

Financial and Estate Planning Council of Metro Detroit

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Achieving the Promise and Avoiding the Pitfalls of Multi-Participant Trusts

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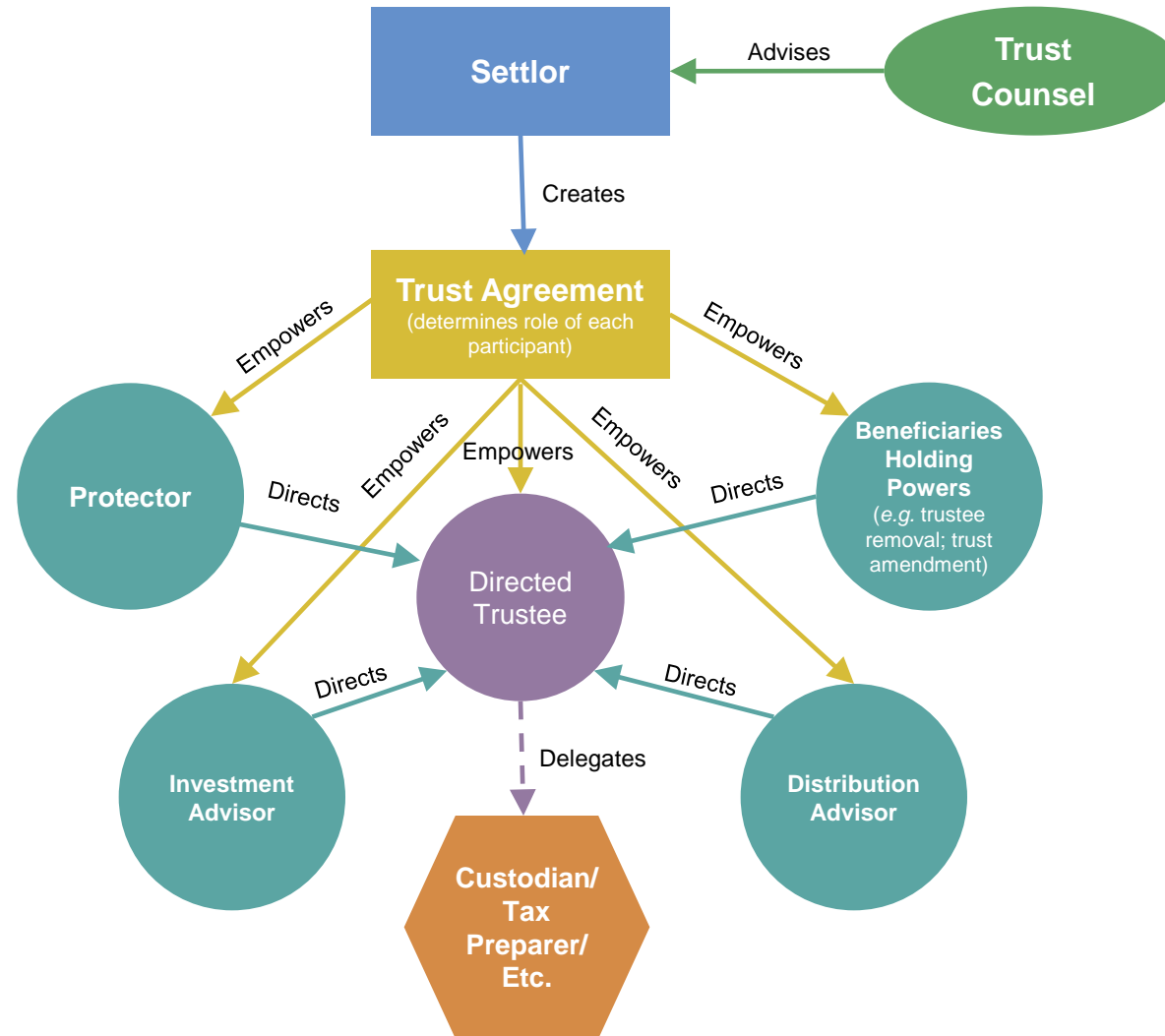
A Revolutionary Trust Structure

