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**Directed Trusts: A Primer on the Bifurcation
of Trust Powers, Duties, and Liabilities in
Special Needs Planning**

*By William D. Lucius, Esq., and
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Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties, and Liabilities in Special Needs Planning

By William D. Lucius, Esq., and Shirley B. Whitenack, Esq., CAP, Fellow

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I. Introduction

The provision of legal services in the fields of elder law and special needs planning has expanded over the past decade into a client-focused, holistic, and collaborative approach.¹ Consequently, this developing philosophy has permeated into the estate plans and trust instruments related to these fields, such as special needs trusts (SNTs)² and settlement preservation trusts (SPTs),³ wherein the selection of an

appropriate fiduciary is no longer a choice between two or among several individuals or corporate trustees. Nontraditional “multiparticipant trust agreements,”⁴ in which the “powerholders”⁵ may be a potpourri of trustees, co-trustees, distribution directors, investment advisers, trust advisory committees, and trust protectors, are becoming more commonplace.⁶ With the advent of directed trusts, these powerholders may now encroach upon the traditional trustee’s once overarching authority and compel the trustee to act (or not act) in furtherance of the trust’s objective.⁷

Consider the case of Nathaniel.⁸ Like most 4-year-olds, Nathaniel was curious and adventurous in equal measure. Due to the alleged negligence of a day care employee, Nathaniel left his day care facility through an open gate and wandered unsupervised to an adjacent parking lot. When Nathaniel attempted to climb through a half-open car window, his head became stuck and he could no longer support his

1 Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 J. Intl. Aging L. & Policy 103, 106 (Summer 2007).

2 SNTs are commonly referred to as either first-party or third-party SNTs depending on the source of funds used to establish them. A first-party SNT, funded with the assets of a beneficiary with a disability, is created pursuant to Title 42 U.S.C. § 1396p(d)(4)(a) (2018); a third-party SNT, funded with the assets of a third party, is largely a creature of state law. For purposes of this article, “SNT” is used to refer to both types of SNTs because the distinction does not bear heavily on the topic of this article. Moreover, intentionally omitted from this article are pooled SNTs authorized by Title 42 U.S.C. § 1396p(d)(4)(c) and Qualified Income Trusts as found in Title 42 U.S.C. § 1396p(d)(4)(b). The authors assume the readers are knowledgeable of the definitions, types, and purposes of SNTs.

3 SPTs are a type of irrevocable, discretionary support trust commonly used in special needs planning. SPTs do not have a federal authorizing statute and do not protect the beneficiary’s ability to receive means-tested benefits (e.g., Supplemental Security Income, Medicaid); therefore, they do not need to comply with the Medicaid payback requirements of Title 42 U.S.C. § 1396p(d)(4)(a). In addition to affording a minimum level of creditor and spendthrift protection, SPTs may be useful planning tools for minor beneficiaries, beneficiaries with incapacity considerations, and those who may be vulnerable or susceptible to undue influence. See Thomas D. Begley Jr., *Settlement Protection Trusts*, 30 NAELA News 4 (Nov. 2018).

4 A multiparticipant trust, unlike the traditional single-fiduciary trust, employs a team of multiple trustees and/or advisers with specific roles and responsibilities. See John P.C. Duncan & Anita M. Sarafa, *Achieve the Promise — and Limit the Risk — of Multi-Participant Trusts*, 36 ACTEC L.J. 769, 772 (2011).

5 Powerholders are loosely defined in this article to include trust directors, trust advisers, trust protectors, trust advisory committees, and other parties with the power to direct another fiduciary on some aspect of the trust instrument.

6 Duncan & Sarafa, *supra* n. 4, at 773.

7 John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 1 (Winter 2019).

8 Nathaniel’s story is loosely based on the real events of a beneficiary of an SNT administered by one of the authors. Although Nathaniel’s guardian gave permission to share his story, Nathaniel’s name and certain substantive facts have been changed to protect his privacy.

weight. The near-strangulation caused a significant, irreversible traumatic brain injury. Now 8 years old, Nathaniel is incapacitated, has no gait strength or swallowing reflexes, has frequent seizures, and requires 24-hour supervised care. Nathaniel's parents sued the day care provider and parking lot owner, securing an \$8 million cash settlement, which includes a 40-year guaranteed structured annuity payment of \$4,500 per month, adjusted 3 percent annually. The court that approved the settlement ordered the establishment of a first-party SNT for Nathaniel's benefit that included, in part, the following language:

Art. 1.1 — Trust Company, N.A., shall serve as the initial Corporate Trustee. Distribution Directors, Inc., shall serve as the initial Distribution Director under this Agreement. Each of the entities shall serve as fiduciaries but shall only be responsible for the decisions that fall within their respective authorities as defined hereunder. Both may rely conclusively on the other if that instruction relates to a matter under the other's purview, and neither shall have a duty nor obligation to review the underlying actions of the other.

Art. 1.2 — During the lifetime of Nathaniel, Distribution Director may direct Corporate Trustee to distribute, from income, principal, or both of this Trust, such amounts as the Distribution Director, in its sole, absolute, and unfettered discretion, may from time to time deem advisable or reasonable for Nathaniel's special needs.

Art. 9.1 — Nathaniel's mother is appointed as Trust Protector. The Trust Protector shall not be entitled to compensation for services rendered but shall be entitled to reimbursement of reasonable expenses in the exercise of her services. The Trust Protector is authorized, in her sole and absolute discretion, to remove from office, without Court approval, any Corporate Trustee or Distribution Director appointed herein, with or without cause and for any reason

whatsoever, and may replace such Corporate Trustee or Distribution Director with another Corporate Trustee or Distribution Director who is not related to or subordinate to the Beneficiary (within the meaning of Internal Revenue Code § 672(c)) to act in place of the Corporate Trustee or Distribution Director so removed.⁹

In Nathaniel's case, by ordering a trust with bifurcated duties among various parties, the court followed the advice of the guardian ad litem, who recommended a multiparty directed trust arrangement to best address the investment management and discretionary decision-making complexities that will likely last the length of the trust's administration.

