



MEMORANDUM

From: Robert H. Sitkoff, Chair
Turney Berry, Vice-Chair
John D. Morley, Reporter

To: Uniform Law Commission

Re: Uniform Directed Trust Act

Date: June 9, 2017

This memo provides an overview of the Uniform Directed Trust Act, which is slated for second reading at the upcoming 2017 Annual Meeting in San Diego. Much of the memo is derived from the Prefatory Note.

Background. The Uniform Directed Trust Act addresses an increasingly common arrangement in contemporary estate planning and asset management known as a directed trust. A directed trust is created by naming a person that is not a trustee to hold a power over the trust, such as a power over the investment, distribution, or administration functions that would otherwise have belonged to the trustee. There is no consistent vocabulary to describe the nontrustee powerholder in a directed trust. Several terms are common in practice, including “trust protector,” “trust adviser,” and “trust director.” There is much uncertainty in existing law about the fiduciary status of a nontrustee that has a power over a trust and about the fiduciary responsibility of a trustee (sometimes called an “administrative trustee” or “directed trustee”) with regard to actions taken or directed by the nontrustee. Existing uniform trusts and estates acts address the issue inadequately. Existing nonuniform state laws are in disarray.

Under the Uniform Directed Trust Act, a power over a trust held by a nontrustee is called a “power of direction.” The holder of a power of direction is called a “trust director.” A trustee that is subject to a power of direction is called a “directed trustee.” The main contribution of the act is to address the many complications created by giving a power of direction to a trust director, including the fiduciary duty of a trust director and the fiduciary duty of a directed trustee.

Enabling Settlor Autonomy Consistent with Fiduciary Minimums. By validating terms of a trust that provide for a trust director with a power of direction, the Uniform Directed Trust Act promotes the settlor’s autonomy in accordance with the principle of freedom of disposition. At the same time, the act imposes a mandatory minimum of fi-

duciary duty on both a directed trustee and a trust director in accordance with the traditional principle that a trust is a fiduciary relationship.

Structure of the Act. The heart of the Uniform Directed Trust Act appears in Sections 6 through 11, which address the powers and duties of a trust director and a directed trustee. Sections 6 through 8 address the kinds of powers that the terms of a trust can grant to a trust director and the default and mandatory fiduciary duties of the director. Sections 9 through 11 address the fiduciary duty of a directed trustee and prescribe the ways in which a power of direction in a trust director changes the trustee's powers and duties. Section 12 addresses cotrusteeship, enabling the settlor to apply the fiduciary standards of conduct for a directed trust under this act to a cotrusteeship. The remaining sections address a variety of important technical issues in this act's relationship to existing law and in the administration of a directed trust, including rules of construction for recurring matters that might be overlooked in the drafting of a directed trust.

Fiduciary Duty in a Directed Trust. The most critical policy question is the fiduciary duty in a directed trust of a trust director and a directed trustee. Under the Uniform Directed Trust Act, a trust director has the same default and mandatory fiduciary duties with respect to a power of direction that would apply to a trustee if a trustee held the same powers (Section 8), and a directed trustee is liable only for the trustee's own "willful misconduct" in complying with a trust director's exercise or nonexercise of a power of direction (Section 9). Regarding a power of direction, the trust director functions much like a trustee in an undirected trust and thus should have the same duties as a trustee in the exercise or nonexercise of the director's power of direction. To facilitate the settlor's intent that the trust director be the primary or even sole decisionmaker regarding a power of direction, the fiduciary duty of the directed trustee is reduced with respect to issues over which the director holds the power of direction.

In preserving some minimal fiduciary duty in a directed trustee, the drafting committee was influenced by the prominent directed trust statute in Delaware, which provides likewise. *See* Del. Code Ann. tit. 12, § 3313 (2017). The popularity of directed trusts in Delaware establishes that a directed trust statute that preserves in a directed trustee a duty to avoid "willful misconduct" is workable in directed trust practice. The drafting committee therefore declined the suggestion that the Uniform Directed Trust Act follow the statutes in Nevada and other states that eliminate completely the fiduciary duty of a directed trustee. The drafting committee's analysis is elaborated in the extensive comments to Section 9.

In summary, under the Uniform Directed Trust Act a beneficiary's main recourse for misconduct by a 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 directed trustee, but only to the extent of the trustee's own willful misconduct. Relative to a non-directed trust, the act increases the total fiduciary duties owed to a beneficiary. All of the usual duties of trusteeship are preserved in the trust director, and in addition the directed trustee has a duty to avoid willful misconduct.