- Directed trusts respond to wide-spread concerns with the limitations of a traditional, single all-powerful trustee
- In essential part, a directed or multi-participant trust carves up the traditional trustee role to allocate key powers among a team of advisors, protectors and administrators
- The purpose is to position the right people with the right skills and sensitivities to fulfill the trustee's key responsibilities
- It is hard to realize how revolutionary multi-participant trusts are unless you reflect that trustees could not even delegate their powers before Prudent Advisor Acts began to be adopted, barely 20 years ago
- The desire for a more skilled, responsive, flexible and sensitive trusteeship that led to the Prudent Investor Acts has also driven the development and proliferation of directed trusts
- It is no wonder, then, that statute writers have been slow to recognize and respond to all the implications of this radical and powerful structure
- By the same token, trust counsel drafting directed trusts must rise to the challenge of
 - Devising rules never before needed to manage a trust with multiple power-holding participants and
 - Prescribing the duties, standards and liability applicable to each participant

Forces behind the robust trend toward multi-participant trusts— Family needs and changes in trust laws

- Shortages of Philosopher Kings and Queens
- Control, by a family-chosen advisor or family committee, of the family business, portfolio companies, family office or private trust company, rather than by a single individual or institutional trustee
- Desire of families to maximize their lawful control over significant trust decisions or who is making them
- Need for a dynasty trust structure that will be adaptable over generations as beneficiaries' needs and circumstances change
- Successful experiences with the benefits of co-trustees, and more recently with delegation of major trust roles—and recognition of the limitations of both
- Modern trust statutes granting trustees more authority and flexibility, especially in investment management and trust reformation
- Sophisticated investment and financial management that can require multiple experts
- Trust risk management that may also encourage allocating trustee roles to participants with specialized skills
- Increased opportunities to “shop” for the best trust laws

A fully-realized multi-participant trust structure



- Few state laws or trust instruments recognize that this is an organization pursuing a common cause and requiring a set of governing rules much like a corporation or LLC needs bylaws

The goal of the directed trust, like the traditional trust, is to accomplish the purposes of the trust and further the interests of the beneficiaries

To Accomplish these Goals

A Traditional Trustee Model recruits a single trustee exercising all fiduciary and administrative trust powers



A Multi-Participant Trust Model recruits multiple individuals who

- o may or may not be fiduciaries,
- o have specific, trust-instrument-assigned roles, responsibilities, authority and duties (sometimes overlapping), and
- o must communicate, cooperate and coordinate in order to accomplish the purposes of the trust and further the interests of the beneficiaries



Trust Roles in Directed Trusts and Other Multi-Participant Trusts

- **Sole, Full Trustee:** An individual or entity given authority to manage all aspects of trust administration including making discretionary distributions and full investment management responsibility
- **Co-Trustee:** A co-trustee may be given all of the responsibilities of a full trustee or may have a narrower set of responsibilities. (Specific ability to limit co-trustee's responsibilities varies by state)
 - Under common law, joint and several liability
 - Restatement (Third) allows for majority vote for decisions, but historically, unanimity has been required
 - Dissenting co-trustees are typically protected
- **Directed Trustee:** A trustee required under the terms of the trust document to follow the directions of a third party
 - The Uniform Trust Code (UTC) dictates that the directed trustee has overall responsibility of seeing that terms of trust are honored, but has minimal oversight responsibility
 - The UTC also states that directed trustees are generally not liable for following direction of trust advisor or protector, but may be liable if exercise is contrary to terms of the trust or if trustee knows the exercise would be a serious breach

Trust Roles in Directed Trusts and Other Multi-Participant Trusts (cont.)

- **Investment Advisor.** As the spectrum of possible trust investments has expanded over the last 40 years, so has the need for increasingly sophisticated investment advisors. An investment advisor typically has authority to make investment decisions with respect to all investment assets or sometimes with regard to special assets such as
 - a family business
 - a concentrated position, and
 - alternative assets

The trustee follows the directions of the investment advisor and performs the administrative functions such as custody of assets, executing investment purchases and sales and sending statements
- **Distribution Advisor.** The distribution advisor is solely responsible for exercising discretion over distributions to beneficiaries and directs the trustee to make them
 - Separate from both administrative and investment advisory roles
 - Often focuses on the “soft” needs of beneficiaries (e.g. career ambitions, financial independence, social and personal maturity)
 - Use of a distribution advisor can allow for a broad, case by case, interpretation of the trust document and such party may be best positioned to understand and act in a manner which reflects the intention of the grantor in the exercise of his or her discretion
- **Trust Protector.** A trust protector is any disinterested individual or entity with the power to change, amend, modify, or review any component of the trust itself or any party involved in trust management (e.g., to modify or amend the trust instrument because of changes in law, to remove a trustee, to consent to trustee actions). Their decision is typically binding on all parties