A. The Confluence of Multiparty and Directed Trusts

A directed trust, similar to Nathaniel's SNT, includes individuals or entities with a power to direct the trustee on some aspect of the trust, such as investment management, administration, and distribution decisions, powers historically reserved to the trustee.¹⁰ In Nathaniel's case, the distribution director is the directing party (the powerholder) on matters pertaining to discretionary distribution decisions; therefore, the traditional trustee is a "directed trustee"¹¹ insofar as the distribution director holds the power to direct and compel the trustee to act (or not act) in this regard.

9 This sample language is a consolidation of various trust provisions from governing instruments spanning multiple jurisdictions. This language is being offered for example only and should not be construed as language suggested for use.

10 Unif. Directed Trust Act § 2 cmt (5).

11 Unif. Directed Trust Act § 2(3) defines "directed trustee" as a "trustee that is subject to a trust director's power of direction."

This article emphasizes this “power of direction”¹² as well as the attendant powers, duties, and liabilities of powerholders and directed trustees. Although a directed trust is a multiparticipant trust by design, because there must be both a directing party and directed party, it does not follow that all trusts with multiple parties are directed trusts or that all parties to a directed trust are powerholders.¹³ Although Nathaniel’s mother, in her capacity as trust protector, has the authority to remove and appoint the trustee or distribution director, the governing instrument in this case does not afford her any powers to direct the trustee or distribution director in the administration of the trust. It is the inclusion, or absence, of a power of direction in the governing instrument that is dispositive.

Powerholders are often referred to inconsistently among practitioners; however, powerholders are most commonly known as trust protectors, trust or investment advisers, trust advisory committees, and trust directors.¹⁴ Each role has its own advantages and limitations. Again, each may or may not be a powerholder,

depending on whether the individual or committee has been provided a power of direction in the governing instrument.

Trust protectors originated in the early 1990s in response to the increased use of then-popular foreign-based asset protection trusts.¹⁵ Trust protectors have morphed into a check on trustees of SNTs and discretionary support trusts by providing increased oversight of the trustee-beneficiary relationship.¹⁶ A trust protector, a person or entity the settlor nominates to ensure that the trustee adheres to the settlor’s wishes, is distinct from a trust adviser inasmuch as the trust protector is often granted broader powers, including the ability to remove and appoint trustees and amend or terminate the trust.¹⁷ Certain states now embody the definition of “trust protector” in their probate codes and enumerate the rights and responsibilities of the role.¹⁸

The value of a trust protector is found in his, her, or its ability to monitor the trustee’s conduct and interaction with the beneficiary, amend burdensome or unintended dispositive provisions, change situs, and modify or terminate the trust. However, this value is restrained by whether the trust protector serves in an active or passive role, the relationship the

12 Unif. Directed Trust Act § 2(5) defines “power of direction” as “a 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 trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of administration. ...”

13 Morley & Sitkoff, *supra* n. 7, at 10.

14 Unif. Directed Trust Act, *Prefatory Note*. Also note that the term “trust director” is defined in § 2(9) of the Uniform Directed Trust Act as a “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. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.”

15 J. Andy Marshall, *Trust & Estates Law — Trust Protectors — Increasing Trust Flexibility and Security While Decreasing Uncertainty of Liabilities for Doing So: How Amending Ark. Code Ann. § 28-73-808 to Better Conform With the Modern Trend of Clarifying Trust Protection Could Effectively End the Fiduciary Guessing Game in Arkansas*, 35(4) UALR L. Rev. 1137, 1140 (2013).

16 *Id.* at 1141.

17 Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 Real Prop. Tr. & Est. L.J. 319, 321 (Summer 2010).

18 Idaho Code § 15-7-501 (West) (Current through ch. 329 of 2019 reg. sess.)

trust protector has with the trustees and beneficiaries, additional fees imposed due to this added layer of protection, and most important, whether the trust protector is considered to be serving in a fiduciary capacity, which varies by state and presumably impacts who may be willing to serve.¹⁹

Trust advisers, trust advisory committees, and trust directors are prevalent in special needs planning inasmuch as they may assist a trustee, in particular a professional trustee, who may not know the beneficiary well, may not fully understand the beneficiary's special needs, or may be removed geographically from the beneficiary.²⁰ These roles may be filled by one or several advisers (e.g., relative of the beneficiary, attorney, financial adviser, accountant, case manager, advocate, health care professional) who provide a range of insight and services for the trustee.²¹ The Uniform Trust Code posits that a trust adviser assists with certain trustee functions (e.g., determining the appropriateness of a particular distribution request, opining on the structure of an investment portfolio), whereas a trust protector connotes a grant of larger powers.²²

Trust advisers, trust advisory committees, and trust directors may support the trustee; provide guidance in helping the trustee understand the nature and extent of the beneficiary's medical, social, and therapeutic needs; review investment management decisions to ensure that they

are consistent with the settlor's investment philosophy; direct distributions; identify government and private benefits programs; resolve disputes among co-trustees; and remove and appoint trustees. Yet these entities can frustrate the trust administration process if the trust is drafted in such a way that their purpose, the extent of their authority, or their relationship with the trustee is ambiguous. Without a clear dispute resolution and governance process, a lack of consensus among these entities and trustees can stall the trust administration process.²³ And trust advisers, advisory committees, and directors may be too disinterested, lack the time and commitment, or be too ill-informed to adequately perform their obligations under the governing instrument.

Just as the comments on § 703 of the Uniform Trust Code caution that "co-trusteeship should not be called for without careful reflection," by extension, when employing multiple parties to a trust who may be called upon to hold a power of direction over the trustee, drafting attorneys must proceed judiciously and balance the utility of the nontrustee participant's role and services with the settlor's objectives. Attorneys also must be mindful that the use of multiple participants in a trust has eclipsed the available case law and state statutes that define and govern these various roles.²⁴

19 Alexander A. Bove Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77 (2011).

20 B. Bailey Liipfert III, *Trust Advisory Committees Can Guide Trustee Decisions*, Spec. Needs Alliance (2016), <https://www.specialneedsalliance.org/trust-advisory-committees-can-guide-trustee-decisions> (accessed Apr. 24, 2019).

21 *Id.*

22 Unif. Trust Code § 808 cmts. (2000).

23 Daniel P. Felix, *Opportunities and Pitfalls in the New Illinois Directed Trust Statute*, 101 Ill. B.J. 6 (June 2013).

