

Appendix A – Colorado statutes relevant when planning for unique assets

PRUDENCE AND STANDARD OF CARE

C.R.S. § 15-1.1-101. Prudent investor rule

- (a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article.
- (b) *The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust.* A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

C.R.S. § 15-1.1-102. Standard of care - portfolio strategy - risk and return objectives

- (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.
- (b) *A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole* and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.
- (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:
 - (1) General economic conditions;
 - (2) The possible effect of inflation or deflation;
 - (3) The expected tax consequences of investment decisions or strategies;
 - (4) *The role that each investment or course of action plays within the overall trust portfolio*, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
 - (5) The expected total return from income and the appreciation of capital;
 - (6) Other resources of the beneficiaries;
 - (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital;
and
 - (8) *An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.*

- (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.
- (e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article.
- (f) *A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.*

C.R.S. § 15-1.1-108. Reviewing compliance

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and *not by hindsight*.

DIVERSIFICATION AND REVIEW OF INCEPTION ASSETS

C.R.S. § 15-1.1-103. Diversification

A trustee *shall diversify* the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

C.R.S. § 15-1.1-104. Duties at inception of trusteeship

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee *shall review the trust assets and make and implement decisions concerning the retention and disposition of assets*, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this article.

DELEGATION

C.R.S. § 15-1.1-109. Delegation of investment and management functions

- (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
 - (1) Selecting an agent;
 - (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

- (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (c) A trustee who complies with the requirements of subsection (a) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
- (d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.

C.R.S. § 15-5-807. Delegation by trustee

- (1) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
 - (a) Selecting an agent;
 - (b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
 - (c) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
- (2) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
- (3) A trustee who complies with subsection (1) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.
- (4) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

DIRECTED TRUSTS

Colorado Uniform Directed Trust Act, C.R.S. §§ 15-16-801 to 818.

DECANTING

Colorado Uniform Trust Decanting Act, C.R.S. §§ 15-16-901 to 931.

TRUST MODIFICATION

C.R.S. § 15-5-410. Modification or termination of trust - proceedings for approval or disapproval

- (1) In addition to the methods of termination prescribed by sections 15-5-411 to 15-5-414, a trust terminates to the extent that:
 - (a) The trust is revoked or expires pursuant to its terms;
 - (b) No purpose of the trust remains to be achieved; or
 - (c) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.
- (2) A proceeding to approve or disapprove a proposed modification or termination pursuant to sections 15-5-411 to 15-5-416, or trust combination or division pursuant to section 15-5-417, may be commenced by a trustee or a beneficiary.

C.R.S. § 15-5-411. Modification or termination of noncharitable irrevocable trust by consent

- (1) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's consent to a trust's modification or termination may be given by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust, by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized, or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.
- (2) Other than a trust established by court order under Title XIX of the federal "Social Security Act", 42 U.S.C. sec. 1396p (d)(4), a noncharitable irrevocable trust may:
 - (a) Be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust; or
 - (b) Be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.
- (3) A spendthrift provision in the terms of a trust is not presumed to constitute a material purpose of the trust.
- (4) Upon termination of a trust pursuant to subsection (1) or (2) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

- (5) If not all of the beneficiaries consent to a proposed modification or termination of a trust pursuant to subsection (1) or (2) of this section, the modification or termination may be approved by the court if the court is satisfied that:
 - (a) If all of the beneficiaries had consented, the trust could have been modified or terminated pursuant to this section; and
 - (b) The interests of a beneficiary who does not consent will be adequately protected.

C.R.S. § 15-5-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively

- (1) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
- (2) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
- (3) Upon termination of a trust pursuant to this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

§ 15-5-414. Modification or termination of uneconomic trust

- (1) After notice to the qualified beneficiaries, the trustee of a trust property having a total value less than one hundred thousand dollars may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.
- (2) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.
- (3) Upon termination of a trust pursuant to this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.
- (4) This section does not apply to an easement for conservation or preservation.

C.R.S. § 15-5-415. Reformation to correct mistakes

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

C.R.S. § 15-5-416. Modification to achieve settlor's tax objectives

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

DUTY OF IMPARTIALITY

C.R.S. § 15-1.1-106. Impartiality (identical to C.R.S. §15-5-803)

If a trust has two or more beneficiaries, the trustee *shall act impartially in investing and managing the trust assets*, taking into account any differing interests of the beneficiaries.

DUTY OF LOYALTY – CONFLICTS OF INTEREST - VOIDABLE TRANSACTIONS

C.R.S. § 15-12-713. Sale, encumbrance, or transaction involving conflict of interest - voidable - exceptions

- (1) Any sale or encumbrance to the personal representative, his spouse, agent, or attorney, or any corporation or trust in which he has a beneficial interest, or any transaction which is affected by a conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented, unless:
 - (a) *The will or a contract entered into by the decedent expressly authorized the transaction; or*
 - (b) The transaction is approved by the court after notice to interested persons.
 - (c) Repealed.
- (2) Any transaction previously declared by subsection (1) of this section to be void shall be deemed voidable unless a petition has been filed with the court to set aside any such transaction and a lis pendens has been recorded in the county where any affected real property is located, within sixty days after July 16, 1975.

C.R.S. § 15-1.1-105. Loyalty

A trustee shall invest and manage the trust assets *solely in the interest of the beneficiaries*.

C.R.S. § 15-5-802. Duty of loyalty

- (1) A trustee shall administer the trust solely in the interests of the beneficiaries.

- (2) Subject to the rights of persons dealing with or assisting the trustee as provided in section 15-5-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:
 - (a) The transaction was authorized by the terms of the trust;
 - (b) The transaction was approved by the court;
 - (c) The beneficiary did not commence a judicial proceeding within the time allowed by section 15-5-1005 ;
 - (d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 15-5-1009 ; or
 - (e) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
- (3) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:
 - (a) The trustee's spouse;
 - (b) The trustee's descendants, siblings, parents, or their spouses;
 - (c) An agent or attorney of the trustee; or
 - (d) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.
- (4) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.
- (5) A transaction not concerning trust property, and in which the trustee engages in the trustee's individual capacity, involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.
- (6) An investment by a trustee in securities of an investment company or investment trust to which the trustee or its affiliate provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the "Colorado Uniform Prudent Investor Act",

article 1.1 of this title 15. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee must at least annually notify the persons entitled pursuant to section 15-5-813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

- (7) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.
- (8) This section does not preclude the following transactions, if fair to the beneficiaries:
 - (a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
 - (b) Payment of reasonable compensation to the trustee;
 - (c) A transaction between a trust and another trust, decedent's estate, guardianship, or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
 - (d) A deposit of trust money in a regulated financial service institution operated by the trustee; or
 - (e) An advance by the trustee of money for the protection of the trust.
- (9) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

Appendix B

Estate Planning with Directed Trusts Under the Proposed Colorado Uniform Directed Trust Act

Presented to the
Women's Estate Planning Council

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Estate Planning with Directed Trusts
Under the Proposed Colorado Uniform Directed Trust Act