The problems that have arisen with multi-participant trusts include:

- Lack of clarity regarding roles, responsibilities and authority of participants
- Uncertainty as to their duties, standards and liability
- Inadequate communication and coordination among them
- Disharmony among participants
- Compensation and reimbursement uncertainty
- Unfilled vacancies of participants
- Exposure of the trust to multi-jurisdictional taxation by multiple participant domiciles
- Unanticipated duties to monitor, report or correct misdeeds of other trust participants or to warn beneficiaries
- Joint decision-making and implementation complexity without clear assignments of responsibility and authority



What's required from each trust participant?

- To accomplish the purposes of the trust and further the interests of the beneficiaries, each trust participant must be able to
 - Understand his job
 - Perform it competently
 - Without being exposed to unreasonable risk
- And required to:
 - Document what he has done and
 - Inform other trust participants whose own performance may be affected by his decision and actions
 - So the other participants can
 - ✓ Implement the decision made by the first trust participant and
 - ✓ Reflect his actions and decisions in their own decision-making and actions



The burden is on trust counsel to assure the participants know and can fulfill what's required for their successful performance and the success of the trust

First step Determining the effect the laws governing the substance and administration of the trust will have on

- The performance of each participant of his/her assigned role
- His/her willingness to accept the role
- Whether the trust should be sited in a more supportive jurisdiction

Second step Carefully drafting provisions to

- Fill any state law gaps in the standards of conduct, liability for acts and omissions, and duty and authority to coordinate with other participants
- Overturn, if possible, any standards, duties or liabilities imposed by state law that are inconsistent with the settlor's objectives
- Supply every element he/she determines is requisite to a well-functioning multi-participant trust

Third step. Assuring the validity of trust provisions intended to supplement or override state law

- Confirm that under applicable state law any provision clearly overrides any conflicting laws of that state
- If not, again consider another situs or other steps to invoke a more supportive state's laws

Twelve Requirements for a Well-Functioning, Multi-Participant Trust

Part I—Clarity as to legal and risk parameters

Determine and make clear to settlor and each participant

1. Where the trust will be administered/sited and the applicable administrative law
2. Whether the non-trustee participant is a fiduciary and the applicable duties and standards for his/her performance
3. The potential liability of the directed trustee or each non-trustee participant for known or unknown decisions, actions or omissions of any other participant
4. Whether a trustee or other participant must follow a direction that the recipient knows or should have known may violate
 - ✓ The instrument,
 - ✓ Applicable law
 - ✓ Fiduciary responsibilities of the direction provider or the recipient
5. More generally, whether a directed trustee is relieved of any responsibility for functions assigned to a non-trustee participant, other than to follow that participant's directions

Twelve Requirements for a Well-Functioning, Multi-Participant Trust

Part II—An effective trust management structure

Provide in the trust instrument for

1. Mandated communication among trust participants (*e.g.*, of what they have done; what they have learned)
2. Coordination among the trust participants (*e.g.*, speaking with a consistent voice if possible, investing and liquidating assets, taking a consistent view as to the meaning of trust provisions)
3. Assuring vacancies are filled and the performance of absent participants' functions
4. Time limits for a trust participant to vote on, consent to or veto an action and certainty as to when a decision has actually been made
5. Clear decision-making authority when there is more than one participant with the power to act (*e.g.*, clarity on whether actions must be made unanimously, by majority, by any one participant as well as requirements and impact of a dissenting vote)
6. Expeditious out-of-court resolution of major and minor disagreements among participants
7. Certainty as to whether non-trustee participants will be compensated and reimbursed for expenses

Impact of state law on establishing a well-functioning multi-participant trust

- The preferred situs' laws may facilitate, impede or preclude the trust from fulfilling one or more of the 12 requirements
- Other situs' laws may better facilitate meeting all the requirements, or at a minimum allow the trust instrument to override any common law or statutory impediments
- State law may provide—
 - Default rules for the fiduciary status, duties and liabilities of participants
 - If default rules exist, do they facilitate, impede or preclude achieving the grantor's objectives?
 - If they impede or preclude an objectives, can they be overridden by the instrument?
 - Default rules that are legal mandates impacting achieving a well-functioning trust
 - If they are legal mandates, do they facilitate, impede or preclude reaching the grantor's objectives?
 - If they impede or preclude reaching an objective, a new situs may be needed
 - Conversely, robust authority to settlors to override state law defaults affecting the legal or risk parameters for trust participants or coordinated trust management
 - If default rules in such a state would impede or preclude the grantor's objectives, will be able to draft around the rules
 - For the direct or indirect liability of directed trustees for decisions, acts or omissions of other participants, which may include a duty or inquiry
 - If liability of directed trustees is uncertain or unacceptable, consider more favorable state situs with stronger directed trustee statute