24 Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, ABA Real Prop., Trust & Est. L. (Mar. 14, 2018), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2017/january_february_2017/2017_aba_rpte_pp_v31_1_article_huber_trust_protectors (accessed Apr. 24, 2019).

B. A Departure From Traditional Delegation Principles

To better understand the concept of a directed trust arrangement, contrast this structure with what it is not — delegation, whereby the trustee’s authority over a particular function is transferred or delegated to another party.²⁵ Historically, trustee delegation rules generally limited trustees from delegating any function that a trustee could be reasonably expected to perform himself or herself, including investment management.²⁶ Trustees were (and still are) required to rely on any special skills they have in the administration of a trust, especially in cases in which the settlor relied upon those skills when selecting the trustee.²⁷

The Uniform Prudent Investor Act, Restatement (Third) of Trusts, and Uniform Trust Code have since changed course and now encourage trustees to evaluate whether they are competent enough to perform the obligations and duties imposed on them by the governing instrument and if they are not, whether and to whom they should delegate this authority.²⁸ The two-fold dilemma with delegation is not only that the trustee has an ongoing statutory duty to exercise “reasonable care, skill and caution” in selecting the agent, establishing the scope of the agent’s authority, and reviewing the agent’s actions²⁹ but also that the settlor may not want the selected trustee to have complete autonomy in outsourcing key components of the trust administra-

tion and investment management process.³⁰

Rather than using the top-down approach that accompanies delegation, a directed trust separates assigned trust functions *ab initio* among the multiple participants pursuant to the settlor’s intent and without necessary consideration of the trustee’s preference or selection of those participants.³¹

C. Avoiding the Paralysis of Decision-Making by Committee

Directed trusts are a response to the always-evolving area of sophisticated estate planning, which has been impacted by a renewed focus on achieving the settlor’s objectives.³² An increase in regulatory and litigious activity, complex dispositive provisions, the consequences of improper distributions, and portfolios that contain significantly concentrated positions in assets that are not traditional marketable securities — which have long plagued wary fiduciaries — become more palatable through a directed trust arrangement.³³ With proper planning, a powerholder under a directed SNT may do the following:

- Direct the trustee to hold a concentrated position;
- Invest in illiquid assets including busi-

25 Unif. Trust Code § 807(a) (2010).

26 *Restatement (Second) of Trusts* § 171 cmt. (h) (1959).

27 Unif. Trust Code § 806.

28 Unif. Prudent Investor Act § 9 (1994); *Restatement (Third) of Trusts* § 171 (2003); Unif. Trust Code § 807.

29 Unif. Trust Code § 807(a)(1)–(3).

30 David A. Diamond & Todd A. Flubacher, *The Trustee’s Role in Directed Trusts*, 149 J. Wealth Mgt. Trust & Ests. 11, 24–25 (Dec. 2010).

31 Todd A. Flubacher, *Directed Trusts: Panacea or Plague?* NAEPJ. Est. Tax Plan. (Sept. 2015), <http://www.naepjournal.org/journal/issue22i.pdf> (accessed Apr. 24, 2019).

32 For example, Florida Senate Bill 478 was introduced in 2017 to amend the Florida Trust Code to ensure, in part, that the settlor’s intent is paramount in trust interpretation, thereby relegating the best-interest-of-the-beneficiary standard.

33 Diamond & Flubacher, *supra* n. 30.

- ness entities, real estate and timber, and oil and gas interests;
- Structure and manage the portfolio;
 - Provide asset valuations for hard-to-value assets;
 - Remove and appoint trustees;
 - Communicate with third parties on behalf of the trust; and/or
 - Compel or prohibit distributions.³⁴

Directed trusts are also a counterbalance to the old adage that a “camel is a horse designed by a committee” and may be employed to clear the logjams that are common in decision-making associated with multiparticipant trusts, in which roles and responsibilities are often blurred, overlapping, or ambiguous.³⁵

The efficacy of directed trusts is not without limitations. State law remains scattered and judicial guidance is limited regarding the powers, duties, and liabilities imposed on the directed trustee and powerholder. In Massachusetts, the trust protector and the trustee of a trust in which the trust protector has the authority to advise the trustee on socially responsible investing³⁶ has fiduciary considerations that are entirely different from those of a directed trustee and investment adviser of a trust with an Alaska situs in which the investment adviser holds a power of direction on the same socially responsible investment philosophy.³⁷

Would a directed SNT really benefit Nathaniel? Are the additional fees and other costs that result from removing traditional trustee functions (e.g., the exercise of discretion) and transferring them to a distribution director reasonable? What protections, if any, are afforded the directed trustee, powerholder, and beneficiary? This brief primer on the bifurcation of trust powers, duties, and liabilities in the context of special needs planning attempts to answer these questions by first summarizing the legislative evolution of directed trusts. Next, the various ap-

form Trust Code approach to directed trustee liability and admonishes the trustee not to act in accordance with the attempted exercise of power by another if doing so would be “manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” Mass. Gen. Laws ch. 203E, § 808(b) (West)(Current through Ch. 12 of 2019 First Annual Sess.). Alaska protects directed trustees and absolves them from liability for following the instructions of a powerholder by stating that a directed trustee “required to follow the directions of the advisor is not liable, individually or as a fiduciary, to a beneficiary for a consequence of the trustee’s compliance with the advisor’s directions, regardless of the information available to the trustee, and the trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of a power of the trustee if the exercise of the power complies with the directions given to the trustee. An advisor under this subsection is liable to the beneficiaries as a fiduciary with respect to the exercise of the advisor’s directions by a trustee as if the trustee were not in office, and the advisor has the exclusive obligation to account to the beneficiaries and to defend an action brought by the beneficiaries with respect to the exercise of the advisor’s directions by the trustee.” Alaska Stat. § 13.36.375(c) (West)(Current through 2018 Second Regular Sess. of 30th Legis.)

34 *Id.*

35 Morley & Sitkoff, *supra* n. 7, at 44–50.

36 Socially responsible investing is an investment management strategy that combines financial return with the investor’s desire to bring about positive social and/or environmental change through selected investments. See Adam Connaker & Saadia Madsbjerg, *The State of Socially Responsible Investing*, Harv. Bus. Rev. (Jan. 17, 2019), <https://hbr.org/2019/01/the-state-of-socially-responsible-investing> (accessed Apr. 26, 2019).