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SYNOPSIS

- I. Introduction to Directed Trusts
- II. When Might a Directed Trust be Suitable?
- III. Establishing a Trust Director's Powers and Duties
- IV. Directed Trustee's Duty to Comply and Liability for Complying with a Trust Director's Direction
- V. Directed Trustee's Liability for a Trust Director's Independent Action or Inaction
- VI. Duty to Share Information Among Trust Directors and Trustees
- VII. Duty of Trust Director to Communicate with and Provide Information to Beneficiaries
- VIII. No Duty to Monitor
- IX. No Duty to Warn
- X. Office of Trust Director
- XI. Limitation of Actions Against a Trust Director
- XII. Drafting and Practical Considerations

Estate Planning with Directed Trusts

Under the Proposed Colorado Uniform Directed Trust Act

Jeffrey B. Kadavy, JD, CTFA

I. Introduction to Directed Trusts

In a directed trust arrangement, the fiduciary duties and responsibilities ordinarily vested in a trustee or equally across multiple co-trustees are divided and allocated among separate parties. One party, called a “trust director” under the proposed Colorado Uniform Directed Trust Act (“CUDTA”), has the power to direct the trustee in the performance of a specific function or functions, and the trustee must comply with such direction. The trustee who is subject to the trust director’s power of direction, called a “directed trustee” under the CUDTA, either lacks or has diminished authority to act regarding the functions allocated to the trust director. Because the directed trustee’s authority to act with respect to the functions subject to the trust director’s power of direction is reduced, so is the directed trustee’s fiduciary duty and, therefore, potential liability.

A. Before Modern Directed Trust Statutes: The Common Law

At common law, a trust settlor could retain or grant to a third party the power to control the trustee in certain circumstances. This power could be exercised either by directing the trustee or requiring consent before the trustee could act. Section 185 of the *Restatement (Second) of Trusts* characterizes this power, as well as the trustee’s fiduciary duty in complying, as follows:

If under the terms of the trust a person has the 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 the 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.

The *Restatement (Third) of Trusts* bolsters this position. Under § 75:

[Generally], . . . if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.

Thus, at common law, a directed trustee had a duty to comply with a trust director’s direction, but the trustee retained a significant fiduciary duty: before complying, the trustee was required to interpose his or her own judgment to determine whether doing so would contradict the terms of the trust or violate any fiduciary duty that the *trust director* owed to the beneficiaries, essentially acting as a watchdog. A directed trustee could not escape being a trustee, even with

respect to functions specifically within the purview of a trust director. Modern directed trust statutes alter this regime.

B. Distinguished from Delegations

A directed trust does not involve a delegation of a trustee's authority. In a delegation, a trustee exercises his or her power to assign certain functions to a third party. *See, e.g.*, C.R.S. § 15-1-804(2)(x)(I) (providing that a trustee may employ attorneys or other directors to advise or assist the fiduciary in the performance of his or her duties or, instead of acting personally, employ one or more agents to do any ministerial act required to be done by the fiduciary in the performance of his or her duties). In so doing, the trustee must exercise due care in selecting the party to whom the functions are delegated and maintains an ongoing fiduciary duty to supervise that party and monitor his or her conduct. *See, e.g.*, C.R.S. § 15-1.1-109(a) (providing that in delegating investment and management functions, a trustee must exercise reasonable care, skill, and caution in selecting an agent; establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation); and C.R.S. § 15-1-804(1) (providing that in exercising his or her powers generally, a fiduciary has a duty to act reasonably and equitably with due regard for his or her obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved, and the purposes thereof). Rather, in a directed trust arrangement, because the trust director is specifically named in the terms of a trust, which vests him or her with specific authority over certain functions, the directed trustee's authority to act independently with respect to those functions is either reduced or eliminated. This lowers the directed trustee's fiduciary duty and potential liability.

C. Distinguished from Co-trusteeships

A directed trusteeship is not synonymous with a co-trusteeship. The powers and duties of co-trustees are generally held jointly: co-trustees are fully authorized to act in concert with respect to *all* trust functions, and are therefore obligated to discharge *all* fiduciary duties in their entirety. Thus, co-trustees generally remain fully liable for any breaches of trust. Conversely, in a directed trust arrangement, because the trust director alone is empowered to act with respect to certain functions, the directed trustee is disempowered as to those functions and therefore enjoys a reduced fiduciary duty and, concomitantly, reduced potential liability.

D. Focus of These Materials

These materials focus on private directed trusts created by individual settlors. Delegations of a trustee's authority and co-trusteeships are outside of their scope, as are cover directed trusteeships involving the federal Employee Retirement Income Security Act (ERISA).

E. Procedural Posture of the CUDTA

The Uniform Directed Trust Act (UDTA) was promulgated by the Uniform Law Commission in November 2017. A subcommittee of the Colorado Bar

Association Trust & Estate Section's Statutory Revisions Committee (SRC) completed a thorough review of the UDTA in August 2018; the subcommittee's adaptation of the UDTA for Colorado, i.e., the CUDTA, was introduced on January 19, 2019, in the Colorado State Senate as Senate Bill 19-105. The Senate sponsor is Sen. Robert Rodriguez and the House sponsor is Rep. Kerry Tipper. The bill passed the Senate on February 11th, and passed the House on March 8th. If signed by Gov. Polis, the CUDTA will replace Colorado's existing Directed Trustees statute at C.R.S. § 15-16-801 *et seq.* Its effective date would be August 2, 2019, if the General Assembly adjourns on May 3, 2019, as scheduled, and no referendum petition is filed. You can monitor the bill's progress at <https://leg.colorado.gov/bills/sb19-105>.

II. WHEN MIGHT A DIRECTED TRUST BE SUITABLE?

A directed trust can afford significant flexibility to trust settlors in achieving their goals. The following is a non-exhaustive list of scenarios in which a directed trust might be appropriate.

A. Investment of Trust Assets

1. **Professional Investment Advisor.** A settlor may have a long-standing relationship with a professional investment advisor whom the settlor wishes to manage trust assets for the settlor's beneficiaries but not assume any of a trustee's other duties. This structure carries with it the advantage of being able to change the trust's investment manager — say, for chronically underperforming a relevant benchmark or failing to communicate effectively with beneficiaries — without having to replace the trustee, who may be performing his or her duties well and with whom the beneficiaries may have a strong relationship.
2. **Beneficiary Management.** A settlor may desire that a beneficiary be responsible for managing a trust's investments, particularly if the trust has only one beneficiary and that beneficiary has demonstrated interest and competence in performing this function.
3. **Unmarketable or Illiquid Assets.** If a trust will be funded with any unmarketable or illiquid assets, such as real estate or a closely-held business, then a settlor may wish to vest one or more trust directors having particular expertise or knowledge with authority over those assets. This authority could include not only the power to manage the assets day to day, but also, for example, responsibility for obtaining proper valuations and/or deciding whether the assets should be retained in the trust. The trustee would be a directed trustee as to those specific holdings for which the trust director would have authority, but would retain full discretion over the trust's remaining assets.

B. Distributions

A settlor may wish to vest distribution decision-making authority in one or more persons who have knowledge of a trust's beneficiaries and their circumstances, but allocate all other fiduciary functions to a professional trustee. The trust

director(s) responsible for distribution decisions might include family members or close family friends.

C. Ministerial Matters

A settlor may wish to allocate certain ministerial duties to a particular party, including, for example, valuing unmarketable assets, inspecting or properly insuring trust-owned real estate, or preparing the trust's tax returns and making appropriate tax reporting to beneficiaries.