Impact of state law on establishing a well-functioning multi-participant trust (continued)

- State laws may provide (continued):
 - A duty to communicate and other provisions governing the relationship among participants
 - A duty of the trustee to notify other participants that an action by them is required
 - Rules governing how actions are deemed to have been taken when approval involves more than one person (e.g., a distribution committee, co-advisors or co-protectors)
 - For the filling of vacancies in participant positions and/or empowering other parties to act during the vacancy
 - Compensation of non-trustee participants
 - How a participant is deemed to accept the appointment
 - A mechanism for non-judicial dispute resolution among participants
- In each case above, if no law, or if law does not meet settlor's objectives, must provide for in instrument or seek a more favorable state situs

Let's sample how the law actually addresses some of these issues ...

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
1) Fiduciary duty of non-trustee participant (trust advisor or protector)		
A person empowered to control a trustee is a fiduciary if the power is for the benefit of the beneficiaries	<p>UTC:</p> <ul style="list-style-type: none"> •§808 provides that anyone with a power to direct the trustee for someone else's benefit is a fiduciary and has fiduciary duties <p>MI: (Departs from UTC) Trust protectors (which include trust advisors) are fiduciaries, unless their power is a power of administration within the meaning of §675(4). The protector cannot be relieved of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or interests of the beneficiaries. This provision <u>cannot</u> be modified by the settlor. This matches exculpation limits of trustees</p>	<p>DE: Directing party is presumed a fiduciary unless the governing instrument provides otherwise</p> <p>SD: Trust advisors are fiduciaries if they are given authority to direct, consent to, or disapprove a fiduciary's decisions</p> <p>NH and WY: A trust advisor or trust protector are fiduciaries but only to the extent of the powers granted to them</p>
2) Trust Advisor Authority		
<ul style="list-style-type: none"> • Sparse case law • Generally accorded same duty as full trustee with regard to the functions the advisor directs • Fiduciary duties such as duty to diversify likely to apply 	<p>UTC:</p> <ul style="list-style-type: none"> •§808(d) provides that any person, other than a beneficiary with the power to direct a trustee is a fiduciary and is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries <p>MI: Follows the UTC</p>	<p>DE: Delaware recognizes a broad class of advisors who are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decisions</p> <p>SD: Statute specifically outlines the powers and discretions for an investment trust advisor (e.g., to direct retention, purchase, sale or encumbrance of trust property) and distribution trust advisors (e.g., to direct the trustee with regard to all discretionary distribution decisions)</p> <p>NH and WY: An essentially unlimited range of powers may be given to a trust advisor under the trust instrument</p>

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan (cont.)

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
3) Trust Protector Authority		
<ul style="list-style-type: none"> • The duties of protectors are not generally delineated or limited by case law • If the protector holds powers that can be exercised for the benefit of others, fiduciary duties may apply and trustee may be under duty to inquire whether acting pursuant to a protector's direction is contrary to settlor's intent or a breach of trust • If a protector is a beneficiary, there may be no fiduciary duty • <i>McLean</i>, a 2009 MO appellate court case, held that the duty of a trust protector is to the trust not to the beneficiaries. Also, a trust protector who could remove trustees in a "fiduciary capacity" made the protector susceptible to liability for actions taken in bad faith 	<p>UTC:</p> <ul style="list-style-type: none"> • UTC does not distinguish between protectors and other non-trustee power holders except in the Comments to §808 • Thus, as with trust advisors, §808 provides that where a protector is not a beneficiary, the protector is presumed to be a fiduciary but trust terms can dictate • Protector is required to act in good faith with regard to the purposes of the trust and interests of the beneficiaries • Trustee is liable for following direction of protector if trustee knows exercise constitutes a serious breach of trust or is manifestly contrary to terms of trust <p>MI:</p> <ul style="list-style-type: none"> • Refers to trust advisors as protectors • Protector shall act in good faith and in accordance with the terms of the trust • Trustee may not act in accordance with protector where exercise of power is contrary to trust terms or would breach a fiduciary duty of the protector to the beneficiaries. Otherwise, trustee not liable for losses for complying with decisions of trust protector 	<p>DE:</p> <ul style="list-style-type: none"> • No specific duties delineated • Protector is presumed to be a fiduciary but trust can dictate • Protector cannot be a beneficiary <p>SD:</p> <ul style="list-style-type: none"> • Defines a protector as "any disinterested third party whose appointment is provided for in the instrument" • Powers must be exercised in best interests of trust, in the sole discretion of protector, and are binding on all persons • Protectors are not fiduciaries unless the governing instrument imposes a fiduciary obligation <p>AK:</p> <ul style="list-style-type: none"> • A protector is not a fiduciary if the power is deemed to be "personal power" not a fiduciary power provided the exercise is not manifestly contrary to the power and the exercise is done in good faith

