

A New Direction for Directed Trusts A Talk with John Morley

- Overview
 - Traditional understanding of trusts
 - Power to administer trust belongs to a trustee, including powers over investment, distribution, and management of trust property
 - Rather than beneficiary, settlor, or anyone else not formally a trustee
 - Directed trusts
 - Trust director (trust protector/trust adviser) does not hold legal title to the trust property and is not a trustee, but holds power to direct the trustee
 - Directed trustee/administrative trustee power is subject to the power of the trust director
 - Trend toward directed trust
 - Flexibility of trust assets management
 - Flexibility in decision-making and potential for changes in the nature of the business over time
 - Particularly useful for long-term trusts holding interests in family-controlled or family-owned businesses
- New Uniform Directed Trust Act (UDTA)
 - Approved by the Uniform Law Commission in 2017
 - Adopted in some form in 8+ states
 - Attempt to settle law and provide clarity on:
 - Fiduciary duties
 - Non-fiduciary matters
 - Cotrusteeship
 - Exclusions that preserve existing law and settlor autonomy
- Scope and exclusions
 - Basic terms
 - UDTA § 2(9) definition of "trust director": person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee
 - UDTA § 2(3) definition of "directed trustee": trustee that is subject to a trust director's power of direction
 - Are functional definitions
 - Trust director's "power of direction"
 - Scope depends on powers that qualify as a "power of direction"
 - UDTA § 2(5) "power of direction": power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee

- Includes powers to direct a trustee; to act in own right, to release trustee from liability; over investment, management, or distribution; etc.
 - Excludes power that belong to a trustee
- UDTA § 6(b)(1) “appropriate” power: by default, UDTA supplies further powers as “appropriate” to the exercise of that expressly granted power
 - Operates as a “necessary and proper” clause
 - “Appropriateness” judged in relation to the purpose and function of expressly granted power
 - vs. South Dakota directed trust statute: confers certain powers by default to the “investment trust advisor” and the “distribution trust advisor”¹
- When there are multiple directors with different powers
 - Shelton v. Tamposi, 62 A.3d 741 (N.H. 2013)
 - Tamposi’s sons Sam, Jr. and Steve appointed investment directors of various trusts, 12 separate trusts for his 6 children. Contained an in terrorem clause. Betty and Nick wanted a separation of their beneficial interests in the trust property. A settlement was reached in which Sam, Jr. and Steve resigned as investment directors over all but 10 assets in Betty and Nick’s subtrusts. Betty’s trustee filed suit to “decouple” assets in her trust from the other subtrusts.
 - Court examined the trust documents and found that the investment directors have unequivocal authority to make investment decisions, and those decisions are not reversible by the trustee.
 - 5 exclusions to “power of direction”
 - Nonfiduciary powers of appointment
 - Power to appoint or remove a trustee or trust director
 - Settlor’s powers over a revocable trust
 - Power of a beneficiary
 - Power held in nonfiduciary capacity to achieve settlor’s federal tax objectives
- Fiduciary duties
 - UDTA § 8 trust director duties
 - Has same fiduciary duty and liability as a trustee in a like position and under similar circumstances
 - Trust director absorbs the same fiduciary duty as that of similarly situated trustee
 - Directed trustee

¹ S.D. Codified Laws §§ 55-1B-10, 55-1B-11
https://sdlegislature.gov/#/Statutes/Codified_Laws/2072632

- UDTA § 9 directed trustee duties
 - UDTA § 9 trustee has affirmative duty to take “reasonable action” to comply with trust director’s instructions. Is not liable for taking “reasonable action” except if such action constitutes “willful misconduct”
 - “Willful misconduct” is left undefined
 - vs. Delaware directed trust statute: defines "wilful misconduct" as “intentional wrongdoing, not mere negligence, gross negligence or recklessness.”²
 - South Dakota directed trusts statute: no liability for “excluded fiduciary”³
- Even in no duty statutes, courts may still find a duty:
 - *Rollins v. Branch Banking & Trust Company of Virginia*: court held no breach of duty for directed trustee who failed to question the investment director’s decisions to concentrate portfolio but held trustee liable for failing to warn beneficiaries about the risks⁴
 - *Rollins* would have a different result under the UDTA because there is no duty to inform beneficiaries.
- Information sharing duty
 - UDTA § 10 duty to provide information to trust director or trustee
 - Affirmative duty to provide information and responsive duty to reply to requests for information
 - Safe harbor for relying on information. Safe harbor applies if trustee who relies on information is not engaged in willful misconduct.
 - § 11(a) no duty to cross monitor
 - No duty of trustee to monitor trust director or inform the settlor or beneficiary
 - Same rule applies for trust director

² Del. Code Ann. tit. 12, § 3301(g) <https://delcode.delaware.gov/title12/c033/index.shtml>

³ S.D. Codified Law §§ 55-1B-2 Liability limits of excluded fiduciary
https://sdlegislature.gov/#/Statutes/Codified_Laws/2072621

⁴ 56 Va. Cir. 147 (2002)

Resources

- Directed Trust Act, Uniform Law Commission
<https://www.uniformlaws.org/committees/community-home?CommunityKey=ca4d8a5a-55d7-4c43-b494-5f8858885dd8>
- Morley, John D. and Sitkoff, Robert H., Making Directed Trusts Work: The Uniform Directed Trust Act (September 28, 2018). 44 ACTEC Law Journal 1 (2018, Forthcoming), Yale Law & Economics Research Paper No. 601, Harvard Public Law Working Paper No. 19-02, Available at SSRN: <https://ssrn.com/abstract=3256987>
- Morley, John D. and Sitkoff, Robert H., The New Uniform Directed Trust Act Paves the Way for Creative and Thoughtful Divided Trusteeship (September 28, 2018). 52 Annual Heckerling Institute on Estate Planning (Tina Portando, ed., 2018, Forthcoming) , Yale Law & Economics Research Paper No. 600, Available at SSRN: <https://ssrn.com/abstract=3257010>