III. ESTABLISHING A TRUST DIRECTOR'S POWERS AND DUTIES

A. Defined in the Terms of a Trust. Under the CUDTA, the *terms of a trust* define the trust director's powers and duties. "Terms of a trust" is a term of art under the CUDTA, and includes not only "the manifestation of the settlor's intent regarding a trust's provisions as . . . expressed in the trust instrument[.]" but also "as may be established by other evidence in a judicial proceeding." C.R.S. § 15-16-802(8)(a) (Draft 2019). The terms of a trust can also be established by a court order, a nonjudicial settlement agreement under the CUTC, a trustee or trust director in accordance with applicable law, or alternative dispute resolution. C.R.S. § 15-16-802(8)(b) (Draft 2019). Thus, in contrast to Colorado's current directed trust statute, which specifies that only a *governing instrument*, defined as a will, trust agreement or declaration, or court order appointing a trust director, can create the director's powers and duties, C.R.S. §§ 15-16-803(2) and -801(4), the CUDTA provides a broader suite of means by which a director's powers and duties may be established.

B. Powers

- 1. Power of Direction.** The CUDTA provides, generally, that "the terms of a trust may grant a *power of direction* to a trust director." C.R.S. § 15-16-806(1) (Draft 2019) (emphasis added). A power of direction is "a power over a trust granted to a person by the terms of the trust," and broadly includes "a power over the investment, management, or distribution of trust property or other matters of trust administration." C.R.S. § 15-16-802(5) (Draft 2019). It does not, however, include a power of appointment, the power to remove a trustee or trust director, a power that is held in a nonfiduciary capacity to achieve the settlor's tax objectives, a power to enforce the intended use of the assets of a trust for the care of animals (unless the terms of the trust provide otherwise), and a number of other powers. *Id.*, C.R.S. § 15-16-805(2) (Draft 2019). A power of direction cannot be exercised while a trust director is serving as a trustee. C.R.S. § 15-16-802(5) (Draft 2019).
- 2. Further Power.** Unless the terms of the trust provide otherwise, a trust director may also exercise "any further power appropriate to the exercise or nonexercise of a power of direction granted to the director[.]" C.R.S. § 15-16-806(2)(a) (Draft 2019). Examples of such further powers include a power to:

(1) incur reasonable costs and direct indemnification for those costs; (2) make a report or accounting to a beneficiary or other interested party; (3) direct a trustee to issue a certification of trust under Uniform Trust Code § 1013 (2000); (4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or (5) employ a professional to assist or advise the director in the exercise or nonexercise of the director's powers.

Unif. Directed Trust Act cmt. 6 (2019).

C. Duties

1. **Same as a Trustee.** Under the CUDTA, a trust director generally “has the same fiduciary duty and liability in the exercise or nonexercise of [a] power [of direction]” as a sole trustee or a co-trustee “in a like position and under similar circumstances.” C.R.S. § 15-16-808(1)(a) (Draft 2019). That the CUDTA expressly equates a trust director's fiduciary duty to that of a trustee provides clarity that Colorado's current statute lacks: current law provides that a trust director must act in a fiduciary capacity, *see* C.R.S. § 15-16-802, but does not elucidate the extent of the fiduciary duty.
2. **Extent of Duty Can be Changed.** Unlike the current statute, the CUDTA affords flexibility with respect to the extent to which a settlor may reduce or increase a trust director's fiduciary duty: the terms of a trust “may vary the [trust director]'s duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.” C.R.S. § 15-16-808(1)(b) (Draft 2019). However, the terms of the trust may impose on a trust director duties or liabilities that are beyond those imposed by the CUDTA, C.R.S. § 15-16-808(3) (Draft 2019), meaning that the CUDTA provides a mandatory floor.

IV. DIRECTED TRUSTEE'S DUTY TO COMPLY AND LIABILITY FOR COMPLYING WITH A TRUST DIRECTOR'S DIRECTION

- A. **Duty to Comply.** The CUDTA provides that a directed trustee “shall take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction . . .” C.R.S. § 15-16-809(1) (Draft 2019). The trustee's duty is therefore to “take reasonable action to comply with whatever the terms of the trust require of a trustee in connection with a trust director's exercise or nonexercise of the director's power of direction. . . .” Unif. Directed Trust Act cmt. 9 (2019). Thus:

A power of direction under which a trust director may give a trustee an express direction will require a trustee to comply by following the direction. A power that requires a trustee to obtain permission from a trust director before acting imposes a duty on the trustee to obtain the required permission. A power that allows a director to amend the trust imposes a duty on the trustee to take reasonable action to facilitate the amendment and then comply with its terms.

Id.

- B. No Liability for Complying.** In complying with a trust director’s direction, “the trustee is not liable for the action.” C.R.S. § 15-16-809(1) (Draft 2019). This insulation from liability extends to the trustee’s action in compliance with a further power appropriate to the exercise or nonexercise of the director’s power of direction. *Id.*
- C. Willful Misconduct Exception.** The directed trustee’s duty to comply has its limit: a trustee “must not comply with a trust director’s exercise or nonexercise of a power of direction” or related “further power . . . to the extent that by complying the trustee would engage in willful misconduct.” C.R.S. § 15-16-809(2) (Draft 2019). This exception is consistent with Colorado’s current directed trust statute.
1. **“Willful Misconduct” Defined.** In contrast to the uniform law, which sets forth the willful misconduct exception without further elaboration, the CUDTA defines the term: “‘Willful misconduct’ means intentional wrongdoing and not mere negligence, gross negligence or recklessness.” C.R.S. § 15-16-802(11) (Draft 2019). This is verbatim the definition used in Colorado’s current statute. However, the CUDTA adds substance to this definition, providing that “[w]rongdoing’ means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.” C.R.S. § 15-16-802(12) (Draft 2019). Both of these definitions are drawn from Delaware’s directed trust statute, upon which the UDTA’s willful misconduct standard was based. *See* 12 Del. C. § 3301(g), (h)(4). They provide clarity, as well as a high bar to trustee liability, thus facilitating the use of directed trusts in Colorado: a trustee can know with greater certainty the extent of his or her potential liability when accepting an appointment.
 2. **Increased Total Fiduciary Duty Owed to Beneficiaries.** In adopting the willful misconduct exception, the Uniform Law Commissioners expounded its rationale for doing so and the standard’s effect on the combined fiduciary duty of the trustee and trust director:

[B]ecause a trustee stands at the center of a trust, the trustee must bear at least some duty even if the trustee is acting under the direction of a [trust] director. . . . [T]o facilitate the settlor’s intent that the trust director rather than the directed trustee be the primary or even sole decisionmaker, it is appropriate to reduce the trustee’s duty and liability below the usual level with respect to a matter subject to a power of direction. Accordingly, . . . a beneficiary’s main recourse for misconduct by the trust director is an action against the director for breach of the director’s fiduciary duty to the beneficiary. The beneficiary also has recourse against the trustee, but only if the trustee’s compliance with the terms of the power of direction amounted to “willful misconduct” by the trustee. Relative to a non-directed trust, this . . . approach has the effect of increasing the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust

director, but in addition the directed trustee also has a duty to avoid willful misconduct.

Unif. Directed Trust Act cmt. 9 (2019).