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan (cont.)

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
4) Liability of directed trustee with for following direction of the non-trustee participant/trust advisor		
<ul style="list-style-type: none"> Liability is generally limited for following directions of a trust advisor. <p>Exception:</p> <ul style="list-style-type: none"> Directed trustee had “reason to suspect” violation of the terms of the trust or fiduciary duty by power holder If violation is suspected, trustee has potential liability for following direction Leaves directed trustee vulnerable 	<p>UTC:</p> <ul style="list-style-type: none"> The directed trustee is generally not liable for following the direction of the trust advisor or protector Potential liability follows to the extent of the directed trustee’s residual responsibility The duty of inquiry can leave the trustee vulnerable <p>MI: Follows the UTC</p>	<p>DE: No liability for following direction of the directing party unless willful misconduct on the part of non-trustee participant/trust advisor in complying with the direction. (Note <i>Duemler</i> case: Court upheld the willful misconduct statutory defense under the Delaware statute. Trustee not liable for not providing information to investment advisor)</p> <p>SD: No liability individually or as a trustee for (1) a loss resulting from compliance with the direction of a trust advisor, (2) loss that results from a failure to take any action proposed by a directed trustee that requires a prior authorization of the trust advisor if that directed trustee timely sought but failed to obtain such authorization, or (3) any loss that results from any action or inaction except for gross negligence or willful misconduct when a directed trustee is required to assume the role of trust advisor</p> <p>NH: No liability for trustee resulting from any loss for actions or inactions for following the direction of a trust advisor or trust protector</p>

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan (cont.)

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
5) Residual fiduciary duty of directed trustee to monitor or warn the trust advisor, beneficiary or third party		
<ul style="list-style-type: none"> • General fiduciary duties linger such as to keep informed, to investigate and to warn beneficiaries of a potential breach of trust (e.g. <i>Rollins, Enron and Worldcom</i> where the directed trustee could not rid itself of the duty to warn) • <i>Rollins</i>: Directed trustee may not be able to rid itself of the duty to keep informed as to the condition of the trust and to warn the beneficiaries 	<p>UTC:</p> <ul style="list-style-type: none"> • §808 leaves the directed trustee with a residual oversight duty • Trustee must act in accordance with a third party's direction "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 fiduciary duty..." • §104 provides that a person is charged with knowledge of facts if they would have discovered the issue upon reasonable inquiry • Directed trustee retains overall responsibility for seeing that the terms of the trust are honored <p>MI: Has adopted the UTC approach.</p>	<p>DE:</p> <ul style="list-style-type: none"> • No duty to monitor, provide advice to or consult with trust advisor • No duty to communicate with or warn a beneficiary or third party of how the trustee would have exercised his own discretion <p>NH: No duty to consider whether "the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise is a serious breach of fiduciary duty..."</p> <p>IL: No duty to monitor, review, inquire, investigate, recommend, evaluate, or warn with respect to a directing party's exercise or failure to exercise any power</p>

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan (cont.)

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
6) Requirement for communication between trust participants		
Not addressed. Note, however, co-trustees have been found to have a duty to consult. See <i>Kline v Reed</i> , 479 N.E.2d 714 (Mass. App. Ct. 1985)	UTC: Not addressed MI: Not addressed	NH: Unique statutory provision confirming a trustee's duty to keep co-trustees and any other fiduciaries informed about trust administration. Includes information that would be reasonably necessary for the co-trustee or other fiduciary to perform his or her duties DE: Similar to NH but eliminates inference that person who receives information has any duty to monitor the provider. Burden on each participant to request desired information SD: Similar to NH but obligation on advisor to provide information to directed trustee (but without a reciprocal duty)
7) Compensation and reimbursement of directed trustee, trust advisors and protectors		
Not addressed for non-trustee participants	UTC: No specific provision but should be similar to co-trustees standard of reasonable compensation. Comment to UTC §708 states that when there are multiple trustees, the total amount of compensation and how it should be divided depends on the totality of the circumstances. MI: Follows the UTC	NH: Reasonable compensation "under the circumstances" or the compensation provided in the instrument for directed trustees, trust advisors and trust protectors NV, SD, DE: Do not appear to specifically address compensation for trust advisors and protectors

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan (cont.)

