

# Estate Planning with Directed Trusts Under the Colorado Uniform Directed Trust Act

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# Agenda

- Introduction to Directed Trusts
- When Might a Directed Trust be Suitable?
- Overview of the CUDTA
- Drafting and Practical Considerations



# Introduction to Directed Trusts

## What is a Directed Trust?

Powers and Duties Ordinarily Vested in the Trustee  
Are Divided and Allocated Among Multiple Parties



# Introduction to Directed Trusts

## Trust Director

Person who has the power to direct the trustee in the performance of a specific function or functions.

The trustee must comply.



# Introduction to Directed Trusts

## Directed Trustee

The trustee who is subject to the trust director's power of direction.

Lacks or has diminished authority to act regarding the functions allocated to the trust director.



# Introduction to Directed Trusts

Trustee's Reduced Authority

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Trustee's Reduced Liability



# Introduction to Directed Trusts

Before Directed Trusts: Common Law

Trustee Must Comply with Trust Director's Directions  
BUT...

Must First Determine Whether Doing So Contradicts the  
Terms of the Trust or Violates a Fiduciary Duty  
the *Trust Director* Owes to the Beneficiaries





# Introduction to Directed Trusts

## Not a Delegation

Delegation: Trustee Exercises Power to Assign Functions to a Third Party

Directed Trust: Trustee Exercises No Power — Trust's Terms Assign Director's Functions



# Introduction to Directed Trusts

## Not a Co-Trusteeship

Co-Trusteeship: Powers and Duties are Jointly Held and Exercised

Directed Trust: Trustee Disempowered as to Director's Functions



# Introduction to Directed Trusts

## Procedural Posture of the CUDTA

Senate Bill 19-105

Passed the Senate on February 11<sup>th</sup>

Passed the House on March 8<sup>th</sup>

Governor Polis Signed on March 28<sup>th</sup>

Became Effective on August 2<sup>nd</sup>



# When Might a Directed Trust be Suitable?

## Investment of Trust Assets

- Professional Investment Adviser
- Beneficiary Management
- Unmarketable or Illiquid Assets



# When Might a Directed Trust be Suitable?

Distributions

Ministerial Matters



# Establishing Trust Director's Powers & Duties

The Terms of a Trust

Define a Trust Director's Powers and Duties



# Establishing Trust Director's Powers & Duties

## The Terms of a Trust

“[T]he manifestation of the settlor’s intent regarding a trust’s provisions as . . . expressed in the trust instrument[,]” and “as may be established by other evidence in a judicial proceeding.”

C.R.S. § 15-16-802(8)(a)



# Establishing Trust Director's Powers & Duties

## The Terms of a Trust

- Court Order
- Nonjudicial Settlement Agreement Under the CUTC
- Trustee or Trust Director in Accordance with Applicable Law
- Alternative Dispute Resolution

C.R.S. § 15-16-802(8)(b)





# Establishing Trust Director's Powers & Duties

## Trust Director's Power of Direction

“[A] power over a trust granted to a person by the terms of the trust,” including “a power over the investment, management, or distribution of trust property or other matters of trust administration.”

C.R.S. § 15-16-802(5)



# Establishing Trust Director's Powers & Duties

## Trust Director's Power of Direction

Excludes:

- Powers of Appointment
- Power to Remove a Trustee or Trust Director



# Establishing Trust Director's Powers & Duties

## Trust Director's Power of Direction

Excludes:

- Power Held in a Non-Fiduciary Capacity, Including to Achieve the Settlor's Tax Objectives
- Several Other Powers

C.R.S. §§ 15-16-802(5), 15-16-805(2)



# Establishing Trust Director's Powers & Duties

## Trust Director's Power of Direction

Cannot be Exercised While the Trust Director  
is Serving as a Trustee

C.R.S. § 15-16-805(2)



# Establishing Trust Director's Powers & Duties

## Trust Director's Further Power

“[A]ny further power appropriate to the exercise or nonexercise of a power of direction granted to the director . . . .”