3. **Mandatory Minimum Standard of Conduct.** The willful misconduct standard is a “mandatory minimum” under the UDTA and its Colorado adaptation, *id.*, meaning that it is not a default rule: the terms of a trust “may not reduce a trustee’s duty below the standard of willful misconduct. Terms of a trust that attempt to give a trustee no duty or to indicate that a trustee is not a fiduciary . . . are not enforceable” and would be construed as “provid[ing] for the willful misconduct standard.” *Id.*

D. **Trustee’s Added Implicit Duty When Complying.** Within the trustee’s duty to comply with the trust director’s direction, there appears to exist an implicit duty to determine whether the direction falls within the scope of the director’s power of direction. If it does not, and the trustee acts upon an improper direction from the director, then the trustee could be left without the protection from liability that he or she expected to receive. The CUDTA provides a mechanism for achieving clarity in instances of uncertainty: an directed trustee who has “reasonable doubt” about his or her duty to comply may petition the court for instructions. *See* C.R.S. § 15-16-809(4) (Draft 2019). Thus, for example, if a trust director with a power of direction over investment matters directs the trustee to export all of the trust’s assets to a bank in the Cayman Islands, the trustee could petition the court for instruction as to whether the director’s power to direct trust investments includes expatriating the trust’s assets.

V. DIRECTED TRUSTEE’S LIABILITY FOR A TRUST DIRECTOR’S INDEPENDENT ACTION OR INACTION

Colorado’s current directed trust statute expressly provides that a directed trustee has no liability for any action or inaction of a trust director. C.R.S. §§ 15-16-807(2), 15-16-801(1). In contrast, the CUDTA is silent on the matter: it addresses only a trustee’s liability for complying with a trust director’s direction. This is consistent with the Act’s structure, which presumes that a trust director does not act independently, but rather only through an directed trustee who acts in compliance with the director’s direction. However, the Uniform Law Commissioners’ comments to the UDTA state that the trustee’s duty “to act reasonably in complying with the terms of a power of direction does not . . . impose a duty to ensure that the substance of a direction is reasonable.” Unif. Directed Trust Act cmt. 9 (2019). In other words, “subject to the willful misconduct rule[,] . . . a trustee is liable only for its own breach of trust in executing a direction, and not for the director’s breach of trust in giving the direction.” *Id.*

VI. DUTY TO SHARE INFORMATION AMONG TRUST DIRECTORS AND TRUSTEES

A. **Reciprocal Duties of Trustee and Director.** Under the CUDTA, a trustee must share information with a trust director to the extent that it is “reasonably related both to . . . the powers or duties of the trustee[] and . . . the powers or duties of the director.” C.R.S. § 15-16-810(1) (Draft 2019). Similarly, a trust

director must share information with a trustee or another director to the extent that it is “reasonably related both to . . . the powers or duties of the director and . . . the powers or duties of the trustee or other director.” C.R.S. § 15-16-810(2) (Draft 2019). The Uniform Law Commissioners explain the rationale for structuring the UDTA’s information-sharing rules as between a trustee and trust directors as follows:

The information must be reasonably related to the powers or duties of the person making the disclosure, because otherwise that person cannot be expected to possess the information. The information must also be reasonably related to the powers or duties of the person receiving the disclosure, because otherwise that person would not need the information.

Unif. Directed Trust Act cmt. 10 (2019). Thus, a trustee and a trust director have reciprocal duties with respect to information sharing among fiduciaries that are in parity with each other. This represents an improvement over current law, which obligates the trustee to share information that is not related to his or her own responsibilities, resulting in potential liability for not sharing information that he or she should not be expected to possess. *See* C.R.S. § 15-16-806(1).

- B. Trustee’s Duty to Provide Terms of the Trust.** The CUDTA contains a provision not in the uniform law that requires a trustee to provide a copy of the terms of the trust to a trust director. C.R.S. § 15-16-810(5) (Draft 2019). The rationale for this added language is that disagreements could occur between a trustee and trust director as to what is reasonably related to the director’s powers or duties, and the trustee might therefore withhold information from the director that the director believes he or she needs. At a minimum, all trustees and trust directors should have a copy of all of the trust’s terms, so that they can have a full understanding of the totality of the trust’s governing provisions.

VII. DUTY OF TRUST DIRECTOR TO COMMUNICATE WITH AND PROVIDE INFORMATION TO BENEFICIARIES

Unlike Colorado’s current directed trust statute, the CUDTA does not contain specific provisions regarding a trust director’s duty to provide information to beneficiaries. However, because the CUDTA provides that a trust director “has the same fiduciary duty and liability in the exercise or nonexercise of [a] power [of direction]” as a trustee “in a like position and under similar circumstances[.]” C.R.S. § 15-16-808(1)(a) (Draft 2019), the trustee’s statutory duty to provide information to beneficiaries under C.R.S. § 15-5-813 will apply to trust directors to the same extent as it applies to trustees.

VIII. NO DUTY TO MONITOR

The CUDTA provides that trustees and trust directors have no duty to monitor each other. This is a default rule, so it can be overridden in the terms of the trust: “Unless the terms of a trust provide otherwise . . . [a] trustee does not have a duty to . . . monitor a trust director,” C.R.S. § 15-5-811(1)(a)(I) (Draft 2019), and a “trust director does not have a duty to . . . monitor a trustee or another trust director.” C.R.S. § 15-5-811(2)(a)(I) (Draft 2019). This is consistent with the Act’s general exculpation of a

trustee, in the absence of willful misconduct, for complying with a trust director's direction regarding a matter subject to the director's power of direction, *see* C.R.S. § 15-5-809(1), (2) (Draft 2019); it is also consistent with the scope of the trust director's fiduciary duty and liability, which relates only to the exercise or nonexercise of his or her power of direction or any related further power. *See* C.R.S. § 15-16-808(1) (Draft 2019). It is an improvement over current law, which provides that a directed trustee has no duty to monitor a trust director, but is silent as to whether a trust director has a duty to monitor a directed trustee or other trust director.

- **Catch 22.** The CUDTA, like the UDTA itself, contains an apparent catch-22 relating to a trustee's duty to monitor. A directed trustee must not comply with a trust director's "exercise or nonexercise of a power of direction" to the extent that doing so would constitute willful misconduct by the trustee. How could a trustee reasonably know of a trust director's nonexercise of a power of direction without monitoring the director? A nonexercise of a power constitutes a negative that a trustee could not know about as a practical matter, absent actual knowledge of the trust director's affirmative acts or information constituting inquiry notice of the same. This knowledge could likely be obtained only through the trust director's express communication to the trustee, which the director is likely under no duty to make, or through the trustee's ongoing monitoring of the director's conduct. If a trustee could be liable for willful misconduct relating to a trust director's nonexercise of a power, does this imply that a trustee has a duty to take some action when faced with a nonexercise? If so, what is the nature of that duty? These are questions that are left open by the CUDTA as it is currently drawn, and it is likely that they cannot be answered until these provisions of the Act are interpreted by a court. Given the high bar to trustee liability inherent in the willful misconduct exception, *see* § IV.C.1, *supra*, this issue is likely academic, but it theoretically exists.