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
8) Filling vacancies for trust advisors and protectors		
Common law does not address vacancies for trust advisors and protectors	UTC: The UTC does not address vacancies in the office of trust advisors and protectors MI: Not addressed	NH: <ul style="list-style-type: none"> • Unless the instrument provides otherwise, upon obtaining knowledge of a vacancy in the office of trust advisor, the trustee shall be vested with the fiduciary power or duty that otherwise would be vested in the trust advisor until a new trust advisor is appointed. No liability for trustee for failing to exercise or assume power held by trust advisor for 60 days after knowledge of vacancy • Similarly for trust protectors, upon obtaining knowledge of a vacancy in the role of trust protector, upon obtaining knowledge of a vacancy, the trustee shall petition the court to fill the vacancy if the trustee determines that the terms of the trust require the vacancy be filled SD: <ul style="list-style-type: none"> • No liability when a trustee is required to assume the role of a trust advisor
9) Dealing with disagreements among trust advisors and protectors		
Common law does not address disagreements among trust advisors and protectors	UTC: Not addressed MI: Not addressed	Not addressed

Directed Trusts – Comparing Common Law, Leading Trust Jurisdictions, UTC and Michigan (cont.)

Common law	UTC and Michigan	Leading Trust Jurisdiction Examples
10) Decision-making authority and impact of dissenting vote		
Common law does not address decision-making authority (unanimous v majority) or impact of dissenting vote among trust advisors and protectors	UTC: Not addressed MI: Not addressed	Not addressed
11) Incapacity of trust advisors and protectors		
Common law does not address incapacity of trust advisors and protectors	UTC: The UTC does not address how incapacity of a trust advisor or protector should be handled MI: Not addressed	Not addressed

Where the law is today—conclusions

- Common Law:
 - o Law on co-trustees is well-developed
 - o Common law has only recently begun to address directed trustees and thus far without providing much comfort regarding them
 - o Almost no common law on other trust participants (other than *McLean* case, a handful of other cases dealing with protectors and Restatements), but their status as fiduciaries unless modified by statute or trust instrument seems clear
- The UTC and specialized state statutes provide substantial clarity as to the legal and risk parameters for directed trustees and other trust participants:
 - o Fairly extensive co-trustee provisions
 - o Explicitly permitting directed trusts with limited duties
 - o Permitting power holders (e.g., trust advisors; protectors)
 - o Identification of power holders as fiduciaries
 - o Clarifying that a trustee must respect direction
 - o Limiting the directed trustee's liability
 - o Some specific statutes delineate fiduciary role and possible powers of trust advisors and protectors
- But states adopting the standard UTC and some other states addressing these issues have made some default duties into mandates not reversible by the trust instrument

Where the law is today—conclusions (cont.)

- Largely neglected by state statutes are rules for the effective management of multi-participant trusts:
 - o Explicit duty on trust participants to coordinate or at least (other than NH, DE, SD, IL) to communicate
 - o Mechanism for filling vacancies in the office of non-trustee participants (other than NH)
 - o Clarification of how a participant is deemed to have accepted appointment (especially one deemed a fiduciary)
 - o Compensation and reimbursement of expenses for non-trustee participants (other than NH)
 - o Determination of incapacity of non-trustee participants
 - o Effect of a trust participant's failure to act when required to
 - o Clarification of joint decision-making and effect of dissenting participant
 - o Mechanism for dealing with disagreements between trust participants

Successfully Building a Multi-Participant Trust

Necessity for supplying the elements when the law is inadequate

- Not enough to assign an array of roles to trust participants, however detailed, and then merely to say, “Now go forth and do good”
- Some issues for how to “do good” have been addressed by state law but none has addressed them all
- Even where addressed, most settlors will not approve of all of the law’s solutions
- Therefore, only the trust instrument can supply the missing elements and reverse unsatisfactory state rules
- Trust counsel must start by identifying and selecting a state with a
 - **A strong directed trustee statute**—to provides the underpinning necessary for the whole concept of a multi-participant trust
 - **Authorization to override state law**—to supply the essential elements missing from state law or those preferred by the settlor
 - **Any other features deemed important to achieve the purposes of the trust or to reinforce the draftsman’s allocations of duties and liabilities**
- The draftsperson must then supply every element that he/she determines is requisite to a well-functioning, multi-participant trust

Successfully Building a Multi-Participant Trust:

Supplying the elements when the law is inadequate (cont.)

