

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

**January 11, 2018**

UDTA Section	Section 12
Section Title	Application to Cotrustee
Statutory Language	<p>The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director’s power of direction under Sections 9 through 11.</p> <p><b><i>Legislative Note:</i></b> <i>A state that has enacted Uniform Trust Code (Last Revised or Amended in 2010) Section 703(c) or (g) should revise those sections to make them subject to this section. In the alternative, the state could insert this section as a new subsection in Section 703, and make subsections (c) and (g) subject to that new subsection if the state also adds to its Uniform Trust Code the definitions of “directed trustee,” “power of direction,” and “trust director” from Section 2(3), (5), and (9).</i></p>
Uniform Law Commission Comment	<p><i>Traditional law.</i> Under traditional law, each cotrustee “has a duty to use reasonable care to prevent a cotrustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.” Restatement (Third) of Trusts § 81(2) (2007). This rule applies even if the settlor limits the role or function of one of the cotrustees. “Even in matters for which a trustee is relieved of responsibility, ... if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct.” <i>Id.</i> cmt. b. Moreover, “even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate.” <i>Id.</i> These rules for cotrusteeship contrast with the less demanding fiduciary standards for a directed trusteeship under Sections 9, 10, and 11 of this act.</p> <p><i>Settlor autonomy.</i> This section allows a settlor to choose either fiduciary regime for a cotrusteeship—the traditional rules of cotrusteeship or the more permissive rules of a directed trusteeship. There seems little reason to prohibit a settlor from applying the fiduciary rules of this act to a cotrusteeship given that the settlor could choose the more permissive rules of a directed trusteeship by labeling one of the cotrustees as a trust director and another as a directed trustee. The rationale for permitting the terms of a trust to reduce the duty of a cotrustee that is subject to direction by another</p>

	<p>trustee is the same as the rationale for permitting the terms of a trust to reduce the duty of a directed trustee. In both instances, a trustee must act according to directions from another person and therefore the other person, not the trustee, should bear the full fiduciary responsibility for the action.</p> <p>Accordingly, if the terms of a trust so provide, a cotrustee may have only the duty required by the reasonable action and willful misconduct standards specified in Section 9, and be subject to the narrower rules governing information sharing and monitoring specified in Sections 10 and 11, with respect to another cotrustee's exercise or nonexercise of a power of that other cotrustee. If the terms of a trust indicate that a directed cotrustee is to have no duty or is not a fiduciary, then the effect will be to reduce the cotrustee's duties to those prescribed by Sections 9 through 11, just as would be the effect of similar language for a directed trustee.</p> <p><i>Mechanics of choosing directed trustee duties.</i> Under this section the default rule is that, if a settlor names cotrustees, the traditional law of cotrusteeship applies. The fiduciary duties of directed trusteeship will only apply to a cotrustee if the terms of the trust manifest such an intent. Whether this section applies to a given trust is thus a question of construction. This section does not impose a requirement of express reference to this section or to this act. Moreover, under Section 3(a), this section applies to a trust created before the effective date of this act, but only as to a decision or action on or after that date.</p> <p>For example, a familiar drafting strategy is to name cotrustees but also to provide that in the event of disagreement about a particular matter the decision of a specified trustee controls and the other cotrustee has no liability in that event. Under traditional law, notwithstanding this provision, the other cotrustee would be liable if it did not take reasonable steps to prevent a breach by the controlling cotrustee. Under this section, on a prospective basis the other cotrustee would be liable only for its own willful misconduct akin to a directed trustee.</p> <p><i>Cotrustees as directed trustees and trust directors.</i> The terms of a trust can place a cotrustee in a position of either giving direction, like a trust director, or taking direction, like a directed trustee. This section only applies to a cotrustee that takes direction. This section does not address the duties of a cotrustee that is not directed. Nor does this section address the duties of a cotrustee that gives direction. Under Section 8, the background law of an enacting state that applies to a directing cotrustee also applies to a similarly situated trustee. The drafting committee intended that the language "with respect to another cotrustee's exercise or nonexercise of a power of the other</p>
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	<p>cotrustee” would refer only to a power of another cotrustee and not a power held jointly with the directed cotrustee, because a cotrustee cannot be thought of as taking direction from another cotrustee if the two cotrustees exercise a power jointly.</p> <p><i>No third-party effects.</i> Although this section changes the degree to which the terms of a trust may reduce a cotrustee’s duty and liability, it does not alter the rules that affect the rights of third parties who contract with or otherwise interact with a cotrustee. The principal difference between cotrusteeship and directed trusteeship is that in a cotrusteeship every cotrustee has title to the trust property, whereas in a directed trusteeship, title to trust property belongs only to the trustee, and not to the trust director. The placement of title can have important consequences for dealings with third parties and for tax, property, and other bodies of law outside of trust law. This section does not change the rights of third parties who deal with a cotrustee in the cotrustee’s capacity as such.</p>
Current Colorado Law	<p>Section 12 allows treatment of a co-trustee as a directed trustee or a trust director; however to be treated as such an “opt-in” by the governing instrument must be made, similar to Colorado’s requirement that directed trust treatment also be affirmatively stated.</p> <p>Colorado case law suggests that a co-trustee’s liability may be limited by the terms of the trust. <i>Poertner v. Razor</i> (Cert. Denied 9/25/1972). However, as this case was not selected for official publication, it cannot be relied upon.</p> <p style="padding-left: 40px;">Where there is more than one trustee, unless one is in a passive position as to the asset involved, legally incompetent or unless otherwise provided by terms of the trust, it is the <b>duty</b> of each to participate in the administration of the trust and one trustee should not be allowed to sit idly by while the cotrustee acts upon a matter and then takes advantage of that action at a later time.</p> <p><b>C.R.S. 15-16-803. Trust advisor and excluded trustee.</b></p> <p>4) If a governing instrument provides that a trustee must follow the direction of a trust advisor and the trustee acts in accordance with such direction, the trustee is an excluded trustee.</p> <p><b>C.R.S. 15-16-801(8)</b> requires the government instrument to affirmatively state trust advisor treatment:</p>

