



Recent Michigan Legislation Regarding Directed Trusts

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A growing trend in estate planning is the use of a directed trust. Michigan joined the movement on December 28, 2018, when Governor Snyder signed into law the Michigan Uniform Directed Trust Act (MUDTA). The law became effective March 29, 2019 and has been added to the Michigan Trust Code (MTC) under section 7703(a).

Several states have had directed trust or similar statutes for many years. For example, Delaware created a directed trust statute over 20 years ago. As more states have become interested in or have actively implemented similar law, the National Conference of Commissioners on Uniform State Laws created The Uniform Directed Trust Act (UDTA) in 2017 to act as a “template.” The UDTA is the basis for the newly implemented Michigan Uniform Directed Trust Act.

So, what is a “directed trust” and why is it important? Generally, a trust is considered a directed trust when the trust document grants a non-trustee a power over a part of the trust’s administration that is normally a power of the trustee. Trustees and trust creators might want the ability to separate or isolate duties for certain activities, voting on closely held family corporate actions, for example, or to allow for family members or advisors to bring personal or expert knowledge into the decision making process. When a trust is “directed,” it is important to identify the responsibilities and liabilities of the person or organization holding the power to direct and the person or organization subject to such direction.

Of course, the legal terminology and definitions are important. The MUDTA defines several important

terms including:

- A power of direction is a power over a trust that is given to a non-trustee.
- A trust director is defined as either an organization permitted to exercise trust powers in Michigan, or an individual, if that person is granted a power of direction.
 - ◊ A trust director can be a beneficiary or the settlor (creator) of the trust.
- A directed trustee is defined as a trustee subject to a power of direction.

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A simple example of how a directed trust might work: Assume the settlor of a trust gives a trust director the power to determine or approve distributions to beneficiaries from the trust. The trust director instructs the directed trustee to distribute \$10,000 to one of the beneficiaries. As long as the directed trustee knows that the trust director is acting within the scope of responsibility as defined in the trust document, the directed trustee must make the distribution to the beneficiary.

The directed trustee is under no obligation to second-guess the decision or instruction of the trust director. If the directed trustee thinks the decision is a bad one, he can, but does not need to, speak up to the settlor, the trust director

or the beneficiary. If the directed trustee does question the distribution, he is under no obligation to do so in the future even under the same set of circumstances.

As one might expect, both trustees and trust directors have a duty to provide to the other the information necessary for each to perform his/her duties under the terms of the trust.

Additionally, neither is liable for relying on the information provided, assuming it was not relied upon in bad faith.

MUDTA relieves the directed trustee from liability for carrying out the direction of the trust director as long as that direction was not obtained by the directed trustee's collusion or fraud. This standard of liability is quite narrow and favorable to the directed trustee. This is one of several places where state laws can differ. In fact, Michigan lowered the directed trustee's standard from willful misconduct, which is the standard in the Uniform Directed Trust Act.

The MUDTA consists mostly of default rules. The settlor of a trust has the ability to depart from these default rules. For example, the settlor can require more responsibility or a higher standard from the trust director but they cannot lower the trust director's responsibilities below a minimum fiduciary obligation. The trust director's responsibilities cannot be lower than the responsibilities a trustee has to the beneficiaries if that trustee held the power that the trust director has been given.

All to say that trust directors and directed trustees continue to carry significant fiduciary responsibilities to and for the beneficiaries of a trust.

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With the very recent addition of MUDTA to the MTC, there is uncertainty as to how Michigan courts will handle actions brought by “dissatisfied beneficiaries” of directed trusts. It will take time for drafting attorneys to become familiar with the law, create language that meets the needs of clients and corporate trustees, and for corporate trustees to become comfortable with the risk / reward that this new Michigan legal framework provides.

With other states, such as Delaware, with decades of case law and tested directed trust statutes, trust settlors and trustees have options that should be considered. Greenleaf Trust is fortunate to be in the position to have both Dela-

ware and Michigan trust companies so that we can work in either state and choose the jurisdiction that makes the most sense for the trust, the beneficiaries, the trust director and the trustee. ☑