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# The Trustee's Role in Directed Trusts

Changing circumstances have led to a bifurcation of functions

Over the last decade, trust law has undergone a transformative evolution. It's becoming commonplace for trust settlors to design so-called "directed trusts" and to transfer existing trusts to new jurisdictions to become modified as directed trusts. These trusts include provisions that allow for an advisor, co-trustee or other fiduciary to direct the trustee on how to exercise a variety of ministerial and discretionary responsibilities, such as investment decisions pertaining to all or a portion of the assets, tax reporting, distributions, transfer of trust situs, amendments to the trust instrument and how and when beneficiaries receive notices and information. The trustee continues to possess the trust power and authority that the direction covers, but the trustee executes those powers at the direction of an advisor.[1] This innovation in trust law was both necessary and long overdue.

## Changing Circumstances

Changing circumstances have led to the evolution of trust law towards bifurcation of trustee functions between the trustee and a separate advisor. Today, settlors often select a trustee in a jurisdiction far away from their residence, such as Delaware, Nevada, Alaska or South Dakota to take advantage of their beneficial trust laws. In addition, many existing trusts are moving to those jurisdictions. Consequently, the trustee is often selected because of its ability to administer the trust effectively and efficiently in a desirable jurisdiction. The trustee may provide excellent custody and account statement services, but isn't the party that the settlor or beneficiaries would prefer to make some or all of the investment or distribution decisions.

Additionally, in recent years, settlors have used common law trusts more frequently to carry out specific and unique investment, tax and dispositive objectives that conflict with traditional fiduciary limitations and pose unacceptable risks, obligations and duties on fiduciaries. Modern settlors can accomplish these strategies by bifurcating those responsibilities from the rest of the traditional trust administration functions and assigning them to a separate advisor who will carry out those specific objectives.

## Why a Directed Trust?

Why would anyone want a directed trust? The general answer is simple: the beneficiaries, settlor or trustee wants someone other than the trustee to have some or all of the responsibilities and liabilities traditionally associated with the trustee function. For example, directed trusts may be beneficial in the following contexts:

**Investments.** The settlor of a trust or its beneficiaries may have specific objectives with respect to the investment of trust assets, and a traditional trustee may find those objectives problematic. Often, a settlor wishes to create a trust that holds special assets, such as a concentrated position in the stock of a family-controlled business, a limited liability company (LLC), real estate or stock that will soon be sold in an initial public offering. Settlors and beneficiaries may have specific preferences about how the trust assets should be invested and managed, or they may contemplate a specific transaction in the foreseeable future. The prudent investor rule, prudent person rule, rules requiring

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diversification and rules prohibiting self-dealing may put pressure on a trustee, or indeed require a trustee to abandon these objectives. Alternatively, the beneficiaries may have a special relationship with an investment manager other than the corporate fiduciary. An individual with specialized expertise in running the family business that's held in a trust may possess the special skills required to make business decisions for that investment. The settlor may want to pass wealth down to successive generations through the use of a trust, but isn't yet ready to turn over the investment management. Here, the settlor can retain the power to manage the trust investments by serving as the investment advisor and directing the trustee.

In any of these situations, a directed trust can help facilitate the objectives of the settlor or beneficiaries where the trustee is unable or unwilling to do so. The investment responsibilities and liabilities can be assigned to an investment advisor, named in the trust instrument, and the trust instrument can require the trustee to act solely upon that investment advisor's direction. Without the benefit of a directed trust statute, in many instances the trustee wouldn't be prudent in holding a concentrated position,[2] so the trustee wouldn't be able to meet the settlor's needs. The direction provisions could be limited to special assets defined in the trust instrument, or perhaps the advisor can specify them in writing and change the assets subject to direction. Alternatively, the trustee may be directed as to all of the trust's assets.

A settlor may want more than one investment manager for the trust assets. In that case, the trustee could either delegate to another investment manager, or be directed on the portion of the assets that are managed by the other manager. Either approach may be possible under delegation or direction statutes. However, if the settlor has certain ideas about diversification or investment strategies that don't match the investment policies of the trustee, the trustee may be better suited to meet these needs if acting under a directed trust statute. Also, under a delegation statute, the trustee would have ongoing responsibilities and liabilities with respect to the investment portfolio being managed by a separate investment manager.

