota, they appear to allow for the relief of the trustee

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<sup>59</sup> This is the view adopted by the Internal Revenue Code. The trust is a distinct taxpayer with its own rate table. See I.R.C. § 1(e).

<sup>60</sup> See RESTATEMENT (SECOND) OF TRUSTS § 201 cmt., illus. 1 (AM. L. INST. 1959); RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. c (AM. L. INST. 2007); RESTATEMENT (THIRD) OF TRUSTS § 101 cmt. c, illus. 2 (AM. L. INST. 2012); see also Franke, *supra* note 6 at 527.

<sup>61</sup> See RESTATEMENT (THIRD) OF TRUSTS § 93 cmt. c. (AM. L. INST. 2012).

and directors of liability for all their actions or omissions, with, perhaps, the exception of willful misconduct.<sup>62</sup>

Inasmuch as the trustee's duty to act in good faith and not act in bad faith is a core concept of traditional trust law, if not the exclusive standard of conduct required of a trustee under traditional trust law, a crucial question is what "good faith" and "bad faith" mean. Unfortunately, there is no satisfactory definition. Neither the Restatements of Trust nor the UTC attempts a definition. Not surprisingly, without such guidance, these terms have proven extremely amorphous, ill-defined, and difficult to pin down, though presented routinely as components of the irreducible core of the trust relationship. Most importantly, they are essentially subjective in nature without a "reasonableness" or some other objective standard.

Trust instruments often seek to exculpate the trustee from all liability except in the case of willful misconduct, or a variation of that standard. Many state statutes will not honor such an exculpation clause, since it frees the trustee from liability for acts of reckless indifference and gross negligence, notwithstanding the *Armitage* decision.<sup>63</sup> The meaning of "willful misconduct" is also unsettled. Arguably, it occurs when the trustee takes an action or fails to take an action knowing it is in breach of the trust.<sup>64</sup>

Although traditional trust law typically requires more than just good faith from the trustee, even if the core trust principle is limited to a good faith requirement, this hardly suffices to distinguish the trust as a unique concept. As Justice Millett pointed out in *Armitage*,<sup>65</sup> and Professor Langbein has also explained in some detail,<sup>66</sup> an implied warranty of good faith and fair dealing is central to contract law. In other words, what makes a trust uniquely a trust seems to have little to do with the trustee's duty to act in good faith; that more or less mirrors contract law. Indeed, as Professor Langbein has maintained, it suggests the very contractarian nature of trust law.

Of course, the settlor of a trust expects the trustee or director to abide by the terms of the trust. The crucial question is whether the amorphous "good faith" standard, along with reasonableness and other requirements, can be bypassed by allowing the settlor to afford a more precise limited standard in the trust instrument. The trustees in the

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<sup>62</sup> DEL. CODE ANN. tit. 12, § 3590(a) (2021); NEV. REV. STAT. § 163.120(3) (2021); TENN. CODE ANN. § 35-15-1008(a)(1) (2021).

<sup>63</sup> See *Armitage v. Nurse*, [1997] 2 All ER 705 (Ct. App.) (appeal taken from Wales) (Eng.).

<sup>64</sup> See GEORGE GLEASON BOGERT ET AL., *supra* note 34, § 542.

<sup>65</sup> See *supra* note 5 and accompanying text.

<sup>66</sup> See Langbein, *supra* note 6, at 654-55.

states under consideration are especially desirous of this since they charge a minimal fee when compared to the typical trust company and are not prepared to offer traditional managerial services. Meanwhile, settlors do not insist on a more demanding standard of conduct because control over the trust estate is typically retained by the settlor, his or her family, or their longtime professional advisors and do not expect the trustee to do much independently.

The four states under consideration have very different takes on the issues of the trustee's standard of conduct and the extent to which the trustee may be exculpated. Tennessee law is the most extreme in this regard. Its law stands in sharp contrast to traditional trust law. Under Tennessee Code Annotated section 35-15-105, there is no mandatory good faith requirement. The Comment to the section explicitly states that:

Another way a settlor can override the default rules is such settlor can relieve a fiduciary from acting in good faith (such not being included in T.C.A. § 35-15-(b)(2)). . . .

[U]nlike the Uniform Trust Code, the Tennessee Uniform Trust Code contains no reference to good faith in subdivision (b)(2). Therefore, a settlor may provide a standard other than good faith, (e.g., the Trustee's sole and absolute discretion, which standard under the Tennessee Uniform Trust Code contains no implied good faith or reasonableness standard) to govern the Trustee's actions.

Nevada and Delaware are not as extreme as Tennessee, but also not quite traditional. Under Nevada law, it is not clear whether the trustee or director must act in good faith. Nevada Revised Statutes section 163.160 states that a provision of the trust is not effective to relieve a trustee of liability "(a) For breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of a beneficiary; or (b) For any profit that the trustee derives from a breach of trust."<sup>67</sup>

At first glance this provision seems more demanding than that set out in *Armitage v. Nurse*,<sup>68</sup> which does hold that a trust instrument may exculpate the trustee for gross negligence. On the other hand, with respect to a trustee, under Nevada law, the settlor is free in the instrument to relieve the "trustee from any or all of the duties, restrictions, and

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<sup>67</sup> NEV. REV. STAT. § 163.160(3)(a), (b). This provision is derived from the Uniform Trust Act, which Nevada has enacted.