37 Massachusetts, for example, follows the Uni-

proaches states employ in addressing the powers, duties, and liabilities imposed on a directed trustee and powerholder are proffered. The article concludes with drafting and other practitioner considerations that clearly delineate the rights and duties among the various parties while balancing the best interests of the beneficiary with the settlor's intent.

II. Evolution of Directed Trust Law

A. *Restatement (Second) of Trusts and Restatement (Third) of Trusts*

Published in 1959, the Restatement (Second) of Trusts first addresses directed trusts in § 185, which states the following:

If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.³⁸

The premise of the first part of § 185 is that a trustee has a general duty to act in accordance with a powerholder's direction. This duty is not absolute, however, given the trustee's obligation to ensure that the powerholder's direction does not violate the terms of the trust or the powerholder's fiduciary duty.

The comments on § 185 suggest that the trustee's level of inquiry depends on whether the powerholder's exercise of the power of direction in a fiduciary capacity was in favor of the powerholder or whether the powerholder exercised this power for the beneficiary's benefit.³⁹ If the power-

holder's exercise of the power of direction was in favor of the powerholder only, the trustee's inquiry is limited to confirming whether the direction was consistent with the terms of the governing instrument.⁴⁰ But if the powerholder exercised his or her power of direction in favor of others, the trustee must determine whether any applicable fiduciary duty the powerholder owed was violated.⁴¹ Should the trustee have doubt about, or knowledge of, a breach of duty by the powerholder, the trustee should not follow the disputed direction and instead petition the court for instructions.⁴²

Although the Restatement (Third) of Trusts likewise opined on directed trusts nearly a half-century later, as evidenced by the following excerpt, the trustee's analysis when weighing the appropriateness of the powerholder's direction remains largely unchanged:

if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless the attempted exercise is contrary to the terms of the trust or power or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.⁴³

Neeno, *Directed Trusts: Can Directed Trustees Limit Their Liability?* 21 Prob. & Prop. 45 (Nov/Dec 2007).

40 *Restatement (Second) of Trusts* § 185 cmts. (c), (d).

41 *Id.* at § 185 cmts. (c), (e).

42 *Id.* at § 185 cmt. (f).

43 *Restatement (Third) of Trusts* § 75 (emphasis added).

38 *Restatement (Second) of Trusts* § 185.

39 *Id.* at § 185 cmts. (b)-(f). See also Richard W.

The most noticeable deviation from § 185 of the Restatement (Second) of Trusts pertains to the trustee's review of the powerholder's direction that was exercised in a fiduciary capacity. In such instances, under § 75 of the Restatement (Third) of Trusts, the trustee must refuse to comply with the direction if he or she knows, or has reason to suspect, that the powerholder is violating a fiduciary duty. This is a less exacting standard than § 185, which does not take into account the trustee's knowledge, or lack of knowledge, about whether the powerholder was in breach.

B. Uniform Trust Code

The Uniform Trust Code, considered the first national codification of trust law, was promulgated by the National Conference of Commissioners on Uniform State Laws in 2000 and was last amended in 2010.⁴⁴ According to the Uniform Trust Code Prefatory Note, the commissioners realized that, given the greatly expanding use of trusts, trust law was thin and fragmentary in many states. The Uniform Trust Code was drafted to provide a comprehensive guide on trust law issues and was modeled on California's trust statute in close coordination with the Restatement (Third) of Trusts.

The Uniform Trust Code formerly contained § 808, titled "Power to Direct." It stated:

- (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of

the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

- (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.
- (d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.⁴⁵

The comment on Uniform Trust Code § 808 noted:

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business.⁴⁶

Importantly, the comment is also the first codification that the holder of a power of direction is "presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction."

Section 808 was removed when the Uniform Trust Code was amended in

⁴⁴ Natl. Conf. of Commrs. on Unif. St. Laws, *Uniform Trust Code*, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e9c00113-601a-cd94-3aec-97c75a9f6d5a&forceDialog=0> (accessed Apr. 26, 2019).

⁴⁵ Unif. Trust Code § 808.

⁴⁶ *Id.* at § 808 cmts.

2010. A legislative note was added, stating, “A state that has enacted the Uniform Directed Trust Act (UDTA) should repeal Section 808 and revise certain other provisions of the [Uniform Trust Code] as indicated in the legislative notes to the UDTA.”⁴⁷ Former Section 808 was vague regarding the power to direct. Accordingly, some states, such as New Jersey, added specific provisions dealing with the power to direct to their versions of the Uniform Trust Code.⁴⁸

47 Unif. Trust Code, *Legislative Note* on former § 808 (last revised or amended in 2010).

48 See e.g. N.J. Rev. Stat. § 3b:31-62 (2018), which states:

- a. When one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary’s actual or proposed investment decisions, such persons shall be considered to be investment advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides.
- b. If a governing instrument provides that a fiduciary is to follow the direction of an investment adviser, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct or gross negligence on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.
- c. If a governing instrument provides that a fiduciary is to make decisions with the consent of an investment adviser, then except in cases of willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable for any loss resulting directly or indirectly from any act taken or omitted as a result of such investment adviser’s failure to provide such consent after having been requested to do so by the fiduciary.
- d. For purposes of this section, “investment decision” means with respect to any investment, the retention, purchase, sale, exchange, tender or other transaction affecting the ownership thereof or rights therein and with respect to nonpublicly traded

C. Uniform Directed Trust Act

In the ongoing statutory evolution of multiparticipant trusts and in an effort to corral the various state approaches to directed trusts, which are discussed in Section III of this article, the National Conference of Commissioners on Uniform State Laws commissioned the Uniform Directed Trust Act Drafting Committee

investments, the valuation thereof, and an adviser with authority with respect to such decisions is an investment adviser.

- e. Whenever a governing instrument provides that a fiduciary is to follow the direction of an investment adviser with respect to investment decisions, then, except to the extent that the governing instrument provides otherwise, the fiduciary shall have no duty to:

- (1) Monitor the conduct of the investment adviser;
- (2) Provide advice to the investment adviser or consult with the investment adviser; or
- (3) Communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary’s own discretion in a manner different from the manner directed by the investment adviser.