**Distributions.** Settlors often want responsibility for trust distributions to rest with individuals who are close to the family and have personal knowledge of the beneficiaries' needs. This may be particularly desirable where a beneficiary has special needs or where the trust instrument includes lifestyle incentives or prohibitions that require personal knowledge and impose commitments of time and attention. In addition, under the federal income tax grantor trust rules, beneficiaries with interests substantially adverse to the grantor may need to direct the trustee to make distributions to prevent the trust from being treated as a grantor trust.

> The trustee will generally charge a reduced fee if traditional functions are taken away.

**Other uses.** A trustee's duty to inform beneficiaries can be limited if the trustee is required to provide beneficiaries with notice of the nature and extent of their interests in a trust, or to be notified of the existence of the trust, only in accordance with the direction of an advisor, trust protector or co-trustee. Sometimes a settlor may wish to limit the trustee's obligations to inform beneficiaries of a trust when, for example, the trust is large and the beneficiaries are young or irresponsible. Other possible areas for trustee direction include tax return preparation and reporting, amendments to the trust agreement, change of situs and change of governing law.

**Fees.** When traditional trustee functions such as investments or distributions have been taken away from the trustee and given to a direction advisor, the trustee will generally charge a reduced fee that reflects the lesser risk and responsibility that it will take on. This can reduce fees in the aggregate and provides the settlor or beneficiaries with a menu of options for allocating functions and their fees among multiple service providers.

## Bifurcation

If the settlor or beneficiaries want to truly bifurcate certain duties between the trustee and a separate advisor and require the trustee to follow directions without monitoring, second-guessing or interfering with the advisor's decisions, then the direction provisions in the trust and the applicable state directed trustee statute must be structured with three critical components:

- The trustee should only be liable for willful misconduct when following directions;
- The trustee must be required to follow the direction and act solely at direction; and
- The trustee should have no duty to monitor the advisor.

Without these components, the direction structure is tantamount to a delegation, and the trustee functions won't be bifurcated. A directed trust arrangement isn't a delegation. A delegation requires the trustee to monitor the conduct of the delegatee, and, depending upon the applicable law, to continue to be liable for negligent conduct of the delegatee or negligently hiring the delegatee. This will prevent the settlor and beneficiaries from carrying out their wishes, and the trustee won't charge a reduced fee for serving in a reduced capacity with reduced risk.

**Liability for willful misconduct only.** The trustee must only be liable for willful misconduct, not gross negligence or some lesser standard of liability. The crux of a workable directed trustee statute is a willful misconduct standard that applies to a trustee acting at the advisor's direction.[3] If the trustee is liable for gross negligence or simple negligence in connection with carrying out the advisor's directions, then the trustee will be saddled with the obligation to independently monitor and second-guess the decisions of the advisor because of the threat of liability.

**No independent discretion.** If there's an advisor with the power to direct the trustee, the trustee must be required to follow that direction. The trustee can't have any independent discretion to decide whether to execute the direction. The trustee must also act solely at the advisor's direction. If the trust instrument gives the advisor power to direct the trustee with respect to investments, and requires the trustee to follow those directions, but it doesn't state that the trustee shall act solely at the advisor's direction, then the trustee must follow directions but essentially has continuing, simultaneous powers and duties to invest in its own discretion as well. The trust instrument must provide that the trustee shall exercise the investment powers only upon direction, or the responsibilities will not be bifurcated.

**No duty to monitor.** The trustee should have no duty to monitor the advisor because with that duty comes potential responsibility, liability and interference with investment decisions. Delaware's directed trust statute specifically provides that the trustee shall have no duty to "(1) monitor the conduct of the adviser; (2) provide advice to the adviser or consult with the adviser; or (3) communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser."[4] The directed trustee provisions in Section 808 of the Uniform Trust Code (UTC) don't effectively bifurcate the investment function and remove it from the trustee's responsibilities because, from the trustee's perspective, it will continue to be potentially liable for the advisor's decisions if they constitute a breach of trust.[5] In addition, the trustee shouldn't be able to remove or appoint the advisor. If the trustee has appointed the investment advisor, or has the power to remove or appoint the investment advisor, the trustee may be vicariously liable for the advisor's conduct for negligently hiring or failing to fire the investment advisor.

The applicable state statute and the language drafted in the trust instrument must adequately address these issues. Otherwise the structure will be tantamount to a delegation and there will be no bifurcation.

