



Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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THE UNIFORM DIRECTED TRUST ACT

- A Summary -

The Uniform Directed Trust Act (UDTA) addresses the rise of directed trusts. In a directed trust, a person other than a trustee has a power over some aspect of the trust's administration. Such a person may be called a "trust protector," "trust adviser," or in the terminology of the UDTA, a "trust director." This division of authority between a trust director and a trustee raises a host of difficult questions for which the UDTA provides clear, practical answers.

In a traditional trust, the responsibility for all aspects of the trust's administration—including custody, investment, and distribution—belongs to the trustee. For centuries, this allocation of authority to a trustee has been a foundation of trust law. In a directed trust, however, this foundation may be modified by a grant of power over some aspect of trust administration to a trust director. A trust director is not a trustee, but has the power either to direct the trustee in the trust's administration or to administer the trust directly. A trust director can have virtually any power over a trust, including the power to direct the trustee in the investment and distribution of trust property and the power to amend or terminate the trust.

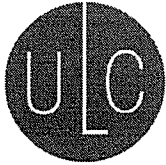
The rise of directed trusts raises numerous unsettled questions of law. The most obvious question is how to allocate fiduciary responsibility between a trust director and a trustee. If a trust director exercises a power of direction and the trustee acts accordingly, a court must decide how much responsibility for the action belongs to the director and how much belongs to the trustee. In addition, a directed trust creates a host of further problems about how to govern a trust director, such as how to discern whether a trust director has duly accepted appointment and how to differentiate between a fiduciary power belonging to a trust director and a nonfiduciary power belonging to the holder of a power of appointment.

The purpose of the UDTA is to address these complications. The UDTA expressly validates terms of a trust that provide for a trust director and prescribes a simple set of rules for directed trusts. The UDTA's basic strategy for allocating fiduciary duty is to impose primary fiduciary responsibility for a trust director's actions on the director, while preserving a minimum core of duty in a trustee. A trust director has the same fiduciary duties as a trustee would have in a like position and under similar circumstances, but a trustee that acts subject to a trust director's direction is generally liable only for the trustee's own willful misconduct. The UDTA authorizes a similar allocation of power and duty among cotrustees.

In addition to this modified fiduciary scheme, the UDTA also offers solutions to the many practical problems created by the presence of a trust director. Among other things, the UDTA deals with the sharing of information among a trustee and a trust director and the compensation, succession, and appointment of a trust director.

The Uniform Directed Trust Act is appropriate for consideration in every state, whether or not the state has enacted the Uniform Trust Code or other legislation addressing directed trusts. For further information about the UDTA, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.

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**WHY YOUR STATE SHOULD ADOPT THE
UNIFORM DIRECTED TRUST ACT**

The Uniform Directed Trust Act (UDTA) provides clear, practical answers to the challenges raised by the rise of directed trusts. The act offers a simple framework for allocating fiduciary power and duty between a trust director and a trustee and comprehensively addresses the many practical questions raised by the presence of a trust director. Although many states have already enacted statutes to govern directed trusts, the UDTA improves on these statutes by offering solutions that are simpler, more precise, and more complete. Because directed trusts are now standard in sophisticated trust drafting, a comprehensive directed trust statute is essential for every state.

- ***The UDTA balances settlor autonomy and beneficiary safeguards.*** The UDTA divides fiduciary duty between a trustee and a trust director by allocating primary duty to the director while maintaining a minimum core of duty for the trustee to avoid willful misconduct. This approach balances a settlor's freedom of disposition with a beneficiary's need for fiduciary protections. In allocating fiduciary duty in this way, the UDTA clarifies and extends the division of fiduciary duties that has already been pioneered by Delaware. Delaware's success in attracting directed trusts indicates that the UDTA approach is workable in practice.
- ***The UDTA is comprehensive.*** In addition to providing a sensible and clear allocation of fiduciary duty, the UDTA address a host of other issues that have been largely overlooked by existing state statutes. The UDTA provides rules to govern the flow of information between trustees and trust directors, for example, and offers solutions to important practical problems concerning trust directors, such as succession, compensation, and removal. The UDTA's comprehensiveness is driven by a coherent drafting philosophy that largely extends a state's existing law of trusteeship to trust directors.
- ***The UDTA offers many technical innovations.*** Because the UDTA is the product of an extensive drafting process aided by nationally recognized trust law experts, the UDTA offers many technical innovations that improve on existing state statutes. Some of these innovations fix errors and oversights in existing statutes. Unlike most state statutes, for example, the UDTA makes clear that the settlor of a revocable trust is not a trust director. The UDTA also offers a number of novel innovations. It provides tools to assist a settlor's tax planning, for example, and resolves doubt about ancillary areas of a trust director's authority. The UDTA further innovates by treating all trust directors similarly, thereby avoiding the artificial and overly rigid categories of trust directors that make many existing statutes difficult to work with.