	<p>(a) “Trust advisor” means a person who is:</p> <p>(I) Acting in a fiduciary capacity; and</p> <p>(II) Vested under a governing instrument with fiduciary powers to direct a trustee’s actual or proposed investment decisions or non-investment decisions.</p> <p>(2) “Excluded trustee” means any trustee that, under the terms of the governing instrument, is precluded from exercising certain powers, which powers may be exercised only by a trust advisor designated by the governing instrument.</p> <p><b>C. R. S. 15-16-803. Trust advisor and excluded trustee. * * *</b></p> <p>(2) The powers and duties of a trust advisor, and the extent of such powers and duties, are established by the governing instrument, and the nonexercise of such powers and duties is binding on all other persons.</p> <p><b>C. R. S. 15-16-805. No duty to review actions of trust advisor.</b> An excluded trustee has no duty to review or monitor the actions of a trust advisor.</p> <p><b>C. R. S. 15-16-806 Duty to communicate - no duty to warn.* * *</b> (3) A trust advisor has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration, to the extent that such information relates to a duty or function being performed by the trust advisor. This duty is governed by section 15-16-303.</p> <p>(4) A trust advisor has no duty to communicate with or warn any beneficiary or third party concerning any action or actions taken by any other trust advisor or trustee.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

It is awkward to insert a provision in the existing sections regarding the overarching duty of a trustee and a trust director to exercise discretionary power, good faith, etc...

Would it not be best to insert a new section in the Act? Something like this:

**Fiduciary Duty. This Act does not alter the duty of a trustee and a trust director to exercise discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.**