## Types of Statutes

When deciding upon a directed trust structure, it's important to know exactly what type of directed trust statute the selected jurisdiction has. Not all statutes are created equal.[6] Thirty-five states have some form of a directed trust statute.[7] Of these, two states have adopted the approach outlined in Section 185 of the *Second (Restatement) of Trusts*.[8] Eighteen states have adopted the approach found in UTC Section 808.[9] An additional 15 states have enacted other forms of directed trust statutes that generally afford more protection than the *Restatement* or UTC approaches.[10] The states that have enacted directed trust statutes differ as to how they limit the fiduciary duties that apply to directed trustees. These differences can limit the utility of the statutes or produce materially different results. Specifically, states following the *Restatement* and the UTC approach fail to effectively bifurcate the duties allocated to the advisor because those approaches require the trustee to ascertain whether the advisor is violating its fiduciary duties with the actions the advisor takes. Thus, the trustee has an ongoing duty to monitor and second guess the advisor, refuse to follow those directions that would result in serious breaches of fiduciary duty and remedy breaches of fiduciary duty.

Differences also exist among the states that provide more protection for trustees. Under the Alaska statute, unless the trust instrument overrides the statute, the trustee isn't required to follow the directions of an advisor.[11] This will result in the trustee continuing to possess the fiduciary responsibility and liability of deciding whether to follow the direction or not. South Dakota doesn't permit advisors to direct the trustee with respect to functions other than investments or distributions.[12] Colorado, Georgia, Kentucky, Oklahoma and Utah only allow for investment advisors.[13] Utah provides for a gross negligence standard in addition to willful misconduct.[14] Direction statutes like those in Utah and South Dakota specifically define the investment decisions that they cover.[15] As we later discuss, limiting the scope of direction actions can cause ambiguity when it comes time to act on directions in certain investment activities, and the attendant risk and uncertainty can impact the efficient administration of the trust.

The directed trust statues present many different approaches, and settlors should be attuned to which jurisdiction's laws will produce the desired result. A state like Delaware will generally provide the best result because it enables an advisor to direct any discretionary or ministerial functions, limits the trustee's liability to willful misconduct and expressly limits the trustee's duty to monitor decisions or identify breaches of trust. This is the best framework for true bifurcation of functions between the advisor and trustee.

## Document Direction

Another method of creating a directed trust is to include specific language in the trust agreement that directs the trustee to retain a specific asset, enter into a specific transaction at a specific time or take some other investment action that's directed in the trust instrument itself. It may not be clear whether such specific directions in the trust instrument are enforceable under applicable common law to protect the trustee. In some jurisdictions, it may not be possible to eliminate a trustee's duty to diversify or override a trustee's fiduciary duties in this fashion. Delaware has a statute that became effective on Aug. 1, 2010, which treats a direction in a trust instrument to retain an investment as if it were an investment direction from an advisor having the power to direct the fiduciary.[16] Section 3304 of Title 12 of the Delaware Code now provides that a direction to retain property as a trust investment shall be deemed to waive any duty of diversification with respect to the investment and shall exonerate the fiduciary from liability for retaining the property except in a case of willful misconduct proven by clear and convincing evidence in the Court of Chancery. Thus, a settlor who creates a trust with a specific strategy in mind involving investments, distributions or any other action to be taken by the trustee, may effectively carry out that strategy using this enabling statute.

> If a trustee has an overriding duty to diversify, monitor or notify beneficiaries if the trustee disagrees with the advisor's investment decisions, then the interested parties may not be able to accomplish the desired objective of having a directed trustee that's removed from investment decisions.

## Tale of Two Cases

The following two cases demonstrate how applicable law can produce very different results. If a trustee has an overriding duty to diversify, monitor or notify beneficiaries if the trustee disagrees with the advisor's investment decisions, then the interested parties to a trust may not be able to accomplish the desired objective of having a directed trustee that's removed from investment decisions.

