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ADVISORS, PROTECTORS, DIRECTORS, OH MY: AN OVERVIEW OF THE UNIFORM DIRECTED TRUST ACT

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In 2017, the Uniform Law Commission (the “ULC” or the “Commissioners”) approved the Uniform Directed Trust Act (the “UDTA” or the “Act”), intended to provide states with a framework to regulate the interrelationship between certain types of concurrently-serving fiduciaries of irrevocable trusts. Increasingly, certain duties and powers over the trust administration which were traditionally held by the trustee or given up entirely are, instead, granted under the terms of the governing trust instrument to additional officeholders who are neither trustees nor beneficiaries. They are referred to as “trust advisors,” “trust protectors,” “special trustees,” “administrative trustees,” and, in the nomenclature of the UDTA, “trust directors.” For the balance of this article, I follow the Commissioners’ terminology and refer to these auxiliary trust administrators as trust directors.

The ability to bifurcate the various duties required for a successful trust administration, or to provide additional authority to an independent third party that the settlor does not wish to grant to the trustee or to the beneficiary, has developed into a widely-accepted and powerful tool. It provides clients with structural flexibility in their trusts and

increased assurance that their intentions will continue to be safeguarded for the life of the trust. The authorities granted to trust directors vary widely, including amending the terms an irrevocable trust in a variety of ways; altering beneficiaries’ rights in the pursuit of income and transfer tax efficiency; increasing flexibility in distributions by restricting distributions when creditor concerns lurk or widening the gates under appropriate circumstances or both; overseeing the trustee’s relationship with the beneficiaries; and any other power available under applicable law to settlors, trustees, or beneficiaries, limited only by the complexity of the settlor’s wishes and the creativity of the drafting lawyer.

Section 808 of the Uniform Trust Code (the “UTC”) contemplates the role of the trust director, but does not provide much in the way of substantive guidance to directed trustees and trust directors in navigating their complementary responsibilities, providing only that trustees are shielded from liability when acting pursuant to the instruction of a trust director unless doing so is “manifestly contrary” to the trust terms or the trustee knows that following the instruction would result in a “serious breach” of the trust director’s fiduciary duty.¹ Moreover, the ULC itself found that no states have implemented that section of the UTC as proposed, and instead have imposed more objective standards.² This includes Ohio, which completely shields trustees from liability when acting pursuant to the instruction of a trust director, and vice versa.³ Presumably in light of the fact that states have rejected the UTC approach, and considering the proliferation in the practice generally with regard to these segmented fiduciary relationships, the Commissioners undertook to reconsider the standard set forth in the UTC and to flesh out the mutual obligations and liabilities of directed trustees and trust directors in proposing the UDTA. Except where the UDTA supplants the existing law, the same background principles of fiduciary law apply to the directed trustee and to the trust director.⁴

Significantly, trust directors are fiduciaries under the UDTA, and therefore are subject to the same standards of performance as trustees charged with the same powers.⁵ Likewise, the settlor may reduce

the trust director's duties to the beneficiaries in the same manner as he or she could do for a trustee.⁶ Thus, the UDTA forecloses the possibility of granting a power of direction to be held in a nonfiduciary capacity.

Generally, any power held by a non-trustee over the administration of the trust is a power of direction, held in a fiduciary capacity and subject to the UDTA.⁷ However, the UDTA carves out several common powers that would not constitute powers of direction, and therefore would not establish a fiduciary relationship:

- Powers of appointment.⁸
- Powers to appoint or remove trustees or trust directors.⁹ The Commissioners excluded the power to appoint or remove fiduciaries from the scope of the UDTA, although commonly granted to trust directors, determining that this type of power is more advantageously held without material restriction on its application.¹⁰ The Commissioners noted, however, that the trust instrument may impose additional fiduciary obligations on the trust director who holds this power, if the settlor wishes.¹¹
- Any power held by the settlor, to the extent the trust is revocable.¹²
- A beneficiary's power to affect his or her beneficial interest or that of another beneficiary by representation.¹³ This provision does not exclude powers held by a majority of beneficiaries, thereby preserving any recourse a minority beneficiary would otherwise have against the majority actors under fiduciary theories.¹⁴
- Any power held, under the terms of the trust, in a nonfiduciary capacity, but only if the power must be so held to achieve the settlor's federal tax objectives.¹⁵ Accordingly, a nominally nonfiduciary power to approve distributions (for purposes of creditor protection) or to approve or veto the exercise of a power of appointment (to protect the integrity of the settlor's long-term estate planning objectives) would not be excluded under the UDTA re-

gime, and the power holder would be a fiduciary.