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the investment adviser’s authority, such as confirming that the investment adviser’s directions have been carried out and recording and reporting actions taken at the investment adviser’s direction, shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument. Such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the investment adviser or otherwise participate in actions within the scope of the investment adviser’s authority.

to draft proposed legislation.⁴⁹ According to the Uniform Directed Trust Act Prefatory Note, the drafting committee was charged with designing a uniform act that combines a settlor's value for "freedom of disposition" with increasingly conservative trustees who seek limited liability in following the direction of a third party, while imposing mandatory minimum fiduciary duties on both the directed trustee and the powerholder in order to protect the beneficiary. The drafting committee's efforts culminated with the final adoption of the Uniform Directed Trust Act during the July 2017 annual conference of the commissioners.

The Uniform Directed Trust Act contains 20 sections, yet the integral part of the Act lies in §§ 6 through 8, which outline the duties, powers, limitations, and liabilities of the powerholder and directed trustee. The remainder of the Act considers ancillary technical differences between the Act and existing state law as well as often-overlooked drafting considerations.⁵⁰

Much like the Restatement (Second) of Trusts, Restatement (Third) of Trusts, and Uniform Trust Code § 9, the Uniform Directed Trust Act requires a directed trustee to comply with a powerholder's exercise (or nonexercise) of a power of direction and is not liable for doing so.⁵¹ Unlike both Restatements and the Uniform Trust Code, however, the Uniform Directed Trust Act does not require the trustee to

follow the powerholder's direction if the exercise (or nonexercise) of the power of direction requires the trustee to engage in willful misconduct.⁵² No longer is the trustee required to look at the powerholder's duties or actions in determining whether to follow a direction. Instead, the trustee must only look at himself or herself to ensure that the direction given does not cause the trustee to knowingly or intentionally engage in misconduct. Therein lies the principal cornerstone of modern directed trusts.

Regarding the powerholder's powers, duties, and liabilities, although the trust instrument may confer a broad power of direction to the powerholder, absent contrary language in the trust document, § 8 of the Uniform Directed Trust Act imposes on the powerholder the same fiduciary duties and attendant liabilities in the exercise (or nonexercise) of a power of direction as a trustee "in a like position and under similar circumstances."⁵³ The Uniform Directed Trust Act Drafting Committee believed that because the powerholder acts much like a fiduciary of a traditional trust, the powerholder should have the same duties as a similarly situated trustee and the directed trustee's duties with respect to the powerholder's power should be reduced accordingly.⁵⁴ For example, in New Jersey, where a trust vests the power to make investment decisions in a person other than the trustee, the trustee cannot be liable, absent willful misconduct or gross negligence, for any loss that may result from the retention or sale of an investment.⁵⁵

By inference, a powerholder with the power of direction over discretionary dis-

49 Natl. Conf. of Commrs. on Unif. St. Laws, *Unif. Directed Trust Act* (2017), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=eedab7b6-8fd9-29f1-835f-ed4f385e12aa&forceDialog=0> (accessed Apr. 26, 2019).

50 *Id.*

51 Unif. Directed Trust Act § 9(a).

52 *Id.* at § 9(b).

53 *Id.* at § 8(a)(1)(A).

54 *Id.* at *Prefatory Note*.

55 N.J. Rev. Stat. § 3b:31-62(b), (d).

tributions from an SNT would presumably have the same fiduciary responsibility in exercising his, her, or its discretion as a sole trustee of a similar trust; thus, the directed trustee's liability pertaining to discretionary decision-making would be reduced. This fact is punctuated by the Uniform Directed Trust Act's mandate that a powerholder be subjected to the same rules as a trustee in a similar position regarding Medicaid payback provisions necessary to comply with the requirements of Title 42 U.S.C. § 1396p(d)(4)(a).⁵⁶

Both the powerholder and the trustee are required to share information necessary to fulfill their duties.⁵⁷ But under the Uniform Directed Trust Act, the trustee does not have a duty to (1) monitor the powerholder or (2) inform or advise the settlor or beneficiary concerning an instance in which the trustee may have acted differently from the powerholder.⁵⁸ It is in these two provisions that a directed trust, at least through the lens of a directed trustee, becomes more palatable than delegation, as discussed in Section I of this article.

States are beginning to view the Uniform Directed Trust Act as a model as the special needs, estate planning, and fiduciary communities are beginning to view multiparticipant trusts as comprehensive, beneficiary-centered, and holistic planning tools.⁵⁹

In Michigan, a recent state to amend its trust code to conform to the spirit of the Uniform Directed Trust Act (with support from the State Bar of Michigan Probate & Estate Planning Section Governing Council), practitioners have already opined that the recent legislative changes will allow fiduciaries to seriously consider a settlor's desire to bifurcate administrative duties in a directed trust, previously viewed as posing unnecessary fiduciary risks and being labor intensive, which in turn should incentivize pricing competition among professional fiduciaries.⁶⁰

Unfortunately, states, even those that have adopted or are considering adopting the Uniform Directed Trust Act, largely remain divided on directed trusts, the level of trustee oversight required, and attendant trustee liability to impose. Therefore, drafting attorneys must be cautious when employing a directed trust and be familiar with the law in the state the trust is situated.

III. State Approaches and Other Considerations

A. State Approaches to Directed Trustee Liability

In today's regulatory and litigious environment, most fiduciaries are keenly aware that when held to account, a court will impose upon them an exacting standard that Justice Benjamin Cardozo eloquently described as "not honesty alone, but the punctilio of an honor the most sensitive."⁶¹ It follows, therefore, that in the context of directed trusts involving

56 Unif. Directed Trust Act § 7(1).

57 *Id.* at § 10(a).

58 *Id.* at § 11(a)(1)(A)-(B).

59 Eleven states have recently introduced or enacted legislation to adopt some version of the Uniform Directed Trust Act: Utah H. 314 (2019), Conn. H. 7104 (2019), R.I. H. 5476/R.I. Sen. 344 (2019)(introduced), Colo. Sen. 105 (2019), Ark. H. 1765 (2019), Mich. H. 6130 (2019), Neb. Legis. Doc. 536 (2019), Maine Legis. Doc. 1468 (2019), Indiana Sen. 265 (2019), Ga. H. 121 (2018), and N.M. S.

101 (2018).