The Delaware Chancery Court case, *R. Leigh Duemler v. Wilmington Trust Company,*[17] demonstrates the principle of effective bifurcation of investment responsibility. The court validated a statutory defense under Section 3313(b) of Title 12 of the Delaware Code to a breach of trust suit, providing that Wilmington Trust Company (WTC) wasn't liable as trustee for its actions with respect to trust investments in the absence of willful misconduct. Duemler was the investment advisor of a trust with the express power under the trust instrument to direct WTC, as the trustee of the trust, with respect to all investments. The trust invested in "a nondiversified portfolio with extremely risky assets," the kind of portfolio "that requires the most diligent of monitoring." WTC forwarded a prospectus to Duemler for an investment decision concerning one of the trust's investments. Duemler didn't provide WTC with any direction as to the investment and, subsequently, the investment experienced a significant drop in value. The court stated that in these circumstances, Section 3313 requires the investment advisor to make investment decisions in isolation, without oversight from the trustee, because if the investment advisor doesn't make the investment decisions alone, the investment advisor's role wouldn't work, as the trustee would always "second guess" the investment advisor's decisions.[18] Finding that WTC didn't engage in willful misconduct, the court upheld a statutory defense under Section 3313(b) of Title 12. The court further explained that if the trustee were liable in such situations for "the failure to provide information or to make sure that [the investment advisor] making the decision knew what they were doing" it would "gut the statute."[19] The court also stated that "this is precisely the situation where the person who is taking the lead on making investments directed a decision. And you don't get to come in and hang your fellow fiduciary on that unless they engaged in willful misconduct."[20]

> A trustee should be careful not to cross the line where it could arguably be evaluating the merits of the investment.

Another case, on the opposite side of the spectrum, illustrates the issues that exist when the trustee has an ongoing duty to monitor the investments. In *Rollins v. Branch Banking & Trust Co. of Va.*,[21] the trust held a concentrated position in a closely held stock that experienced a significant decline in value. The beneficiaries sued the trustee for breach of various fiduciary duties. The trust instrument gave the trustee the power to make investments, but that power was limited by the following language: "Investment decisions as to the retention, sale, or purchase of any asset of the Trust Fund shall likewise be decided by such living children or beneficiaries, as the case may be."[22] The court concluded that "[t]he beneficiaries, alone, had the power to make investment decisions."[23] The court cited the Virginia statute, which provides that whenever a governing instrument reserves to a person other than the trustee the power to make investment decisions, the trustee shall not be liable for any loss resulting from the investment decision made by the other person.[24] Consequently, the court held that the trustee wasn't liable for a failure to diversify. However, the court found the trustee liable for failing to attempt to prevent a breach of trust by failing to warn the beneficiaries about the impending decline in the value of the stock. The court stated that "[t]he legal and equitable obligations of a trustee result from the nature of the relationship between the parties and not the literal words of the trust agreements."[25] The court stated that the trustee can't "rid himself of this duty to warn."[26]

## Drafting Direction Language

When drafting the direction language in a trust instrument, it's important to provide a comprehensive and detailed description of the powers to be exercised upon direction. This is critical for the effective administration of the trust. For example, assume the direction language merely says that the trustee shall act only upon direction of an investment advisor with respect to the "investment of the trust assets," or perhaps it includes a short, generic description of investment activities, like "retention, purchase, sale, lending and voting" of trust assets. When it comes time for the trustee to enter into a transaction involving complicated contractual arrangements like a stock purchase agreement, security agreement and loan and guarantee documents, including representations and warranties, the ambiguities in the scope of the direction language will immediately become apparent. What trustee powers relating to the legal documents are covered in the direction language in the trust instrument? Can the trustee safely rely on the direction letter? The rubber meets the road when the trustee must determine whether the direction language covers the investment powers being exercised. The best solution is to provide a broad and inclusive description of investment activities, plus a specific cross-reference to all of the detailed investment powers granted to the trustee in the trust instrument. Why not take full advantage of the broad and detailed list of powers already included in the trust instrument? The investment advisor provision should also cover things like valuation of interests in closely held and non-public entities. Trustees often find that when they are directed to hold an interest in an entity, like an LLC, and they don't have any information about the entity, issues arise with reporting the asset in account statements.

> Before accepting assets into the directed trust, it's important for the trustee to review those assets to ensure they don't pose concerns.

## The Direction

The advisor should give all directions to the trustee in writing. The direction letter should be specific, and leave no discretion to the trustee. Ideally, if there are documents to be signed, the direction will attach those documents and essentially state "sign here." It's also advisable to include the language of the given statute that provides for the ability for the trustee to be directed, as well as language that states that the trustee does not have the duty to monitor the actions of the trust advisor.