IX. NO DUTY TO WARN

Unless the terms of the trust specify otherwise, under the CUDTA, a trustee has no duty to "inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director." C.R.S. § 15-16-811(1)(a)(II) (Draft 2019). A trust director is similarly relieved of such a duty with respect to situations in which he or she might have acted differently than the trustee or another director. *See* C.R.S. § 15-16-811(2)(a)(II) (Draft 2019). This is a default rule that can be altered in the terms of the trust. The CUDTA fills a proverbial hole that exists in Colorado's current directed trust statute, which provides that a trust director has no duty to communicate with or warn any beneficiary or third party concerning actions taken by another trust director or trustee, but is silent regarding a similar duty on the part of the trustee. *See* C.R.S. § 15-16-806(4).

- A. **Relief from Duty May be Retroactive Only.** Note the use of the past tense in the CUDTA's language: a trustee or trust director is relieved from a duty to inform or give advice to a beneficiary, settlor, trustee, or trust director regarding an instance in which the trustee or trust director "might *have acted* differently" This language seems to indicate that the exemption from the duty to inform or advise is retroactive — relating only to acts that have already occurred. Does a

trustee or trust director retain a duty to inform or advise that is prospective in nature — relating to actions not yet taken, presumably of which the trustee or director has knowledge and against which some preventative measures might be effective? The Uniform Law Commissioners’ comments to the UDTA do not address this question.

- B. **No Assumption of Ongoing Duty.** The CUDTA specifies that if a trustee gives information or advice to a beneficiary (or to a settlor, another trustee, or a trust director) regarding an instance in which the trustee might have acted differently than a trust director, the trustee does not assume a duty to do so. C.R.S. § 15-16-811(1)(b) (Draft 2019). The Uniform Law Commissioners’ comments to the UDTA support this: “The purpose of these provisions is to ensure that if a directed trustee chooses for some reason to monitor, inform, or give advice, the trustee does not assume a continuing obligation to do so or concede a prior duty to have done so.” Unif. Directed Trust Act cmt. 11 (2019). A trust director is similarly relieved of such a duty with respect to situations in which he or she might have acted differently than the trustee or another director. *See* C.R.S. § 15-16-811(2)(b) (Draft 2019).

X. OFFICE OF TRUST DIRECTOR

The CUDTA expressly applies to trust directors the same rules that apply to a trustee under the CUTC regarding acceptance of appointment, giving of bond to secure performance, reasonable compensation, resignation, removal, and vacancy of the office and appointment of a successor. C.R.S. § 15-16-816 (Draft 2019). It also provides that by accepting an appointment as a trust director, the director “submits personally to jurisdiction in this state regarding any matter related to a power or duty of the director,” C.R.S. § 15-16-815(1) (Draft 2019), and allows a trust director to petition the court for instructions under C.R.S. § 15-5-201(3). C.R.S. § 15-16-816 (Draft 2019).

XI. LIMITATION OF ACTIONS AGAINST A TRUST DIRECTOR

- A. **Current Colorado Law.** At present, actions for “breach of trust or breach fiduciary duty” must be “commenced within three years after the cause of action accrues,” regardless of “the theory upon which suit is brought, or against whom suit is brought[.]” C.R.S. § 13-80-101(1). Given this broad language, and because the current directed trust statute prescribes that trust directors must act in a fiduciary capacity, this three-year limitation period applies to breach of fiduciary duty claims against trust directors.
- B. **Application of CUTC’s Statute of Limitations under CUDTA.** Once the CUDTA takes effect, it will render the current three-year statute of limitations, C.R.S. § 13-80-101(1)(f), nugatory as to trust directors. The CUDTA applies to trust directors existing state law regarding limitation of actions against trustees: “An action against a trust director for breach of trust must be commenced within the same limitations period as an action against a trustee for a similar breach of trust as prescribed by section 15-5-1005.” C.R.S. § 15-16-813(1) (Draft 2019).
 - 1. **Reduced Limitations Period Available.** A trust director will be able to avail him- or herself of the CUTC’s reduced limitations period, to wit:

A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date that the beneficiary . . . was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

C.R.S. § 15-5-1005(1). The CUDTA confirms that “report or accounting has the same effect on the limitation period for an action against the director that the report or accounting would have if the director were a trustee as prescribed by section 15-5-1005.” C.R.S. § 15-16-813(2) (Draft 2019). A report would be deemed to adequately disclose the existence of a potential claim if it “provides sufficient information so that the beneficiary . . . knows of the potential claim or should have inquired into its existence.” C.R.S. § 15-5-1005(2).

2. **Default 3-Year Limitations Period.** The CUTC’s default three-year limitations period, which would apply when the reduced one-year period is not operative, will apply to trust directors. In such cases, a beneficiary must commence a judicial proceeding for breach of trust against a trust director within three years after the first to occur of (a) the removal or resignation of the trust director, (b) the termination of the beneficiary’s interest in the trust, or (c) the termination of the trust. *See* C.R.S. §§ 15-5-1005(3), 15-16-813(1) (Draft 2019).

XII. DRAFTING AND PRACTICAL CONSIDERATIONS

Directed trusts present certain challenges that estate planners must consider when crafting estate plans and drafting trust instruments. Below is a non-exhaustive list of several such challenges.

- A. **Clearly Define Responsibilities.** Because the fiduciary function is divided among one or more trustees and trust directors in a directed trust arrangement, it is essential to think through and clearly define in the trust instrument the functions being allocated and the powers that the trustee(s) and trust director(s) will need for a successful overall administration. Consider, for example, a directed trust in which responsibility for the investment of trust assets is given to a trust director. The following issues, and potentially others, should be addressed in the trust instrument:
 - ***Scope of the Director’s Power.*** What is the scope of the director’s power of direction — the investment of the trust’s portfolio of marketable securities, or *all* trust property, including illiquid or unmarketable assets such as real estate, insurance policies, closely held business interests, etc.? If it is the latter, what if the trustee determines that the trust should purchase, as an asset of the trust, a house for the beneficiary to use as his or her primary residence, which would require the liquidation of a sizeable portion of the trust’s liquid investments? Would the trust director be required to comply? Is the director willing to assume such responsibilities?

- **Form of Directions.** What form will the directions from the director to the trustee take? The trust instrument should specify a process for this, and indicate that all directions should be in writing. How will the trust director know that the trustee has received his or her direction?
- **Custody of Assets.** Who will have custody of the assets managed by the trust director — the trustee or the director — and are both agreeable to that arrangement? Many professional investment managers either insist on or have a strong preference for having custody of the assets they will manage. If the trust director will have custody, will he or she be responsible for properly allocating interest, dividends, and capital gains to principal and income in accordance with the Uniform Principal and Income Act? Does the director have the capability to do so? How will the trustee know that the director is not making distributions to beneficiaries, which is the responsibility of the trustee?
- **Asset Valuation.** Who is responsible for valuing the assets? Typically, if a professional investment manager is serving as the trust director responsible for trust investments, he or she should be responsible for valuing only the assets under his or her management.
- **Trustee's Access to Funds.** How will the trustee ensure that he or she has prompt access to the moneys needed to meet the distribution demands and expenses of the trust? The trustee should be empowered under the terms of the trust to direct the trust director to raise cash and tender it to the trustee when needed for such purposes, and the director should be required to comply. If the trustee can maintain a separate pool of funds from which to make distributions and meet expenses, how and where will those funds be invested, and who decides — the trustee or the trust director?
- **Investment Policy Statement.** Given the possibility that, under current Colorado law, a trustee may have a duty to warn beneficiaries regarding a trust director's actions, how will the trustee know if the director has taken an action that might be improper? The trust instrument should require that a trust director responsible for managing the trust's assets prepare and give to the trustee a written investment policy statement. This statement should describe the trust's overall investment goals; the strategic asset allocation for the trust — *i.e.*, the percentages to be allocated to equities, fixed-income securities, cash, and other asset classes, and appropriate ranges for each; the specific types of investment vehicles that the director may use; the maximum percentage of the trust's assets (or of the trust's equity or fixed-income portfolios) that may be invested in any individual security at the time of purchase; the maximum percentage of the trust's assets that may be invested in illiquid or unmarketable investments; if applicable, whether or to what extent the trust director's proprietary investment products may be used; and any additional considerations from an investment perspective. The investment policy statement would let the trustee know what to expect, whether what the trust director plans to do comports with the terms of the trust, and whether the trust director's future actions fall within the director's own written rules.