- Finally, the settlor may opt into the UDTA regime for a power to grant powers of appointment or to designate the recipient of trust property, but those powers are not, by default, subject to the UDTA.¹⁶
- Similarly, the settlor may opt in for a health care professional, acting with regard to the trust in his or her professional capacity; for example to determine a person's capacity or sobriety.¹⁷

Other than these specified exclusions, under the UDTA, fiduciary principles apply to any duties granted to a non-trustee. As a general matter, the UDTA contemplates that settlors may increase, but not decrease, the fiduciary duties owed by the trust director and by the directed trustee to the beneficiaries.¹⁸

The UDTA would apply to trusts located in the enacting state which are created or which become irrevocable after the effective date, to trusts relocated to the enacting state after the effective date, and to actions taken after the effective date with regard to preexisting trusts located in the enacting state.¹⁹

In the UDTA regime, the trust director subject to its terms is any person who holds such a power, regardless of how that person is styled in the trust instrument or applicable law.²⁰ Such a power may be a power to control the trustee's discharge of one or more of the trustee's duties, or a power to act with regard to the trust that is independent of the trustee's activities. A power may be exercisable at the trust director's initiative, or it may be reactive, arising only upon the occurrence of an outside event, such as a beneficiary's request. In any event, the power granted to the trust director carries with it additional enabling powers which are "appropriate" to the exercise (or not) of the power.²¹ The commissioners contemplated a trust director's delegation of duties, and the delegatee would be subject to a reasonable care standard in discharging those duties.²² Note that in Ohio, following a proper delegation of trustee duties, the delegating trustee is not liable to the trust beneficiaries for the ac-

tions of the trustee's agent.²³ While this issue is not addressed in the UDTA, Ohio's protection of the delegating trustee is inconsistent with the UDTA's general approach to the liability of fiduciaries to beneficiaries, as will be explored in more detail below.

Under this expansive definition of a "power of direction," there are several aspects of the Ohio Trust Code (the "OTC") that would be implicated by adoption of the UDTA. For example, a person authorized to enforce the terms of a trust for the care of an animal²⁴ would be a trust director subject to the terms of the UDTA, as would a beneficiary surrogate.²⁵

The OTC provides that powers within the scope of the UDTA may be held in a fiduciary or nonfiduciary capacity, although it establishes a presumption of fiduciary duty.²⁶ As noted above, a trust under the UDTA regime may purport to grant nonfiduciary powers, but few of those powers would actually be held without fiduciary obligations.²⁷ Under the OTC, settlors may choose to grant powers in a nonfiduciary capacity in order to achieve a variety of ends, but the trust instrument must be clear on the nature of the duty. If the Ohio legislature should consider the UDTA, this provision will deserve particular care.

The UDTA also regulates the activity of the directed trustee by requiring reasonable action to comply with the trust director's exercise (or not) of his or her power; however the directed trustee must not comply if doing so would constitute willful misconduct.²⁸ In the case of a trust director releasing a trustee from liability (for example, the beneficiary surrogate under the OTC), the release would be ineffective if it involved the trustee's willful misconduct, if it was induced by improper conduct, or if the trust director did not know the material facts involved.²⁹ This would provide additional guideposts for the beneficiary surrogate who, under current Ohio law, is instructed only to "act in good faith to protect the interests of the current beneficiaries" for whom the surrogate receives information.³⁰ In the case of doubt, a directed trustee may, but is not required to, submit the question to the appropriate court.³¹