## Due Diligence

Initially, the trustee should work with the settlor to determine the best way for the trustee to fully vet the assets on which the trustee will be directed. Therefore, before the trustee accepts the assets into the trust, it's very important to fully review the assets to ensure that the trustee doesn't end up holding an asset that poses concerns such as reputation risk, political risk or legal issues. Arguably, once the assets are in the trust, the trustee can't perform the same level of overall review of the assets as it could before taking the assets into the trust, without risking the erosion of the protection of the statute. The beneficiary might argue that the trustee eroded the protections available under a directed trustee statute if it waived them by having frequent consultations with the beneficiaries and advising, monitoring and participating with the investment advisor. The directed trustee should determine how it will monitor the investments. Even though some directed trust statutes generally provide that an administrative review doesn't constitute a review causing the trustee to assume liability,[27] the trustee should be careful not to cross the line where it could arguably be evaluating the merits of the investment. The trustee will need to understand what it holds in the trust to fulfill its duty as a trustee, and also in case the time comes when the trustee is no longer directed. Once the trustee is acting at direction, the review should be limited to monitoring (1) a description and value of the asset, (2) the fact that the trust advisor still directs the trustee to hold the asset, and (3) confirmation that the trust advisor is still in that role. Sending out a letter asking the trust advisor to verify these three elements can keep the trustee informed and able to fulfill its role as a fiduciary, without causing the trustee to lose the protection of the statute.

## Getting From Here to There

A settlor can draft a trust agreement to create a directed trust if it's governed by the laws of a jurisdiction that provides for directed trusts. If a new trust is being created, it's important to successfully satisfy the conflicts-of-laws rules applicable in the desired jurisdiction. It's more complicated when the beneficiaries and the trustee of an existing trust wish to modify the terms of the trust to make it a directed trust. In those cases, several alternatives may exist. If the governing instrument permits the amendment of the trust for administrative purposes, then the trust document can be changed to include a directed trustee provision. If no amendment power exists, it will be necessary to perform a non-judicial or judicial modification of the trust or decant the trust to a new trust that includes a directed trustee provision.

Of course, the trust with the directed trustee provisions will need to have its situs in a jurisdiction that permits directed trusts. If the trust isn't already located in such a jurisdiction, then the situs and law governing the administration of the trust will need to be changed.

In many jurisdictions, an existing irrevocable trust may be modified to include direction advisor provisions. For example, 23 states have adopted the UTC, which provides a mechanism for non-judicial modification of trusts in Section 411.[28] In some jurisdictions such as Delaware, you can modify a trust quickly and inexpensively by filing a consent petition in court and obtaining a judicial modification of the trust.

In the case of amendment, decanting or judicial modification, the trustee will likely participate in the changes. The trustee won't want to be responsible for selecting the advisor that will direct it, due to the liability issues of negligently selecting the advisor. Furthermore, there will be potential liability associated with the discretionary act of changing the structure of the trust, and a trustee will likely seek releases or consents from all interested beneficiaries. If there are beneficiaries who don't agree with the change, then the trustee should exercise caution in deciding whether to modify the trust to be directed. For these reasons, judicial modification is often the approach that's taken. In a judicial modification, the beneficiaries sign consents and are bound by the order.

## Areas of Concern

When turning an existing trust into a directed trust, there are two areas of particular concern that can negatively effect the beneficiaries. As described above, often a directed trust is desirable so that the trust can hold a special asset, such as an LLC, or carry out a particular transaction. To facilitate this investment objective, the beneficiaries may look to a family member or friend to serve as the investment advisor, who is willing to go along with the objective. The very reason for the directed trust may be that the desired objective isn't one that any professional fiduciary is willing to carry out, or may not be permissible under traditional fiduciary duties. To accommodate the advisor and facilitate the objective, the standard of liability for the investment advisor may need to be limited to willful misconduct so that the advisor is willing to direct the trustee to hold the interest in an LLC or sell the stock pursuant to the objectives.

This raises two issues. First, prior to bifurcating the investment responsibility, the corporate fiduciary was responsible for the investment decisions. Now, the family member or friend is the fiduciary responsible for the multi-million dollar investment decision. He probably doesn't have the resources or institutional expertise, or experience as a fiduciary that the trustee had when it possessed the investment responsibility prior to the modification. Second, the trustee was subject to a standard of liability for negligence or gross negligence or prudence under the document or applicable law, but now the fiduciary solely responsible for investment decisions may only be liable for willful misconduct. In both cases, the beneficiaries have given up some of their recourse against the investment fiduciary. The beneficiaries need to be properly advised and attuned to the relative adverse change to their rights as beneficiaries and the accountability of the investment fiduciary.