Different questions or challenges may arise in different situations, so it is critical to analyze the nature of the directed trust at issue and specifically craft the trust instrument accordingly.

Planning Suggestion

At the outset of a directed trust relationship, it is advisable for the directed trustee and trust director to meet to identify the areas in which they will need to work together to discharge their respective obligations and the mechanics or logistics of how they will do so. Such matters could be technical or tedious, and it may not be practical or possible to describe them in the trust instrument. The topics discussed and decisions made should be memorialized in a written memorandum of understanding, to which the trustee and director can refer throughout the trust's administration. This memorandum can be revised from time to time, with the agreement of the trustee and director, as the administrative demands of the trust may require. This trust instrument can be drafted to require this process.

- B. Select Trustees and Trust Directors Who Will Work Well Together.** A directed trustee and trust director will need to interact with each other throughout a trust's administration. As previously discussed, the law requires the sharing of certain information between directed trustee and trust director in certain instances. Selecting persons for these roles who will be able to work productively together is critical for the success of a directed trust arrangement.
- C. Plan for Director Succession.** What happens if a trust director is no longer able or willing to serve, whether due to death, disability, resignation, or other cause? Will a successor trust director fill his or her role? Who will that person be? What happens if he or she declines to serve? If a successor director is not nominated in the terms of the trust or if a nominated person is unwilling or unable to serve, what is the process by which a successor will be selected? Are there any requirements or characteristics that the trust settlor wants a successor trust director to meet or have in order to serve? Rather than appointing a successor trust director, should the trustee assume the director's functions?

Planning Suggestion

The trust instrument should always define a clear process by which a successor trust director will be selected. The goal is to never have a default in the trust director's role. If the trustee will assume the functions previously performed by a director, it would be wise to include in the trust instrument a provision allowing the trustee to consent within a reasonable time before doing so. The trustee agreed to serve as a directed trustee with respect to the functions performed by the trust director, and taking on those functions may constitute a material increase in the trustee's responsibilities. Depending on the trustee's skills or expertise, the nature of the functions performed by the director, and possibly other factors, the trustee may not be equipped or wish to assume that responsibility. If the trustee does not consent within a reasonable time or affirmatively declines

to assume the director's responsibilities, then a new trust director would be appointed under a process defined in the trust instrument.

- D. Consider Overall Fiduciary Fees.** Generally, one should expect that the more fiduciaries one involves in administering a trust, the greater the overall fees chargeable to the trust will be. Thus, for example, in a directed trust where a professional trustee has been appointed, but responsibility for the investment of trust assets is given to a trust director who is a professional investment manager, two different fiduciaries will need to be paid. While the professional trustee may reduce his or her fee because of the reduced responsibility and risk, it is likely that when the trustee's and investment manager's fees are combined, the total fee will be higher than it would have been if a professional trustee capable of managing trust investments were appointed to serve as sole trustee of a non-directed trust. This is not to say that the directed trust arrangement is not preferable, particularly in certain cases; a directed trust can afford great flexibility to a trust settlor with respect to involving the fiduciaries that he or she believes will best serve the purposes of the trust. One should, however, be mindful of the overall level of fiduciary fees that the trust will shoulder, as it can, over time, erode the funds available for the use or benefit of the beneficiaries.
- E. Converting an Existing Non-Directed Trust to a Directed Trust.** Under the CUTC, converting an existing non-directed trust to a directed trust can be a straightforward and inexpensive matter, provided all parties with material interests agree. The CUTC provides for nonjudicial settlement agreements, under which parties may bind themselves regarding "any matter involving a trust." C.R.S. § 15-5-111(1). These agreements do not need to be supported by consideration. *Id.* Required parties to a nonjudicial settlement agreement include "those persons whose interests in the trust would be materially affected by its provisions . . ." C.R.S. § 15-5-111(2). However, persons who fall outside this definition are permissible parties to an agreement. A nonjudicial settlement agreement is valid only to the extent that "it does not violate a material purpose of the trust" *and* "includes terms and conditions that could be properly approved by the court . . ." C.R.S. § 15-5-111(3). Therefore, if at least all persons whose interests would be materially affected agree, and their agreement does not violate a material purpose of the trust and could be properly approved by the court, then an existing non-directed trust can be converted to a directed trust without court involvement. Such an agreement should address the types of issues discussed previously in this subsection, including the clear delineation of the responsibilities of the directed trustee and trust director and trust director succession.

If a nonjudicial settlement agreement cannot be achieved, then conversion to a directed trust could be pursued through judicial modification under the Colorado Uniform Trust Code, C.R.S. § 15-5-411, or through decanting under the Colorado Uniform Trust Decanting Act, C.R.S. § 15-16-901 *et seq.*

Sample Directed Trust Language

The sample language below is for use in trust instruments when a registered investment adviser or investment adviser representative will be appointed trust director with a power of direction over trust investments, all other fiduciary functions will be vested in the trustee, and Colorado law will apply to questions of administration. It is designed to ensure that the trustee and trust director will work together for the efficient administration of the trust. It replicates, as closely as possible, the way an investment adviser conducts business in the ordinary course; without such replication, the adviser would likely decline to serve. Thus, because investment advisers will almost universally not wish to assume responsibility for investments other than securities, this sample language vests power to invest in non-securities in the trustee. It also clarifies that the trust director's power of direction is subordinate to the trustee's powers of distribution and investment in non-securities (e.g., a residential property for a beneficiary), so no uncertainty would exist as to whose powers take priority. Finally, the language provides for a "succession plan," in the event the trust director ceases to serve. Any language printed in [brackets] needs to be addressed or modified to fit individual circumstances.

Note: Every estate planning situation is different. The following language is not intended to be "plugged in" to a trust instrument without the interposition of the professional expertise and judgment of a competent estate planning attorney. Therefore, Trail Ridge Trust Company, LLC, and its officers, employees, and affiliates, assume no liability in connection with the use of the following language in any trust instrument or other estate planning document.