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 15
Section Title	Jurisdiction Over Trust Director
Statutory Language	<p>(a) By accepting appointment as a trust director of a trust subject to this [act], the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.</p> <p>(b) This section does not preclude other methods of obtaining jurisdiction over a trust director</p>
Uniform Law Commission Comment	<p>Under subsection (a), by accepting appointment as a trust director of a trust subject to this act, the director submits to personal jurisdiction of the courts of this state with respect to “any matter related to a power or duty of the director.” This subsection does not apply to a person that has not accepted appointment as a trust director (the question of whether a person has accepted appointment is governed by Section 16(1)). The drafting committee contemplated that a purported director could contest acceptance, and therefore jurisdiction, in the normal course of a judicial proceeding in which the matter arose, as under Fed. R. Civ. P. § 12(b)(2).</p> <p>Jurisdiction over a person that has accepted appointment as trust director is mandatory. The terms of a trust or an agreement among the trust director and other parties cannot negate personal jurisdiction over a trust director under this section. However, this section does not preclude a court from declining to exercise jurisdiction under the doctrine of forum non conveniens.</p> <p>Subsection (b) confirms that subsection (a) does not prescribe the exclusive method of obtaining jurisdiction over a trust director.</p>
Current Colorado Law C.R.S. § 15-16-809	<p>Trust advisor subject to district court jurisdiction</p> <p>By accepting appointment to serve as a trust advisor of a trust having its principal place of administration in the state of Colorado, the trust advisor is subject to the jurisdiction of the courts of the state of Colorado even if other related agreements provide otherwise, and the trust adviser may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor.</p>
Current Colorado Law C.R.S. § 15-16-203	Trust proceedings – dismissal of matters relating to foreign trusts

	<p>The court will not, over the objection of a party, entertain proceedings under section 15-16-201 involving a trust registered or having its principal place of administration in another state, except when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration, or when the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order.</p>
<p>Current Colorado Law <i>Luebke v. Luebke</i>, 143 P.3d 1008 (Colo. App 2006)</p>	<p>Unlike the common law doctrine of forum non conveniens, this section creates the presumption that courts in Colorado should dismiss actions against foreign trusts. To overcome the presumption, the nonmoving party must show that the interests of justice would be strongly impaired by referring the case to the state where the trust is registered.</p> <p>Probate court did not abuse its discretion when it concluded that referring the case to the state of the trust's administration and the beneficiary's constitutional right of access to Colorado courts was not violated because his claims were not based on a substantive right or cause of action created by the Colorado legislature.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 16
Section Title	Office of Trust Director
Statutory Language	<p>Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters:</p> <p>(1) acceptance[ under Uniform Trust Code Section 701];</p> <p>(2) giving of bond to secure performance[ under Uniform Trust Code Section 702];</p> <p>(3) reasonable compensation[ under Uniform Trust Code Section 708];</p> <p>(4) resignation[ under Uniform Trust Code Section 705];</p> <p>(5) removal[ under Uniform Trust Code Section 706]; and</p> <p>(6) vacancy and appointment of successor[ under Uniform Trust Code Section 704].</p> <p><b><i>Legislative Note:</i></b> A state that has enacted the Uniform Trust Code (Last Revised or Amended in 2010) provisions cited in this section should update the bracketed language to refer to the appropriate provisions of that enactment. A state that has enacted relevant statutory provisions other than the provisions of the Uniform Trust Code cited in this section should replace the bracketed language with cross references to those provisions, except that a state that allows statutory commissions rather than reasonable compensation for a trustee is advised for the reasons given in the comments below to apply a rule of reasonable compensation to a trust director. A state that has not enacted relevant statutory provisions should delete the bracketed language.</p>
Uniform Law Commission Comment	<p>This section applies the law of trusteeship to a trust directorship with regard to seven subjects. Whether the law is default or mandatory as applied to a trust director depends on whether it is default or mandatory as applied to a trustee.</p> <p><i>Paragraph (1)—acceptance.</i> This paragraph absorbs an enacting state’s law governing acceptance of a trusteeship, such as under Uniform Trust Code § 701(a)–(b) (2000) or Restatement (Third) of Trusts § 35 (2003), for application to acceptance of a trust directorship. However, whereas a trustee is expected to participate actively in the administration of the trust, and is therefore usually</p>