60 James P. Spica, *Michigan's Proposed Adoption of the Uniform Directed Trust Act*, 97 Mich. B.J. 11 (Nov. 2018).

61 *Meinhard v. Salmon*, 164 N.E. 545, 465 (N.Y. 1928).

multiple parties, a directed trustee would be hesitant to serve in such a capacity if the trustee would be responsible for the acts of the powerholder. Directed trusts tend to be preferable arrangements — at least from the directed trustee’s perspective — only when state law imposes a lower standard on a trustee acting at the powerholder’s direction.⁶²

Apart from the six states that do not have a directed trust statute on point,⁶³ 13 states and the District of Columbia follow the Uniform Trust Code § 808 approach,⁶⁴ one state follows the Restatement (Second) of Trusts § 185 approach,⁶⁵ and 30 states have statutes that protect directed trustees.⁶⁶ Ten of the states that protect directed trustees have enacted some version of the Uniform Directed Trust Act.⁶⁷ Those states that follow either the Restatement (Second) of Trusts

§ 185 approach or the Uniform Trust Code § 808 approach effectively gut the bifurcated arrangement⁶⁸ insofar as both approaches require the trustee to affirmatively monitor the powerholder to ensure that the exercise of the power of direction (a) is not “inconsistent with the terms of the trust,”⁶⁹ (b) is not “manifestly contrary to the terms of the trust,”⁷⁰ or (c) does not constitute a serious breach of fiduciary duty that the powerholder owes to the beneficiaries.⁷¹ Imposing on a directed trustee a continued obligation to monitor a third party’s actions, with the potential for liability in the event of a breach by the third party, does not distinguish this arrangement from that of traditional delegation, except that the directed trustee had no opportunity to select the powerholder at trust inception.

Even though directed trustees clearly have an advantage in states that have protective statutes, the protection afforded by these statutes varies broadly.⁷² Several states completely limit a directed trustee’s liability for complying with a powerholder under the idea that “duty should follow power.”⁷³ Other protective statutes, consistent with the Uniform Directed Trust Act approach, apply a willful or intentional misconduct standard premised on the idea that the trustee — a pinnacle of the trust relationship — bears some modicum of duty to the beneficiary simply because the settlor chose not to make the powerholder the sole trustee.⁷⁴ It is important to note that the protective approach does not limit the recourse a beneficiary has in the

62 Diamond & Flubacher, *supra* n. 30, at 26.

63 Those states are California, Hawaii, Louisiana, Minnesota, New York, and Rhode Island. Rhode Island recently introduced legislation to adopt the Uniform Directed Trust Act.

64 Those states are Alabama, Florida, Kansas, Maryland, Massachusetts, Montana, New Jersey, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and West Virginia.

65 This state is Iowa. Only Iowa, however, deviates from the language in § 185 and includes a requirement that the trustee not act if the trustee knows that the powerholder is not competent. Iowa Code § 633A.4207(2) (West)(Current through legis. effective May 22, 2019, subj. to change by Iowa Code Editor for Code 2020).

66 Those states are Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida (only if powerholder is a co-trustee), Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming, and Texas.

67 *Id.* at n. 59.

68 Diamond & Flubacher, *supra* n. 30, at 26–27.

69 *Restatement (Second) of Trusts* § 185.

70 Unif. Trust Code § 808(b).

71 *Restatement (Second) of Trusts* § 185; *id.*

72 Unif. Directed Trust Act § 9 cmt.

73 *Id.*

74 *Id.*

event of a breach.⁷⁵ The beneficiary may bring an action against the powerholder for breach of fiduciary duty and against the directed trustee for any willful misconduct — the liability does not necessarily shift among the parties.

Interestingly, the Uniform Directed Trust Act Drafting Committee decided to use the willful misconduct standard based on findings that states that have updated their directed trust statutes (e.g., Delaware) are abandoning the Uniform Trust Code § 808 approach in favor of legislation more protective of the trustee.⁷⁶ According to the drafting committee, such trustee protection need not be unlimited. The drafting committee rejected the suggestion that the Uniform Directed Trust Act eliminate the fiduciary duty of a directed trustee entirely, even a directed trustee's duty to avoid engaging in willful misconduct, finding that Delaware's "prominent directed trust statute" is workable for practitioners and that the more protective total exclusion standard is "unnecessary to satisfy the needs of directed trust practice."⁷⁷ Of course, prefatory language in a uniform act is not binding, and as states such as Michigan continue to adopt their modified versions of the Uniform Directed Trust Act, the issue of

directed trustee liability will continue to evolve.

Although the statutory landscape of directed trusts may appear to be adapting and evolving, the inconsistencies among state laws, especially regarding directed trustee liability, require increased due diligence by drafting attorneys and fiduciaries operating in this space.

B. Planning Considerations

When engaging in special needs planning that involves a directed trust, the threshold the drafting attorney should consider is whether the trust jurisdiction authorizes such an arrangement.⁷⁸ If the jurisdiction has a directed trust statute, the practitioner should determine the approach the state takes in addressing directed trustee liability because this could impact the identification of fiduciaries willing to serve under the instrument. Should the state employ the more restrictive approach of Uniform Trust Code § 808 or Restatement (Second) of Trusts § 185 (or simply have no statute at all), the drafting attorney will need to review the choice-of-law principles of the trust's home state to determine whether a state with more favorable directed trust statutes may be selected as the law that governs the trust.⁷⁹

When parties seek to modify or amend the governing instrument of an existing trust to include directed trust provisions, counsel must undertake the more arduous process of determining whether the trust may be amended, modified (either by judicial or nonjudicial means), or decanted into a trust that includes the preferred directed trust language.⁸⁰ Of course, counsel

75 *Id.*

76 *Id.* Delaware's directed trust statute was tested in *Duermier v. Wilmington Trust Co.*, 2004 WL 5383927 (Del. Ch. 2004) (unpublished trial order). The chancery court found that a corporate fiduciary did not engage in willful misconduct by failing to oversee or provide information to an investment adviser, who had the power to direct the trustee on investment management decisions, and upheld the trustee's statutory defense under Del. Code Ann. tit. 12, § 3313 (West)(Current through ch. 22 of 150th Gen. Assembly 2019-2020).