<sup>68</sup> [1997] 2 All ER 705 (Ct. App.) (appeal taken from Wales) (Eng.).

liabilities which would otherwise be imposed [by the Act]."<sup>69</sup> This would appear to allow wide-reaching exculpation. Despite this provision, a later paragraph<sup>70</sup> in the statute provides that liability for "breach of trust" done intentionally, with "gross negligence, in bad faith, or with reckless indifference to the interest of a beneficiary" cannot be waived. Has the statutory law taken back the broad relief it otherwise seemed to give?

Since the provision barring waiver of liability turns on whether there has been a "breach of trust," the key question then is, what is a "breach of trust?" Restatement (Third) of Trusts section 93, for one, answers this question as follows: "A breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries, or to further the charitable purpose, of the trust." But what if the trustee can be relieved of all duties? Indeed, Nevada Revised Statutes section 163.160(1) does just that. It provides explicitly that the trustee can be relieved of all "duties." In that circumstance, the trustee's actions could not be a breach of trust. If the duties do not exist, there cannot be a breach. Without a breach there can be no liability. By relieving the trustee of any duties to the beneficiaries, but, for example, requiring the trustee to perform certain actions for the benefit of the trust, a different standard of conduct could be imposed by the terms of the trust instrument.

Moreover, when it comes to the interests of discretionary beneficiaries, there is some question whether Nevada Revised Statutes section 163.160(3)(a) even applies. Under Nevada law, a discretionary beneficiary has no enforceable right and a court can undertake a review "only if the trustee acts dishonestly, with bad faith or willful misconduct."<sup>71</sup> However, even this provision is subject to further cut-back. Specifically, the provision is preceded by the clause "Except as otherwise provided in the trust instrument." Thus, it would appear not only that a different standard of conduct of the trustee applies in the case of discretionary trusts, but that the trustee can be fully exculpated for even bad faith or willful misconduct.

As for directed trusts, there is no mention of any nonwaivable standards of conduct at all. The provisions above are applied only to the "trustee." There is nothing in the Nevada Revised Statutes that provides that a director is deemed a trustee and governed by the same rules. Indeed, as has been seen, the settlor can provide in the instrument with respect to investment decisions that the director is a nonfiduciary.<sup>72</sup> Ad-

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<sup>69</sup> NEV. REV. STAT. § 163.160(1).

<sup>70</sup> *Id.* § 163.160(3)(a).

<sup>71</sup> *Id.* § 163.419(1).

<sup>72</sup> *Id.* § 163.5551.

mittedly, the situation is less settled with respect to a distribution trust adviser or trust protector. In all events, the further requirements associated with the trustee's conduct, such as reasonableness, are not reflected in the Nevada statutory provisions dealing with the trustee's conduct and breach of trust.

Delaware law is very straightforward. The trust instrument may exculpate and indemnify the trustee, except with respect to "willful misconduct."<sup>73</sup> It would seem that if the trust instrument even allowed the trustee to act arbitrarily, or for the interests of the trust, though adverse to particular beneficiary interests, this would be tolerated under the willful misconduct standard. The trustee simply must not "knowingly" breach the terms of the trust. In this regard, another critical section, title 12, section 3586 of the Delaware Code, exonerates the trustee from any liability if the trustee has relied in good faith on the terms of the trust instrument. In other words, as long as the trustee acts consistently with the governing instrument, there is no liability even if regarded as a breach of fiduciary duty under traditional trust standards.

As for South Dakota, it remains deeply wedded to the good faith standard. South Dakota Consolidated Laws section 55-2-1 provides that: "In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." There are certain limited exceptions, such as the trustee may not enter into a transaction in which he has an interest adverse to a beneficiary, except where the trust instrument authorizes buying, selling, or leasing from or to the trust.<sup>74</sup> On the other hand, there are harsher, specific and nonwaivable standards, such as the trustee may not use his influence as trustee to gain an advantage over the beneficiary.<sup>75</sup>

While "good faith" may be a readily satisfiable subjective standard, the use of the terminology "highest good faith" suggests a standard to be taken quite seriously. Furthermore, the provisions applicable to trustees would also apply to a director.<sup>76</sup> Thus, South Dakota actually seems to demand a high standard of conduct from the decision-makers in the trust setting, whether trustee or director. The South Dakota situation remains anomalous, however, because of the ability to withhold any disclosure regarding the trust from the beneficiaries. Moreover, the other

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<sup>73</sup> DEL. CODE ANN. tit. 12, § 3303 (2021); *see* *Mennen v. Wilmington Tr. Co.*, No. 8432-ML, 2015 WL 1914599, at \*22 (Del. Ch. Apr. 24, 2015).

<sup>74</sup> S.D. CODIFIED LAWS § 55-2-3(4) (2021).

<sup>75</sup> *Id.* § 55-2-4.

<sup>76</sup> *See supra* text accompanying notes 49-50.

standards imposed on a trustee's conduct under traditional trust law are not present in the South Dakota law.

## VI. CONCLUSION

An examination of the statutes of Nevada, Tennessee, Delaware, and South Dakota reveals significant departures from the irreducible core of the trust, that is, those characteristics that have been traditionally regarded by scholars, law reformers, and judges as the trust's mandatory rules. These enactments do not appear to have been undertaken with the specific purpose of introducing a new concept of the nonfiduciary trust. Nevertheless, their effect has been just that.

It does appear that it is now possible to fashion a nonfiduciary trust, one in which no fiduciary duties are owed to the beneficiaries by either the trustee or directors, so that there are no interests that the beneficiaries are able or even entitled to defend, or, alternatively, of which the beneficiaries may have absolutely no knowledge or insufficient knowledge so as to defend their interests meaningfully. The recognition of a nonfiduciary trust stands as a stark repudiation of the prevailing concept of the trust, thereby posing a direct challenge to the cogency of the trust concept.