In this context, as a practical matter, under the

UDTA, the directed trustee must confirm that the direction is within the scope of the trust director's authority, that the direction given does not contradict the terms of the trust instrument, and that the directed trustee would not violate any of its other fiduciary obligations in acting pursuant to the direction (for example, the prohibitions against self-dealing and conflicts of interest).³² The directed trustee does not have an obligation to confirm that the direction itself is reasonable, or satisfy itself or any other party that the directed trustee would take the same action under the circumstances, unless the trust instrument imposes such an obligation on the directed trustee.³³

While the directed trustee enjoys some protection in acting upon the trust director's instruction, the trust instrument may not reduce the burden on the directed trustee below the "willful misconduct" standard described above.³⁴ In this way, the UDTA departs from existing Ohio law, which fully protects the trustee acting pursuant to such an instruction, and by imposing fiduciary obligations the trust director without completely shielding the directed trustee, provides additional protections to the trust beneficiaries.³⁵ Similarly, Ohio law does not require any further inquiry by the directed trustee into the propriety of the direction; by imposing this obligation, the UDTA increases the scope of the fiduciary obligations owed to the beneficiary.³⁶

Similarly, the trust director is not required under the UDTA to monitor the activity of the directed trustee or review it against the trust director's own preferences (again, unless the trust instrument requires the trust director to do so).³⁷

In order to ensure that the trust director and directed trustee are equipped to discharge their responsibilities, the UDTA requires mutual disclosure of relevant information "to the extent the information is reasonably related" to the powers and/or duties of the trust director and the directed trustee.³⁸ Neither the UTC nor the OTC regulates this issue. The Commissioners recognized this void and proffered Section 10 to protect against a trust director being frozen out of the trust relationship. As it stands in Ohio, drafters must take care that trust instruments, by their terms, require that the trustee provide information to the trust director, in

a manner and to the extent appropriate given the scope of the trust director's obligations. In this section of the UDTA, the Commissioners provide the trust director and the directed trustee with the mutual obligation to provide information proactively, and with the responsive obligations to provide information upon request.³⁹ To the extent that the trust director or the directed trustee acts in reliance upon any information so provided, the Commissioners follow the other liability provisions of the UDTA by protecting the acting fiduciary unless the action taken constitutes willful misconduct.⁴⁰

While seemingly common-sense, implementing the requirements of Section 10 can become thorny. The drafting committee commented that "matters that might require disclosure under this section include asset valuations, modifications to the terms of the trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors."⁴¹ For the examples given, the reasonableness standard set forth in this section seems workable and fair. However, it is easy to see how it could prove difficult to implement. Consider a trust director authorized to find certain facts satisfied in order to trigger spendthrift protection for a beneficiary and convert the trust for his or her benefit to a wholly discretionary trust. This is the sole power of this trust director relating to this trust. If the trustee learns that the beneficiary's spouse intends to file for divorce, disclosure to the trust director would surely be required pursuant to this provision, in order to enable the trust director to serve his or her intended purpose of increasing the protection the trust provides from the beneficiary's creditors. But what if the directed trustee, instead, learns that the beneficiary has been cited for drunk driving? This is slightly closer to the line, but many practitioners would still find disclosure to be required under this standard. But consider further: what if the directed trustee learns only that the beneficiary has been issued several speeding tickets? Or if, absent any information about the beneficiary's driving record, the directed trustee simply receives the bill for the beneficiary's automobile insurance renewal, and sees a marked increase from the prior year for the same vehicle?

At a certain point, of course, it is no longer reasonable to require disclosure to the trust director, but finding that point could be challenging and risks hindsight bias.

In any event, if implemented in Ohio, this UDTA provision requiring mutual information disclosure would introduce a departure from existing law. In adopting portions of the UTC as it relates to co-trustees, the Ohio legislature made an intentional policy choice favoring less aggressive regulation of the co-fiduciary relationship, stating that the contours of that relationship are more properly laid out in the trust instrument, where the settlor can craft the corresponding responsibilities as he or she envisions.⁴² Indeed, neither the UTC nor the OTC contemplates information sharing among co-fiduciaries, presumably because as a matter of first principles, any co-trustee ordinarily is entitled to receive information regarding the trust property from the appropriate source. Without that starting point, however, it would be rational and productive to implement a basic default provision for information sharing, in order to avoid a power imbalance at the outset. Whether the UDTA has gotten the balance right should be considered by the legislature, and in any event, by each settlor and drafting lawyer as they establish the boundaries of the relationship between the trust director and the directed trustee.