Directed Trust Provisions Regarding Investment of Trust Assets

- Directed Trustee and Trust Director.** [Trustee name] (the "Trustee") is a *directed trustee* subject to the *power of direction* of [Registered Investment Adviser or Investment Adviser Representative name], which/who is a *trust director* (the "Trust Director"). The powers and duties of the Trustee and Trust Director are described in the paragraphs that follow.
- Trust Director's Power of Direction — Investment in Securities.** The Trust Director is given a power of direction to invest trust assets in *securities*, as defined in the Investment Advisors Act of 1940, 15. U.S.C. § 80b-2(18). Therefore, except as otherwise provided below, the Trust Director is vested with and may exercise all investment powers set forth in the terms of the trust and applicable law, as well as any further power(s) appropriate to the exercise or nonexercise of its power of direction. [Optional, if required by the Trust Director: However, the Trustee and Trust Director will jointly adopt an investment policy statement for the trust, which the Trust Director will implement in the exercise of its power of direction.]
- Exercise of Trust Director's Power of Direction.** The Trust Director will select and open one or more accounts with a *qualified custodian*, as defined in 17 CFR § 275.206(4)-2(d)(6), which will have custody of all trust assets subject to the Trust Director's power of direction. Except as otherwise provided below, the Trustee will tender to such custodian all trust assets in the Trustee's custody that are subject to the Trust Director's power of direction, as well as any liquid funds exceeding those reasonably necessary to meet the periodic distribution demands, expenses, and costs of the trust. Any trust accounts opened with such custodian will be titled in the name of the Trustee in its capacity as trustee, or as may otherwise be required by applicable law to denote trust ownership. The Trustee, acting in good faith, will execute any documents necessary to open such accounts, and will be held harmless and indemnified by the trust for doing so. As a further power appropriate to the exercise of the Trust Director's power of

direction, the Trust Director is authorized and empowered to place trades for the purchase or sale of securities in any such accounts without first obtaining the consent of or providing notice to the Trustee.

4. **Trustee's Power to Invest in Non-Securities.** The Trustee is authorized and empowered, in its sole discretion, to purchase as a trust investment any assets that are not securities. Therefore, the Trustee alone will select any such assets, execute any documents, and perform any acts necessary to effectuate the purchase of such assets, and may sell any such assets. The Trustee will administer and account for all such assets, including any income derived from them and expenses related to them, in the account(s) maintained for the trust by the qualified custodian selected by the Trustee under the following paragraph, and will obtain or perform all necessary valuations and inspections. The Trust Director's power of direction is subordinate to the Trustee's powers under this paragraph. Therefore, the Trust Director will, within a reasonable time, tender to the Trustee whatever liquid funds the Trustee requests in writing to achieve the purposes described in this paragraph.
5. **Trust Accounts Maintained by Trustee's Custodian.** The Trustee will select a qualified custodian to maintain one or more accounts for the trust, from which the Trustee will make distributions to the Trust's beneficiaries and pay the trust's expenses and costs, including the Trustee's fees for the performance of its services. The Trustee will select the investment vehicle(s) used in such account(s); however, investments are limited to FDIC-insured bank deposits that may be withdrawn on demand or stable value money market funds.
6. **Disbursements from the Trust.** Only the Trustee is authorized and empowered under the terms of the trust to make distributions to the trust's beneficiaries. The trustee is also solely responsible for complying with the terms of the trust and applicable law regarding the allocation of receipts and disbursements to principal and/or income and ensuring, if applicable, that distributable net income is properly calculated and carried out to the trust's beneficiaries who receive distributions. Therefore, the Trust Director is prohibited from making any disbursements from the trust without the Trustee's prior written consent. However, the Trust Director may directly debit the fees for the performance of its services from the account(s) holding trust assets subject to its power of direction. The Trust Director's power of direction is subordinate to the Trustee's power to disburse funds from the trust.
7. **Funding Trust Disbursements.** Within a reasonable time after the Trustee's written request, the Trust Director will raise and tender to the Trustee whatever liquid funds the Trustee determines to be necessary, in its sole discretion, to meet the periodic distribution demands, expenses, and costs of the trust. However, to ensure that the Trust's assets remain properly invested, the Trustee may request from the Trust Director only the liquid funds that are reasonably necessary for such purposes, and within a reasonable time will tender to the Trust Director any liquid funds exceeding those that are reasonably necessary for such purposes.
8. **Books and Records; Account Statements.** Neither the Trustee nor the Trust Director need carry in their respective books and records for the trust, and will not direct their respective qualified custodians to report on their trust account statements sent to beneficiaries or other interested persons, any trust assets under the administration or management of the other. The Trustee and Trust Director will also ensure that, at least annually, statements of holdings and activity for all trust accounts generated by their respective qualified custodians will be sent or

delivered to all of the trust's *qualified beneficiaries*, as defined in the Colorado Uniform Trust Code, C.R.S. § 15-5-103(16). If such a statement will not be sent or delivered to a qualified beneficiary, then the Trustee and Trust Director must first agree in writing.

9. **Principal and Income Accounting.** The Trustee and Trust Director will each direct their chosen qualified custodians to report on their systems of record and trust account statements sent to beneficiaries or other interested persons the allocation to principal and/or income of all receipts to and disbursements from the trust. Any custodian fees charged for this service may be directly debited from the account(s) for which the service is provided. However, the Trustee is responsible under the terms of the trust for ensuring that receipts and disbursements are properly allocated to principal and/or income, so the Trust Director will comply with the Trustee's directions regarding any transfers between principal and income in the trust account(s) maintained with the qualified custodian chosen by the Trust Director. If such qualified custodian is not able to report on its system of record and trust account statements the allocation to principal and/or income of the trust's receipts and disbursements, then the Trustee will account for, in the trust account(s) of its chosen qualified custodian and cause such custodian to report on its trust account statements, the allocation to principal and/or income of receipts and disbursements with respect to the trust account(s) maintained with the qualified custodian chosen by the Trust Director.
10. **Trust Director's Resignation, Removal, or Failure to Serve.** If the Trust Director resigns, is removed from office, or otherwise fails to serve, then the Trust Director's power of direction will terminate, and all powers previously vested in the Trust Director will vest in the Trustee.
11. **Registered Investment Adviser Documents.** The Trust Director, as a registered investment adviser or investment adviser representative, may, for regulatory compliance purposes, require the execution of certain documents to serve as trust director or to open trust accounts with the qualified custodian chosen by the Trust Director. Acting in good faith, the Trustee will execute any such documents, and will be held harmless and indemnified by the trust for doing so. Such documents will not be treated, in any way or for any purpose, as having modified or amended the terms of the trust or the powers or duties of the Trustee or Trust Director under the terms of the trust or applicable law.
12. **Directed Trust.** The settlor intends for the trust to be a directed trust under the Colorado Uniform Directed Trust Act, C.R.S. § 15-16-801 *et seq.* The terms *directed trustee*, *trust director*, and *power of direction* are defined as stated therein. Therefore, neither the Trustee nor the Trust Director have any duty to monitor or supervise the performance of the other under the terms of the trust or applicable law and will incur no liability for not doing so.
13. **Inconsistencies and Amendments.** Any inconsistency between this [Article] and any other terms of the trust will be resolved in favor of this [Article]. This [Article] may be amended from time to time, if necessary for the acceptance of a trustee appointment by a corporate or other professional trustee, provided that any such amendment is approved by the settlor, if living, or, if not, by a majority of the beneficiaries then eligible to receive distributions from the trust.

Appendix C

AGREEMENT AS TO RENTAL USAGE

This Agreement is made this ____ day of _____, 2___, among the A TRUST, B TRUST, and C TRUST, as all of the Members of [name of LLC].