	<p>capable of signaling acceptance by conduct, some trust directors, such as a director with a power to determine the settlor's competence, may not take any action for long stretches of time, if ever. This delay in action may complicate acceptance by conduct.</p> <p><i>Paragraph (2)—bond.</i> This paragraph absorbs an enacting state's law governing bond to secure performance by a trustee, such as under Uniform Trust Code § 702(a)–(b) (2000) and Restatement (Third) of Trusts § 34(3) (2003), for application to bond by a trust director. The drafting committee assumed that bond would seldom be required for a trust director, as in the usual case the director would not have custody of the trust property.</p> <p><i>Paragraph (3)—reasonable compensation.</i> This paragraph absorbs an enacting state's law governing reasonable compensation of a trustee, such as under Uniform Trust Code § 708 (2000) and Restatement (Third) of Trusts § 38 cmt. i (2003), for application to compensation of a trust director. The drafting committee contemplated that, just as in total “the reasonable fees for multiple trustees may be higher than for a single trustee,” Restatement (Third) of Trusts § 38 cmt. i (2003), so too the total reasonable fees for a trust with a directed trustee and a trust director may be higher than for a single trustee. Reasonable compensation for a trust director will vary based on the nature of the director's powers, and in some circumstances may well be zero. A state that provides a statutory commission for a trustee should therefore refrain from using the commission for a trust director and should instead use a rule of reasonable compensation. Statutory trustee commissions will often overcompensate a trust director, especially a director that does not participate actively on an ongoing basis in the administration of the trust. The problem will be especially serious in a trust with multiple such directors. Moreover, the reasonable compensation of a directed trustee is likely to be less than that for a trustee that is not directed. An apt analogy is to a trustee that hires others to “render services expected or normally to be performed by the trustee.” Restatement (Third) of Trusts § 38 cmt. c(1) (2003); <i>see also</i> Uniform Prudent Investor Act § 9 cmt. (1994) (“If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.”).</p> <p><i>Paragraph (4)—resignation.</i> This paragraph absorbs an enacting state's law governing resignation by a trustee, such as under Uniform Trust Code § 705 (2001) and Restatement (Third) of Trusts § 36 (2003), for application to resignation by a trust director.</p>
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	<p><i>Paragraph (5)—removal.</i> This subsection absorbs an enacting state’s law governing removal of a trustee, such as under Uniform Trust Code § 706 (2000) and Restatement (Third) of Trusts § 37 cmt. e (2003), for application to removal of a trust director.</p> <p><i>Paragraph (6)—vacancy.</i> This section absorbs an enacting state’s law applicable to a vacancy in a trusteeship for application to a vacancy in a trust directorship. For example, under Uniform Trust Code § 704 (2004), “a vacancy in a trusteeship need not be filled” if “one or more cotrustees remain in office.” So too, if three of five trust directors with a joint power to determine the settlor’s capacity remain in office, the court “need not” fill the vacancies, though the vacancies should be filled if doing so would be more consistent with the settlor’s plan. Likewise, if the sole trust director with power over investment of the trust property ceases to serve, in most circumstances the vacancy should be filled, and this is true even if other directors with unrelated powers remain in office. An apt analogy is to a trust with several cotrustees, each of whom has controlling authority over different aspects of the trust’s administration. If any of those trustees ceases to serve, in many circumstances a court should appoint a successor even though other cotrustees remain in office.</p> <p><i>Costs and indemnification.</i> The power of a trust director to incur reasonable costs and to direct indemnification for expenses would in most cases be covered by Section 6(b)(1).</p>
Restatement (Third) of Trusts § 35 (2003)	<p>Acceptance or Renunciation of Trusteeship</p> <p>(1) A designated trustee may accept the trusteeship either by words or by conduct.</p> <p>(2) A designated trustee who has not accepted the trusteeship may decline it.</p>
Current Colorado Law C.R.S. § 15-16-304	<p>Duty to provide bond</p> <p>A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the court of registration or other appropriate court in amounts and with sureties and liabilities as provided in sections 15-12-604 and 15-12-606 relating to bonds of personal representatives.</p>