The UDTA allows a settlor to opt into the UDTA regime for co-trusteeships, relieving a co-trustee with limited authority from the obligations, imposed by the UTC and the OTC, to monitor the co-trustee and the like.⁴³ Other provisions of the UDTA would mirror the UTC provisions regarding statutes of limitations, affirmative defenses, personal jurisdiction, bond, compensation, acceptance, resignation, removal, and vacancies.⁴⁴ The Commissioners took care to note that unless the trust instrument provides to the contrary, as a fiduciary, the trust director could look to the trust for his or her attorney's fees in defending his or her actions under the trust.⁴⁵

In the end, it would be to the benefit of Ohio settlors, trustees, trust directors, and beneficiaries to provide a basic structure and a set of mutual obligations to regulate the increasingly common scenario

of bifurcated fiduciary relationships. The UDTA has proposed a sweeping response to that need, and the proposed law has great practical application in the context of the UTC. However, Ohio, with its several departures from the UTC and its independent OTC provisions regarding nonfiduciary powerholders, should take care in reviewing each provision of the UDTA for enactment.

ENDNOTES:

¹UTC § 808.

²Comment to UDTA § 9.

³O.R.C. §§ 5808.08, 5815.25.

⁴UDTA § 4 and Comment.

⁵UDTA § 8(a).

⁶*Id.*

⁷UDTA § 2(5).

⁸UDTA § 5(b)(1).

⁹UDTA § 5(b)(2).

¹⁰UDTA § 5, Comment (2).

¹¹*Id.*

¹²UDTA § 5(b)(3).

¹³UDTA § 5(b)(4).

¹⁴UDTA § 5, Comment (4).

¹⁵UDTA § 5(b)(5).

¹⁶UDTA § 5(c).

¹⁷UDTA § 8(b).

¹⁸UDTA, Prefatory Note.

¹⁹UDTA § 3. Accordingly, it is possible that a person could hold a power in a nonfiduciary capacity one day and in a fiduciary capacity the next.

²⁰UDTA § 2(9).

²¹UDTA § 6(b) and Comment. Pursuant to the general law of trusts, the powers granted to the trust director also must be lawful and possible, and may not contravene public policy. UDTA § 6(b) Comment; *see also* O.R.C. § 5804.04.

²²*Id.*

²³O.R.C. § 5808.07(C).

²⁴O.R.C. § 5804.08.

²⁵O.R.C. § 5801.04(C).

²⁶O.R.C. §§ 5808.08(D), 5816.11(B).

²⁷UDTA § 5.

²⁸UDTA § 9.

²⁹*Id.*

³⁰O.R.C. § 5801.04(C).

³¹UDTA § 9(d).

³²Comment to UDTA § 9.

³³*Id.*; UDTA § 11.

³⁴Comment to UDTA § 9.

³⁵O.R.C. § 5808.08.

³⁶*Id.*

³⁷UDTA § 11.

³⁸UDTA § 10.

³⁹*Id.*, Comment.

⁴⁰UDTA §§ 10(c), (d).

⁴¹Comment to UDTA § 10.

⁴²O.R.C. § 5807.03 and Official Comment.

⁴³UDTA § 12; O.R.C. § 5807.03.

⁴⁴UDTA §§ 13-16. The Commissioners take care to note that while total fiduciary compensation of the directed trustee and the trust director may exceed that available to a single trustee, they intend for trust directors to be entitled to reasonable compensation based on the nature and extent of the duties actually conferred, and states that provide a statutory formula for trustee compensation should not incorporate those provisions for trust directors. Comment to UDTA § 16. The OTC provides for reasonable compensation, without a statutory formula, so I have not addressed this issue here. O.R.C. § 5807.08.

⁴⁵UDTA § 14, Comment. This would not be the case for a nonfiduciary powerholder, unless the trust instrument so provides.

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