In order to ensure successful trust operation and management, the foundational trust document of a multi-participant trust must address:

- Every power and duty granted expressly or by implication of law has to be assigned to a trustee or another participant
- Every trust participant must know his/her functions under the trust and have accepted responsibility for those functions
- There must be communication among participants, recognition of their interdependence, and means for addressing the issues interdependence raises
- Disputes among trust participants must be resolved in a manner which is definitive and does not damage the original goals of the trust
- Actions of participants must be coordinated
- There must be adequate incentives (compensation and reimbursement or a personal relationship with the settlor or beneficiaries) to attract trust participants with the necessary capability and commitment
- Participants must be comfortable that they will not be exposed to unreasonable or unknown liabilities if they accept their roles
- Filling vacancies and assuring performance of a vacant participant's functions
- Clear decision-making authority, time limits for a trust participant to vote on, consent to, or veto an action
- Means for determining where a trust is being administered and the law of administration, especially when trust participants are acting in multiple states

Where do we go from here?

- Trend toward multi-participant trusts is likely to continue
- Watch for more developments on the legislative front because this is a rapidly developing area of trust law
- Practitioners and advisors need to have a broad understanding of multiple jurisdictions' law and the many issues involving the array of trust participants
- Careful drafting must fill in where even the best statutes are silent, or ambiguous, or where the settlor wants different terms
- Think of the trust participants as part of an organizational structure needing rules for effective management
- Consider again whether you can rely on participants to “go forth and do good” without detailed guidance in the trust instrument

APPENDIX

Selected Drafting Considerations for Directed and Other Multi-Participant Trusts

***Also see, John P.C. Duncan and Anita M. Sarafa
Achieve the Promise—and Limit the Risk—of Multi-Participant Trusts
36 ACTEC Law Journal, No. 4, Spring 2011 at p. 838 et seq.***

Selected drafting points for creating a manageable multi-participant trust

- Defining who is and who is not a fiduciary
 - o Current law considers various trust participants to be fiduciaries
 - o Specific waiver of this standing as a fiduciary needed to avoid the presumption
 - o In some state's, a court's interpretation of a waiver still uncertain, others prohibit it in part (e.g., Michigan)
- Information sharing
 - o Other than a small number of states (e.g., NH, DE), no statutes or case law address necessity for information-sharing among participants
 - o Draftsperson may want to establish guidelines requiring necessary information
 - o Consider
 - Type of information
 - Timing of information-sharing
 - o Some information-sharing may have limits, e.g., deliberations regarding discretionary decision-making

Further limiting liability of trust participants? Exculpation, indemnification, or neither?

- Directed trustee liability for following a direction is limited under many state statutes absent a finding that attempted exercise is:
 - o Manifestly contrary to the terms of the trust or
 - o Would constitute a serious breach (UTC Standard)
 - o Or willful misconduct (DE) (willful misconduct defined in 2010 to mean intentional wrongdoing not mere negligence, gross negligence or recklessness)
- Power-holder's liability is generally not addressed. Draftsperson and settlor need to consider drafting limits if desired
- Consider use of an entity (such as an LLC) for a trust participant to act if liability exposure needs to be limited
- Consider errors and omissions insurance policy purchases by the trust
- Do consider the need to balance protection of participants with competent performance of trust functions when considering exculpation/exoneration/indemnification
 - o Exculpation clauses should be drafted in as appropriate
 - Some common and statutory law limits usefulness
 - Will not protect against bad faith, reckless indifference to interests of beneficiaries, liability for a trustee's profit from a breach or abuse of a fiduciary or confidential relationship
 - Some cases completely reject as "contrary to public policy"
 - o Indemnification can also be a remedy