<p>Current Colorado Law C.R.S. § 15-10-602</p>	<p>Recovery of reasonable compensation and costs</p> <p>(1) A fiduciary and his or her lawyer are entitled to reasonable compensation for services rendered on behalf of an estate.</p> <p>(5) Except as limited or otherwise restricted by a court order, compensation and costs that may be recovered pursuant to this section may be paid directly or reimbursed without a court order. After a fiduciary receives notice of proceedings for his, her, or its removal, the fiduciary shall not pay compensation or attorney fees and costs from the estate without an order of the court. A court shall order a person who receives excessive compensation or payment for inappropriate costs to make appropriate refunds.</p>
<p>Current Colorado Law C.R.S. 15-1.1-107</p>	<p>Investment Costs</p> <p>In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.</p>
<p>Restatement (Third) of Trusts § 36 (2003)</p>	<p>Resignation of Trustee</p> <p>A trustee who has accepted the trust can properly resign:</p> <p>(a) in accordance with the terms of the trust;</p> <p>(b) with the consent of all beneficiaries; or</p> <p>(c) upon terms approved by a proper court.</p>
<p>Restatement (Third) of Trusts § 37 (2003)</p>	<p>Removal of Trustee</p> <p>A trustee may be removed</p> <p>(a) in accordance with the terms of the trust; or</p> <p>(b) for cause by a proper court.</p> <p>Cmt [e] e. Grounds for removal. The following are illustrative, but not exhaustive, of possible grounds for a court to remove a trustee: lack of capacity to administer the trust (see § 32); unfitness, whether due to insolvency, diminution of physical vigor or mental acuity, substance abuse, want of skill, or the inability to understand fiduciary standards and duties; acquisition of a conflicting interest (cf. Comment f(1)); refusal or inability to give bond, if bond is required (see § 34, Comment a); repeated or flagrant failure or delay in providing proper information or accountings to beneficiaries (see §§ 82 and 83); the commission of a crime, particularly one involving dishonesty; gross or continued inadequacies in matters of investment (see §§ 90-92); changes in</p>

	<p>the place of trust administration, location of beneficiaries, or other developments causing serious geographic inconvenience to the beneficiaries or to the administration of the trust; unwarranted preference to the interests of one or more beneficiaries; a pattern of indifference toward some or all of the beneficiaries; or unreasonable or corrupt failure to cooperate with a co-trustee.</p> <p>Not every breach of trust warrants removal of the trustee (cf. Comment g), but serious or repeated misconduct, even unconnected with the trust itself, may justify removal.</p>
Colorado Subcommittee Comment	
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 17
Section Title	Uniformity Of Application And Construction.
Statutory Language	In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.
Uniform Law Commission Comment	None
Current Colorado Law	NA
Colorado Subcommittee Comment	This is a standard provision for uniform laws.
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 18
Section Title	Relation To Electronic Signatures In Global And National Commerce Act.
Statutory Language	This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).
Uniform Law Commission Comment	None
Current Colorado Law	No provision.
Colorado Subcommittee Comment	This is a standard provision in uniform laws.
Colorado Subcommittee Recommendation	

**Colorado T&E Section Statutory Revisions Committee Subcommittee on the  
Uniform Directed Trust Act**

UDTA Section	Section 20
Section Title	Effective Date.
Statutory Language	This [act] takes effect . . . .
Uniform Law Commission Comment	None
Current Colorado Law	The current Colorado Directed Trustees Act, C.R.S. § 15-16-801 et seq., was effective August 6, 2014. It includes no specific effective date provision.
Colorado Subcommittee Comment	<p>We need to consider:</p> <p>(1) The effective date to use. The standard approach is as follows: Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August __, 2019, if adjournment sine die is on May __, 2019); except that, if a referendum petition is filed pursuant to section 1(3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2019 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.</p> <p>(2) Under UDTA § 3, the act would apply to any trust, “whenever created,” that has its principal place of business in Colorado, but if the trust was created before the effective date, the act would apply only to decisions or actions taken on or after the effective date, and if the principal place of administration is changed to Colorado on or after the effective date, then the act would apply only to decisions and actions taken on or after the date of the change.</p> <p>(3) Should we say something to the effect of: Any trust that is subject to Part 8 of Article 16 of Title 15, Colorado Revised Statutes, as in effect before the effective date of this act [will continue to be subject to that Part and will not be subject to this act] [unless the trustee [after notice to the qualified beneficiaries] elects in writing that the trust will be subject to this act]?</p>
Colorado Subcommittee Recommendation	