I. "Member" in this Agreement shall be deemed to refer to the Trust which is named as a Member of [name of LLC], or the individual beneficiary or beneficiaries of any such Trust, as the case may be.

II. The Members have agreed as follows with respect to public rental usage and personal usage of the condominium known as _____ (hereafter "Unit 1202"):

A. Public Rental Usage. Beginning _____, 2___, Unit 1202 will be put into the [name of property] Shores Rental Program and made available for rental to the public for a minimum of nine (9) months of each calendar year, which shall include the months of January, June, July, August, November and December (the "high season"). The remaining three (3) months shall be determined by the Managers after personal usage is determined under Paragraph B. below.

B. Personal Usage. Three (3) months of each calendar year shall be designated for the personal usage of the Members, and shall be allocated by the Managers after consultation with each of the Members as follows:

1. The A TRUST shall be allocated one (1) month personal usage per calendar year.
2. The B TRUST shall be allocated one (1) month personal usage per calendar year.
3. The C TRUST shall be allocated one (1) month personal usage per calendar year.

All of the time allocated to Members for personal usage must be contiguous, leaving no public rental usage period of less than one (1) month during any calendar year. Once chosen, each Member's allocated personal usage during a particular year may be changed with approval of the Managers, provided, however, that such change shall not reduce any public rental usage time to a block of less than one month, and no personal usage during high season shall be allowed.

If a Member does not use its allocated personal usage time, and Unit 1202 is rented to the public during such Member's personal usage time, the net rent for that period shall be credited to such Member.

III. The Members may amend this Agreement at any time by a written instrument signed by all of the Members.

III. The Members may amend this Agreement at any time by a written instrument signed by all of the Members.

IN WITNESS WHEREOF, the undersigned have signed this Agreement as of the date first above written.

Date: A TRUST
By: _____
A, Trustee

Date: B TRUST
By: _____
B, Trustee

Date: C TRUST
By: _____
C, Trustee

APPENDIX D – SAMPLE LANGUAGE

FARM AND RANCH POWERS

[insert in trustee powers section]:

(>>) In addition to the general powers with respect to property in the Trust estate, the Trustees shall have the following powers with respect to any farming or ranching property or interest:

(a) To operate the property or interest with hired labor, tenants or sharecroppers; to hire a farm manager, or a professional farm management service, to supervise the farming operations; to lease or rent land, equipment, or livestock for cash or on shares; to sell, purchase, exchange, or otherwise acquire or dispose of farm machinery, livestock, farm products, timber, supplies, and services used in connection with the property; to remove, construct, repair and improve fences, structures and buildings of all kinds on the premises; to fertilize, terrace, clear, ditch and drain lands, install irrigation systems, and in general follow soil conservation and other practices designed to conserve, improve and maintain the fertility and productivity of the soil, and to carry on reforestation; to carry on both a crop and livestock program, including the raising, purchase and sale of livestock and any ranch or farm products whatever.

(b) To execute contracts, notes, chattel mortgages, and other agreements relating to agriculture, with the Commodity Credit Corporation, the Secretary of Agriculture of the United States, or any other officer or agency of the Federal or state governments, or of any corporation organized under them; to enter into acreage reduction agreements; to make soil conservation commitments; and, in general, to do all acts necessary to cooperate with any governmental agricultural program and to participate in and receive all payments and other benefits and proceeds under any such programs.

(c) To sell, purchase, pledge, exchange, mortgage, lease, make contracts concerning, or otherwise acquire or dispose of farm machinery, equipment, livestock, farm products and other personal property, supplies and services used in connection with said farming or ranching business.

(d) To make or obtain secured or unsecured loans or advances for the purpose of carrying on any farming, ranching or timber operations, on such terms as the Trustees shall determine.

FARM MANAGER PROVISIONS

[insert as its own article]

(>>): At the time of the execution of this Trust, the Settlor and his wife own and operate a farm in the State of Colorado. For the purposes of this Trust, whenever the word "farm" is used, it shall be deemed to include the land and all improvements, equipment, sprinkler systems and water in connection with water rights, whether shares of ditch companies, reservoir companies, or any other water arising from water rights which have been used in such farming operation, and any rights to lease any other land used in connection with farming or ranching operations, including, but not limited to, grazing rights.

If, at the time of the death of the survivor of the Settlor and his wife, such farm is owned by the Settlor, his wife or by a Trust he created during his lifetime, then the Settlor directs that a child, or children, as the case may be, of the Settlor who wishes to operate the farm be given the opportunity to do so. In the event that a portion of such farm is originally held in the Trusts established for a child, and/or children, as the case may be, of the Settlor who is not farming such land, or if a portion of such farm is held in a Trust created for a descendant other than a child of the Settlor, then the child, or children, as the case may be, who does wish to farm the land, or the Trust established for his or her benefit, shall have the right to lease such interest of the farm originally held in the other descendant's or descendants' Trust.

For the purposes of this Clause, whenever the words "Farm Manager" are used, it shall be deemed to be the child or children of the Settlor who is operating the farm or the Trust or Trusts created for his or her benefit, as the case may be.

The terms of such lease shall be as follows: The Farm Manager shall be given one hundred eighty (180) days after the death of the survivor of the Settlor and his wife to exercise his or her right to lease the farm, or portion of the farm, as the case may be, not held in his or her Trust. The terms of the lease shall be agreed upon by all the acting Trustees. In the event that the Trustees are unable to reach an agreement, then each Trustee shall select a qualified appraiser or an individual familiar with land leases in the area and the majority vote of the appraisers, or other individuals so appointed, as the case may be, shall control. In the event that there is not a majority, then the appraisers shall choose another appraiser and the decision of the majority shall be binding on all parties.

After such time that the Farm Manager has leased the farm interest not in his or her Trust for a period of ten (10) years, any child or children of the Settlor not actively engaged in farming, or the Trusts established for his or her benefit, has the right to sell the interest in the farm held in his or her Trust. Provided, however, if such farm interest is offered for sale, the Farm Manager, or a Trust established for his or her benefit, shall be given the first option to purchase such interest. Such option must be exercised within one hundred eighty (180) days after such notice of sale has been duly given in writing. Provided, further, that if a child of the Settlor is not living at the time of the death of the survivor of the Settlor and his wife or if one or more of the Settlor's children not actively engaged in the farming operation dies, the Farm Manager, or the Trust established for his or her benefit, shall be given the first option to purchase such farm interest. In

no event, however, shall the Farm Manager be required to exercise this option to purchase prior to the expiration of the ten (10) year lease.

The purchase price of the farm interest shall be the fair market value agreed upon by the buyer or buyers, as the case may be, and the seller. Should there be a disagreement between the buyer or buyers and the seller as to the fair market value of the farm, such value shall be determined by arbitration as follows: The buyer or buyers, as the case may be, and the seller shall each appoint an appraiser and the majority vote of the appraisers shall control. In the event that there is not a majority, then the appraisers shall choose another appraiser and the decision of the majority shall be binding on all parties.

Should there be no adult child of the Settlor desirous of operating such farm, unless it is determined to be economically infeasible to retain the farm, it shall not be sold until the youngest child of the Settlor attains the age of twenty-one (21) years. Then and at that time, if no child wishes to farm the land under the terms and conditions set forth in this Clause, the farming operation in its entirety may be sold.