



MEMORANDUM

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

To: Members, Advisors, and Observers
Drafting Committee for an Act on Directed Trusts

Re: Philadelphia Meeting (October 28-29, 2016)

Date: October 7, 2016

This memo provides an overview of the status of our project as we head into our fourth drafting session in Philadelphia on Friday and Saturday, October 28 and 29, 2016. It also provides a brief overview of important changes to the draft since the Annual Meeting and takes note of several discussion issues.

The upcoming meeting will be the fourth of what is planned to be five in-person drafting sessions. After our final meeting this Spring (location still to be determined), we will read our proposed final draft at the 2017 Annual Meeting of the Uniform Law Commission, to be held in July in San Diego, California. At that meeting, the Commission will vote on whether to approve the act for promulgation to the states (subject to further amendments at that meeting).

At this past summer's Annual Meeting, in Stowe, Vermont, we had no substantial objections from the floor. Of particular note, no Commissioner called into question our fundamental policy decision to apply a "willful misconduct" standard to a directed trustee. Instead, the questions and comments were generally more specific and technical in nature. With one exception, we believe we have adequately addressed those questions and comments in the current draft.

Limits for tax, charity, or special needs? The one exception pertains to whether we should prescribe mandatory limits on a trust director's powers for charitable trusts, for special needs trusts, or to guard against inadvertent loss of certain tax benefits. The drafting committee considered this question previously. After extensive discussion at our Fall 2015 meeting, the committee decided not to include such provisions. The committee reasoned that such mandatory limits on a settlor's autonomy were not justified by

the benefit of protecting a settlor from bad drafting. The committee also took notice of the fact that only a small handful of state directed trust statutes contain such provisions. The overwhelming majority of the statutes, including the statutes in Delaware, Nevada, South Dakota, and Alaska, do not.

Nonetheless, because the issue was raised from the floor, and because our ACTEC observer may have reversed her position, we are raising the question again for review in Philadelphia. For a refresher of what such a provision might look like, we enclose a lightly modified version of our prior effort from the Fall 2015 draft as Appendix A and the handful of existing provisions as Appendix B.

Let us turn now to a brief overview of the more significant revisions since the Annual Meeting and some further discussion issues. We will elaborate on all of these points at the meeting.

We have added a definition for a *power of appointment* in Section 2, which allows for specific use of that term in Sections 5 and 6. Section 5 excludes a power of appointment from this act. Section 6 prescribes a default rule of construction under which a power to designate a recipient of an ownership interest in or a power of appointment over trust property is a power of appointment, excluded by Section 5, unless the terms of the trust provide otherwise— that is, unless the terms of the trust indicate that the power was meant to be a power of direction subject to the fiduciary and other rules of this act. In consequence, even after enactment of this act a settlor could grant a person a nonfiduciary power over distribution of trust property (i.e., a power of appointment), and under this act this is the default rule of construction.

We have moved a *power to appoint or remove a trustee or trust director* into Section 5, excluding such a power from the scope of this act. In consequence, a person who holds such a power is not a trust director with respect to the power, and the fiduciary and other rules of this act do not apply. Instead, the power is subject to otherwise applicable law. As noted in the comment to Section 5, under prevailing law the only limit on the exercise of such a power is that it “must conform to any valid requirements or limitations imposed by the trust terms.” Restatement (Third) of Trusts § 37 cmt. c (2003).

We have provided two alternatives for the exclusion in Section 5 of *powers that for tax reasons must be nonfiduciary*. We received extensive feedback at the summer ACTEC meeting and elsewhere that alternative B is preferable, that is, we have been told by many lawyers in a variety of venues that not everyone agrees that the only power that must be nonfiduciary to achieve the settlor’s tax objectives is a power to substitute assets.

The most important change in this draft is a simplification of the blackletter of Section 6 on the *powers of a trust director*. In this draft, we have only one category, a power of direction, because after excluding a power to appoint or remove a trustee and clarifying the exclusion of a power of appointment, further differentiation among types or kinds of powers was not needed for the fiduciary rules for a trust director (Section 7) or

directed trustee (Section 8). Instead, Section 7 subjects a trust director to the fiduciary duties ordinarily applicable to a trustee, and Section 8 provides for a “willful misconduct” rule for a directed trustee with further procedural and substantive safeguards if the trust director has a power to release a trustee from liability (which had been part of the power of consent in the previous draft). In this way, both Section 7 on the *duties of a trust director* and Section 8 on the *duties of a directed trustee* have been simplified. Section 11, which applies to *cotrustees*, has been simplified likewise.

The exclusion of fiduciary duty for a *trust director who is a health-care provider* in Section 7(b) has been rewritten to track the Uniform Health-Care Decisions Act. This rewrite is responsive to a concern raised at the Annual Meeting that the language of the prior draft was imprecise and that the term “licensed medical professional” was neither defined nor a term of art.

As discussed in the comments to Section 7, we believe that the revisions to Sections 6 and 7, taken together, allow the terms of a trust to indicate that a trust director’s power to act is not subject to an ongoing duty to monitor whether the power should be exercised (a kind of *latent* or *springing* power).

The legislative note to Section 6 contains a discussion question about pet trusts. The legislative note to Section 8 contains a discussion question about revision or repeal of Uniform Trust Code § 808. The comments to Section 8 contain three discussion questions concerning (1) release of another trust director, (2) release by a beneficiary that affects the interest of another beneficiary, and (3) a question from the floor about affiliates of a trust director. We will elaborate on all three at the meeting. The legislative note to Section 11 contains a discussion question about conforming revisions to Uniform Trust Code § 703.

Section 9 on *information sharing among trustees and trust directors*, and Section 10 on the absence of a duty in a directed trustee to *monitor or advise* a trust director, have been revised substantially for clarity and consistency.

We have added bracketed cross-references to the relevant provisions of the Uniform Trust Code in Sections 12 and 15 where those sections reference other trust law. This change is responsive to a suggestion at the Annual Meeting that such cross-referencing would make the act more user-friendly. Section 13 contains a discussion note about whether the examples given in the comments should be returned to the blackletter. We moved them to the comments in response to the suggestions of several Commissions at the Annual Meeting.