That isn't to say that the structure described in this section is bad per se. Directed trustee arrangements are structured this way all the time to facilitate objectives that would have been inhibited by fiduciary law that applies to trusts. If the beneficiaries go into the structure fully informed, and still intend to put in place an investment advisor who will direct the trustee to carry out a desired outcome, then they should be entitled to take on that risk and consent to the consequences. The end result is a trust in which the settlor is able to achieve results that aren't otherwise available. TE

## Endnotes

1. Note that it's not the direction advisor that possesses and executes those powers. The direction advisor directs the trustee to exercise the powers.
2. *See generally* W. Curtis Elliott, Jr. and Briani L. Bennett, "Closely Held Business Interests and the Trustee's Duty to Diversify," *Trusts & Estates*, April 2009 at p. 44 for a discussion of the risks of holding concentrated positions of closely held business interests in trusts.
3. In Delaware, willful misconduct is defined by statute. 12 Del. C. Section 3301(h)(4) provides: "The term 'willful misconduct' means intentional wrongdoing, not mere negligence, gross negligence or recklessness." Delaware's directed trustee statute also includes a provision that applies when a trustee acts with the consent of an advisor. 12 Del. C. Section 3313(c). In such cases, the trustee is liable for gross negligence. This part of the statute is rarely used, because when acting with consent, the trustee is still responsible for all of the decisions (or indecision) in the first place, and the standard of liability opens the trustee to many claims.
4. 12 Del. C. Section 3313(e). Section 3313(e) further provides: "Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the advisor's authority."
5. Section 808(b) of the Uniform Trust Code (UTC) provides: "If the terms of a trust confer upon a person other than the settler of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust."
6. *See* Mary Clarke and Diana S. C. Zeydel, "Directed Trusts–The Statutory Approaches to Authority and Liability;" *Estate Planning Journal,* September 2008; John P. C. Duncan and Anita M. Sarafa, "Multi-Participant Trusts Need a Coordinator," *Trusts & Estates*, November 2008 at p. 32; and Richard W. Nenno, "Directed Trusts: Can Directed Trustees Limit Their Liability?" *Probate & Property,* November/December 2007 at p. 45, for a discussion of the various approaches to directed trust statutes.
7. *See* Richard W. Nenno, "Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection," Sept. 21, 2010, Appendix G, for a complete list of directed trust statutes.
8. *Ibid.* Those states are Indiana and Iowa. Section 185 of the *Second (Restatement) of Trusts* provides: "If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power."
9. Nenno, *supra* note 7.
10. *Ibid.*
11. Alaska Stat. Section 13.36.375(b).
12. SDCL Section 55-B1-1.
13. Colo. Rev. Stat. Section 15-1-307; Ga. Code Ann. Section 53-12-303(c); Okla. Stat. Tit 60, Section 175,19; Utah Code Ann. Section 75-7-906. *See* Nenno, *supra* note 7.
14. Utah Code Ann. Section 75-7-906(4).
15. Utah Code Ann. Section 75-7-906(1); SDCL Section 55-B1-10.
16. 12 Del. C. Section 3304.
17. *R. Leigh Duemler v. Wilmington Trust Company,* C.A. 20033 (Del. Ch. Oct. 28, 2004). This opinion is an unpublished transcript of a bench ruling. The author's law firm represented the trustee in this case.
18. *Ibid,* at p. 11.
19. *Ibid,* at p. 16.
20. *Ibid.*
21. *Rollins v. Branch Banking & Trust Co. of Va.*, 2001 WL 34037931 (Va. Cir. Ct. April 30, 2001).
22. *Ibid,* at p. 2.
23. *Ibid.*
24. 24. Va. Code Section 26-5.2.
25. *Rollins, supra* note 21 at p. 2.
26. *Ibid,* at p. 3.
27. Two examples are Delaware, 12 Del. Code Section 3313 (e) and New Hampshire, N.H. RSA 564 B: 12-1204 (b).
28. In addition, New Jersey introduced UTC legislation in 2010.