Vacancies, succession, incapacity

- Goal is to avoid a hiatus in an area of trust decision-making if a participant resigns, dies, is incapacitated or is removed
- Problem of vacancies not generally addressed in the law (other than NH). Must solve with good drafting.
- Issues that should be covered:
 - o Succession of multiple trust participants
 - o If vacancy not filled, give trustee or other trust participant power to appoint a successor or direct they petition a court to fill vacancy
 - o Consider vesting the trustee or another participant with the powers held by the former trust participant until a new participant is appointed
 - o Suspend liability for a period of time if role is being temporarily filled by trustee or another trust participant
 - o Require notice to all participants of resignation
 - o Provide when vacancies need not be filled
 - o Vest successors with all necessary powers
 - o Consider waiving liability for acts and omissions of predecessor
 - o Consider tax sensitive powers and possible prohibitions on who can act
- Incapacity
 - o Identify how incapacity will be determined and what the consequences are

Decision-Making Authority, Time Limits, Effect of Dissent

- When a committee or multiple trust participants are acting together, the trust must provide a clear mechanism for joint decision-making, including the impact of a dissenting vote
- Issues that should be considered:
 - o Whether decisions are to be made unanimously or by majority
 - o If a committee is acting as a trust advisor, identify what constitutes quorum for decision-making by majority
 - o Address the manner in which decisions can be made and communicated such as by email, in writing, by fax, etc.
 - o Clearly identify whether a dissenting vote will eliminate liability for a trust advisor or protector and process for communicating such a dissent

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A Chicago-based wealth advisor, Anita advises clients across the Midwest region on their comprehensive estate planning needs and goals including how to tax-efficiently hold, manage and transfer their wealth to family or charity. Prior to assuming this role, Anita was the Fiduciary Manager for the Midwest. Anita is an attorney, admitted to practice in Illinois and is a member of the American and Chicago Bar Associations.

She currently serves as President of the Chicago Estate Planning Council and is a current planned giving advisory board member to both the Chicago Symphony Orchestra and Ravinia Festival. She is also the past president and treasurer of the Auxiliary Board of Northwestern Memorial Hospital.

Anita speaks and writes nationally on topics related to multi-state estate planning, charitable giving and tax planning and has been featured in The New York Times, Dow Jones, Business Week, The Wall Street Journal, Barron's, The Chicago Tribune, CLTV and other local and national media. Prior to joining JPMorgan Private Bank in 2000, Anita was a partner with the Chicago-based law firm of Winston & Strawn, where she practiced law for 11 years as a member of both the Trust and Estates and Corporate departments. Anita earned her B.A. in Political Science from the University of Michigan and her J. D. from Boston University School of Law.

Anita resides in Glencoe, Illinois, with her husband and teenage twins.

John P.C. Duncan

Kozusko Harris Duncan

John Duncan founded the Chicago law firm Duncan Associates Attorneys and Counselors, P.C. in 2000 to represent private, boutique, and traditional trust companies, family offices, and other wealth management organizations. Effective January 1, 2012, Duncan Associates combined with Kozusko Harris Vetter Wareh to form Kozusko Harris Duncan. John's work with families and family offices also includes designing and implementing trans-generational family governance systems, family office risk management programs, family investment funds and family office services platforms.

In 2011 *Private Asset Management* named John to its "Power 25" list of prominent players in wealth management and family offices "excelling in thought leadership and levels of influence in their respective fields." Kozusko Harris Duncan in February of this year received the 2012 PAM Award as the Best Private Client Service Law Firm.

Over the past 22 years, John has worked with more than 100 ultra-wealthy families (and their advisors) on family governance and family strategic structures, including forming close to half of the regulated Private Trust Companies in the United States. In 2009, John assisted a group of private trust companies in founding the PTC Association, LLC, an association of private trust companies.

John drafted a model trust company act that has now been adopted by nearly half the states. John and his colleagues were also principal draftsmen of the innovative trust and trust company laws enacted by New Hampshire in 2007 and 2008. In addition, John served as principal draftsman of the extremely family- and family-enterprise friendly Family Trust Company Act adopted by Nevada in 2009, as well as the comprehensive rewrite of Nevada's commercial trust company act. The firm also collaborates on legislation in many states including a Florida trust company act drafting project. Currently John has been serving as lead draftsman for private trust company legislation to be introduced in the Delaware legislature's 2013 session.

John is a graduate of Yale University (B.A. *cum laude* 1971) and The University of Chicago Law School (J.D. 1974). Prior to forming Duncan Associates, John headed the banking and investment practice of the international law firm Jones Day.

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