

The More Trustees The Merrier? All About Directed Trusts

**NEW YORK STATE BAR ASSOCIATION
Trusts and Estates Law Section**

**Spring Meeting
May 3, 2018**

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Introduction & Brief History

- Directed trusts recognized for 100 years in Delaware
- 1986 – new statute
- 2000s – consent petition procedure streamlined leading to influx
- Fee reduction
- Change in threshold for liability
- Symbiotic interaction of directed trust v. bifurcated co-trustees

Why Use a Directed Trust?

- Maintain control over trust funded with interest in family company
 - E.g. Trust holding LLCs holding shopping centers
- Alleviate need to diversify trust funded with unique assets
 - E.g. Trust holding vacation home
- Maintain control over trust distributions while benefitting from professional trust management
- Maintain control over trust while benefitting from nexus to another state
 - E.g. DING trust

Directed Trusts in New York

- No Statute
- Case Law Interpretation
 - *In Re Rubin*
 - *In Re Rivas*

Directed Trust Legislation

- UTC Section 808
- Section 185 Restatement (Second) of Trusts
- Modified UTC
 - “No Duty” Statutes
 - “Willful Misconduct”

Uniform Directed Trust Act

- Willful Misconduct Standard
- Powers Not Covered by UDTA
 - *Power of Appointment*
 - *Power to remove and replace trustee*
 - *Power of beneficiary that affects beneficial interest of beneficiary or another beneficiary*
 - *Power that is solely for tax objectives*

Uniform Directed Trust Act

- Powers of Trust Director
 - “Further appropriate powers”
- Duties and Liabilities of Trust Director
- Duties and Liabilities of Directed Trustee

Uniform Directed Trust Act

- Communication Between Trust Director and Directed Trustee
 - Duty to Communicate
 - No Duty to Monitor

Proposed NYUDTA

- Definition of “Willful Misconduct”
- Powers of Trust Director enumerated
 - “Further appropriate powers”
- Directed Co-Trustee

Reforming New York Trusts

- Testamentary Trusts
 - Changing NY Trustee to Delaware Trustee
 - Changing situs to Delaware
- Decanting as Reformation Tool
- Inter Vivos Trusts

Trust Modifications in DE

- Non-judicial settlement agreement
- Non-judicial modification agreement
- Decanting
- Merger

Drafting Tips

- Establish clear intent of settlor
- Identify trust powers to be directed
 - See form 2
- Act in fiduciary capacity (unless avoiding tax nexus)
- Avoid conflicts of interest with beneficiaries
- Exculpate
- Compensate

Coordination Between Fiduciaries

- Tax matters and elections
- Cash needs of trust
 - E.g. LLC holdings
- Distribution decisions that are open ended
 - E.g. power to revoke mandatory income distribution
 - E.g. pay in cash or in kind
- Valuation of nonmarketable assets
- Power of substitution
 - Form 6