77 Unif. Directed Trust Act, *Prefatory Note*, § 9 cmt.; *see also* Del. Code Ann. tit. 12, § 3313.

78 Nenko, *supra* n. 39.

79 *Id.*

80 Diamond & Flubacher, *supra* n. 30, at 28.

must fully explore significant federal and state tax and government benefits eligibility issues (which are beyond the scope of this article) before attempting to modify, amend, or transfer the situs of an SNT. There is no guarantee that counsel will find a sympathetic judge willing to make substantive changes to a governing instrument. For example, *In re Will of Flint*, an unsympathetic judge expressly denied the petition of an income beneficiary of a testamentary trust seeking to change the trust from a traditional trustee-managed structure to a directed trust, which was governed by Delaware law rather than the original situs of New York, concluding the requested modification departed too far from the testator's intent.⁸¹

Once the choice-of-law analysis has been performed or consideration has been given to modification, the drafting attorney's attention should move to the specific language delineating the powerholder's and trustee's powers, duties, and liabilities. The Uniform Directed Trust Act, for example, does not contain statutory default powers and simply provides a powerholder those powers granted under the terms of the trust.⁸² By affording a broad grant of power, the Uniform Directed Trust Act Drafting Committee attempted to validate a powerholder's power by deferring to the terms of the trust and, by extension, the settlor's intent.⁸³ The drafting committee contemplated that a trust may confer to a powerholder a broad breadth of powers, including powers to (a) direct investments; (b) modify, reform, terminate, or decant the trust; (c) change the trust's situs or governing law; (d) determine the capacity of a settlor, beneficiary, or trustee;

(e) set fiduciary compensation; (f) grant permission or direct a trustee in the exercise of a power reserved to the trustee; and (g) release the trustee or another director from liability.⁸⁴

The drafting attorney needs to structure how the powerholder will exercise the power of direction under the governing instrument. The settlor, in conjunction with counsel, must decide in what capacity the powerholder will serve, such as trust protector, distribution director, investment adviser, or trust advisory committee, because that will impact the specific powers and duties to be bestowed. When drafting powerholder language, it is important to be as detailed and comprehensive as possible, while limiting the trustee's and powerholder's powers only to those that the settlor intends each to have.⁸⁵ The powerholder's and trustee's respective powers under the governing instrument must be clearly delineated to avoid confusion, ineffective trust administration, and most important, overlap, which could give rise to additional trustee liability.⁸⁶ For example, an aggrieved SNT beneficiary could argue that although the trustee acted at the powerholder's direction, the trustee possessed a similar but independent power under the instrument that, if exercised prudently, could have mitigated the loss caused by the powerholder's exercise of the power of direction.⁸⁷

Even though a settlor has wide latitude in shaping a directed trust, the practitioner must still consider whether the governing document should deviate from any statutory minimum default provisions. Such considerations should include at a

81 118 A.3d 182 (Del. Ch. 2015).

82 Unif. Directed Trust Act § 6(a).

83 *Id.* at § 6(a) cmt.

84 *Id.*

85 Diamond & Flubacher, *supra* n. 30, at 28.

86 *Id.*

87 Flubacher, *supra* n. 31.

minimum: (a) whether the powerholder should be held to a fiduciary standard; (b) whether the trustee should have a continuing duty to monitor the powerholder's actions; and (c) if state law allows, whether the trustee's liability should be limited to either willful or intentional misconduct or gross negligence.⁸⁸

Regarding the allocation of liability, careful attention should be given to the inclusion of exculpatory clauses in the governing instrument and whether such clauses are consistent with and enforceable under state law. A governing document that completely relieves a directed trustee or powerholder of liability, rather than simply reduces the trustee's or powerholder's standard of care, may be unenforceable.⁸⁹ In fact, the Uniform Directed Trust Act applies the same rules as the Uniform Trust Code and Restatement (Third) of Trusts to the extent that if a directed trust fully exonerates the powerholder from liability, the powerholder nevertheless has the same liability as a trustee under a similar exculpatory clause.⁹⁰ Should there be concern about the potential mutual liabil-

ity of a directed trustee and powerholder based on the acts of the other, practitioners may consider the use of indemnification provisions similar to the following sample provision, rather than complete exculpation:

Art. 10.5 Indemnification of Trustee — Trust Company, N.A., and each of its agents, employees, heirs, successors, and assigns are hereby indemnified by Distribution Director, Inc., against all claims, liabilities, fines, or penalties and against all costs and expenses, including attorneys' fees and disbursements, imposed upon, asserted against, or reasonably incurred in connection with or arising out of any claim, demand, action, suit, or proceeding in which he, she, or it may be involved by reason of being or having been the Trustee or affiliated with the Trustee as set forth above, whether or not he, she, or it continued to serve as such at the time of incurring such claims, liabilities, fines, or penalties and costs and expenses or at the time of being subjected to the same. However, Trust Company, N.A., and each of its agents, employees, heirs, successors, and assigns shall not be indemnified with respect to matters as to which he, she, or it is finally determined to have been guilty of willful misconduct in the performance of any duty by a court of competent jurisdiction. This right of indemnification shall not be exclusive of, or prejudicial to, other rights to which Trust Company, N.A., and each of its agents, employees, heirs, successors, and assigns may be entitled as a matter of law or otherwise.⁹¹

Fiduciary compensation must also be addressed when recommending or draft-

88 *Neeno, supra* n. 39. In Arizona, for example, and under the Uniform Trust Code, unless the governing instrument provides otherwise, a powerholder is only "presumptively" a fiduciary. *Ariz. Rev. Stat. Ann.* § 14-10808(d) (West) (Current through legis. eff. May 27, 2019 of First Regular Sess. of Fifty-Fourth Legis. 2019).

89 *See e.g.* *Fla. Stat. Ann.* § 736.1011(1)(a) (West) (Current with chapters from 2019 First Regular Sess. of 26th Legis. in effect through June 7, 2019); *Unif. Trust Code* § 1008; *Restatement (Third) of Trusts* § 96. These state that a term of a trust relieving the trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for acts committed in bad faith or because of reckless indifference.

90 *Unif. Directed Trust Act* § 8 cmt. and § 14 cmt.