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THE UNIFORM TRUST DECANTING ACT

- A Summary -

“Decanting” is the term used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a useful strategy for changing the outdated terms of an otherwise irrevocable trust, but can also be abused to defeat the settlor’s intent. The Uniform Trust Decanting Act (UTDA) permits decanting for appropriate purposes while preventing abuse and preserving the intent of the settlor.

Because decanting is an exercise of the trustee’s discretion and does not require beneficiaries to consent, certain tax penalties that would otherwise apply can be avoided. Every state allows decanting in some form, but only some states have statutes governing decanting, and those vary widely.

The UTDA includes one stricter set of rules that apply when the settlor gave the trustee limited discretion over distributions, and another more liberal set of rules that apply when the trustee has expanded discretion. In both cases, the person exercising the decanting power is subject to all applicable fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

When the trustee has limited discretion over distributions, decanting is permitted for administrative or tax purposes, but the beneficial interests under the second trust instrument must be substantially similar to the beneficial interests under the first trust. In other words, the trustee may not exercise the decanting power to reduce or eliminate the interest of any beneficiary. However, if the trustee already has expanded discretion to reduce or eliminate the interest of beneficiaries under the terms of the first trust, the UTDA provides more flexibility.

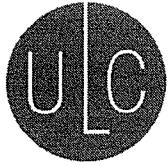
One common reason for decanting is to provide for a beneficiary who becomes disabled after the settlor executed the first trust. If the settlor did not anticipate the possibility of disability, the beneficiary may be ineligible for governmental benefits that would otherwise be available. Section 13 of the UTDA gives additional flexibility to trustees with respect to disabled beneficiaries.

The UTDA limits decanting when it would defeat a charitable or tax-related purpose of the settlor, and Section 14 provides for prior notice to the state official that is responsible for protecting charitable interests. Section 16 prohibits decanting for the purpose of adjusting trustee compensation without the unanimous consent of the beneficiaries or court approval.

In summary, the UTDA provides a more complete set of rules for decanting than currently exists in any state. It is appropriate for states that have adopted the Uniform Trust Code and for states that have a non-uniform trust law statute.

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM TRUST DECANTING ACT

“Decanting” is when a trustee distributes assets from one trust to a second trust, like pouring wine from the bottle to another vessel. Its use has been growing in recent years as trustees search for ways to modify the terms of an otherwise irrevocable trust due to changed circumstances that the settlor did not anticipate. The Uniform Trust Decanting Act (UTDA) provides a set of decanting rules that are designed to further the settlor’s intent, protect the beneficiaries’ interests, and prevent abuses by the decanting trustee. It should be enacted in every state because:

- ***UTDA provides certainty of law.*** Trusts are already being decanted in every state, sometimes under questionable authority based on obscure common-law decisions. The UTDA provides clear statutory rules.
- ***UTDA provides appropriate limits on a trustee’s ability to decant.*** The UTDA contains different decanting rules that ensure the settlor’s intent will not be defeated. One stricter set of rules applies to trustees with limited discretion, and one more lenient set of rules applies to trustees with expanded discretion. All trustees are subject to fiduciary duties and required to act in accordance with the purposes of the first trust.
- ***UTDA protects beneficiaries.*** Under the UTDA, all qualified beneficiaries must receive notice 60 days before a proposed decanting. Anyone who objects to the decanting may ask a court to intervene. Vested interests may not be reduced or eliminated.
- ***UTDA protects charitable interests.*** Under the UTDA, a trust held solely for charitable purposes may not be decanted. If the trust contains any determinable charitable interest, that interest may not be reduced or eliminated by a decanting. The Attorney General must be notified of any proposed decanting and may object on behalf of the charity or charities that stand to benefit.
- ***UTDA protects trustees from liability for a previous trustee’s decanting.*** The UTDA allows a trustee that assumes management of a previously decanted trust to rely on the validity of the previous decanting without risk of incurring liability for the previous trustee’s actions.
- ***UTDA makes decanting easier and safer.*** Under the UTDA, a trustee may “decant” by restating the existing trust document, avoiding the need to draft an entirely new trust when only a small administrative change is intended. The UTDA also contains an innovative savings provision that gives effect to valid provisions of a decanting despite any technical violations that are later deemed invalid.

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