91 This sample language is a consolidation of various trust provisions from governing instruments spanning multiple jurisdictions. This language is offered for example only and should not be construed as language suggested for use.

ing a directed trust. Multiple parties can impact the overall fees assessed to a particular trust, which can be off-putting to fee-sensitive settlors, beneficiaries, and judges, regardless of whether a directed trust arrangement is appropriate under the circumstances. Unless the trust specifies otherwise, a fiduciary is only entitled to compensation that is reasonable.⁹² Even if the trust specifies the compensation to be provided, a court may allow more or less compensation if the duties are substantially different from those contemplated or if the compensation specified under the agreement is unreasonably high or low.⁹³ Although the Uniform Directed Trust Act applies the reasonable compensation standard of the Uniform Trust Code and Restatement (Third) of Trusts to powerholders,⁹⁴ the Uniform Directed Trust Act Drafting Committee understood that fees in a directed trust arrangement may be higher, yet reasonable nonetheless.⁹⁵ To best mitigate fee disputes, the powerholder's compensation should clearly align with the services provided and the directed trustee should reduce his, her, or its fee accordingly for those powers removed from the directed trustee's purview.

C. Best Interests of the Beneficiary Versus Settlor Autonomy

University of Iowa Professor Thomas Gallanis posited:

In navigating between the extremes of settlor control and beneficiary control, the law of trusts has at times taken a position more favorable to the settlor, and at other times a position more favorable to the beneficiaries. ... American trust law, after de-

cedes of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries.⁹⁶

It is true that certain states are shifting back to a focus on the settlor's intent in matters of trust interpretation and construction.⁹⁷ Even the Uniform Directed Trust Act was drafted with the goal of achieving maximum settlor autonomy consistent with fiduciary minimums.⁹⁸ But for those practitioners who operate in the special needs space and are accustomed to trust language that admonishes a trustee to administer the trust for the beneficiary's sole benefit and in a way that enriches the beneficiary's life and makes it more enjoyable, Professor Gallanis' forecast becomes clear that an SNT's foundational structure hyperfocuses on the beneficiary and the trust administration process's impact on the beneficiary's quality of life. Thus, when advising a client on the advantages and disadvantages of a directed SNT that presumably will be drafted because the settlor wishes to control the downstream actors who will be involved in the trust administration, the burden is on the practitioner to design a trust that, while mindful of the settlor's intent and a fiduciary's desire to limit liability, will further the beneficiary's interests above all. All fiduciaries under a trust instrument are bound by the unwaivable duties of loyalty, impartiality, and prudent administration.⁹⁹ Therefore, the practitioner should be cautious about adding third parties or creating a structure, directed or otherwise, that will impede a fiduciary's ability to achieve these foundational duties.

92 Unif. Trust Code § 708(a).

93 *Id.* at § 708(b)(1), (2).

94 Unif. Directed Trust Act § 16(3).

95 *Id.* at § 16 cmts.

96 Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 Iowa L. Rev. 215, 216 (2011).

97 *Supra* n. 32.

98 Unif. Directed Trust Act, *Prefatory Note*.

99 Unif. Trust Code §§ 801–803.

A directed SNT that provides the following is a relatively new planning tool:

- A trustee with investment management prowess and back-office capabilities (e.g., fiduciary tax preparation, accounting, statement and check issuance);
- A distribution director who, because of the trustee's lack of geographic proximity to the beneficiary, can provide a concierge-level of service for a beneficiary with catastrophic needs;
- A trust advisory committee attuned to the beneficiary's daily medical, social, and government benefits and therapeutic needs; and/or
- A trust protector related (or not related) to the beneficiary with the power to remove a powerholder to ensure an effective trust administration process.

As this niche practice area continues to advance in an integrated way while serving the best interests of the most vulnerable members of our population, a directed SNT should be considered.

IV. Conclusion

Nathaniel's mother remembers the settlement process as a time when profoundly confusing and complex long-term decisions had to be made in short order. With the assistance of counsel, she trudged through myriad state and federal laws and regulations concerning benefits eligibility and trust creation and administration issues. Her attorney drafted a comprehensive SNT that she believed focused on Nathaniel's best interests, preservation of his eligibility for much-needed government benefits, and protection and growth of the trust estate. Even as a layperson, when developing the SNT, Nathaniel's mother knew that her time was better served focusing on Nathaniel's daily needs rather than serving as a co-trustee

(thus setting aside the apparent conflict of interest that would exist if she opted to serve in such a capacity). Even so, she wanted to maintain some level of review and control of the trustee's actions. She understood that Nathaniel would likely never receive employment-related income and that the corpus of his trust, although significant, represented the sum total of all available funds throughout his life, which underscored the need to select a reputable trustee with proven investment management capabilities. Finally, she wanted a person or entity involved in the day-to-day coordination and management of Nathaniel's 24-hour skilled care, housing, social, recreational, therapeutic, and benefits eligibility needs.

Counsel advised that a single-fiduciary trust would not likely achieve the creative decision-making approach the mother was seeking and encouraged her to consider taking a team approach by implementing a multiparticipant directed SNT. Tennessee, a state protective of directed trustees,¹⁰⁰ was the situs of Nathaniel's trust. Consequently, a corporate fiduciary with national recognition for investment management and special needs planning was comfortable serving as sole trustee alongside a local distribution director appointed under the document, who was charged with directing the trustee on all matters pertaining to discretionary distributions. Nathaniel's mother was selected as trust protector to satisfy her goal of fiduciary oversight and was vested with the authority under the trust and state law to remove and appoint trustees, advisers, and

100 Tenn. Code Ann. § 35-15-808(e) (West)(Current with laws from 2019 First Reg. Sess. of 111th Tenn. Gen. Assembly, eff. through May 17, 2019).

other powerholders.¹⁰¹

This article should not be construed as an endorsement to implement multiparticipant or directed SNTs under all circumstances. On many occasions, the traditional single-fiduciary approach or some other arrangement may be more appropriate or a directed trust is unavailable. While exploring whether to bifurcate powers, duties, and liabilities in the context of special needs planning, the practitioner should (a) clearly appreciate the settlor's objectives; (b) consider whether a

trustee's power to delegate, rather than a bifurcated arrangement, may achieve the settlor's stated goals; (c) know what directed trustee and powerholder liability approach the state with jurisdiction over the trust employs; (d) draft the instrument to clearly define the powers, duties, and liabilities of all trustees and powerholders consistent with state law and the settlor's intent; and (e) be comfortable that the trust and all related parties have the best interests of the beneficiary at the forefront — the most important consideration in the context of special needs planning.

101 *Id.* at § 35-15-1201(a).