C.R.S. § 15-16-806(2)(a)



# Establishing Trust Director's Powers & Duties

## Trust Director's Further Power

Examples:

- Incur reasonable costs and direct indemnification for them
- Make a report or accounting to a beneficiary or other interested party
- Direct a trustee to issue a certification of trust under C.R.S. § 15-5-1013



# Establishing Trust Director's Powers & Duties

## Trust Director's Further Power

Examples, *cont'd*

- Prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust
- Employ a professional to assist or advise the director in the exercise or nonexercise of his or her powers



# Establishing Trust Director's Powers & Duties

## Trust Director's Duties

A director generally has “the same fiduciary duty and liability in the exercise or nonexercise of [a] power [of direction]” as a sole trustee or a co-trustee “in a like position and under similar circumstances.”

C.R.S. § 15-16-808(1)(a)





# Establishing Trust Director's Powers & Duties

## Trust Director's Duties

The terms of the trust may impose a higher duty, so the CUDTA provides a mandatory floor.

C.R.S. § 15-16-808(3)



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

## Mandatory Compliance

A directed trustee “shall take reasonable action to comply with a trust director’s exercise or nonexercise of a power of direction . . . .”

C.R.S. § 15-16-809(1)



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

## No Liability

In complying with a trust director's direction,  
“the trustee is not liable for the action.”

C.R.S. § 15-16-809(1)



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

BUT...

A trustee “must not comply...to the extent that by complying the trustee would engage in willful misconduct.”

C.R.S. § 15-16-809(2)



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

What is “Willful Misconduct?”

“[I]ntentional wrongdoing and not mere negligence, gross negligence or recklessness.”

C.R.S. § 15-16-802(11)



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

What is “Wrongdoing?”

“[M]alicious conduct or conduct designed to defraud or seek an unconscionable advantage.”

C.R.S. § 15-16-802(12)



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

## The Result: Increased Overall Fiduciary Duty

All of the usual duties of trusteeship are preserved in the trust director, but the directed trustee also has a duty to avoid willful misconduct.



# Directed Trustee's Duty to Comply with Director's Direction, and Liability for Doing So

## Mandatory Minimum Standard of Conduct

The terms of a trust may not reduce a directed trustee's duty below the standard of willful misconduct. Terms of a trust attempting to do so won't be enforced, and will be interpreted as providing for the willful misconduct standard.





# Duty to Share Information Among Trust Directors and Trustees

## Reciprocal Duties

A trustee must share information with a trust director to the extent that it is “reasonably related both to . . . the powers or duties of the trustee[] and . . . the powers or duties of the director.”

C.R.S. § 15-16-810(1)



# Duty to Share Information Among Trust Directors and Trustees

## Reciprocal Duties

Similarly, a trust director must share information with a trustee or another director to the extent it is “reasonably related both to...the powers or duties of the director and . . . the powers or duties of the trustee or other director.”

C.R.S. § 15-16-810(2)



# Duty to Share Information Among Trust Directors and Trustees

## Trustee's Duty to Provide Terms of the Trust

The CUDTA contains a provision not in the uniform law requiring the trustee to provide a complete copy of the terms of the trust to a trust director.

C.R.S. § 15-16-810(5)



# Duty to of Trust Director to Communicate with and Provide Information to Beneficiaries

## Same as a Trustee

A trust director “has the same fiduciary duty and liability in the exercise or nonexercise of [a] power [of direction]” as a trustee “in a like position and under similar circumstances . . . .” C.R.S. § 15-16-808(1)(a).

Thus, duty to provide information to beneficiaries under the CUTC, C.R.S. § 15-5-813, will apply to trust directors.



# No Duty to Monitor

## Default Rule

“A trustee does not have a duty to . . . monitor a trust director,”  
and a “trust director does not have a duty to . . . monitor a  
trustee or another trust director.”

C.R.S. §§ 15-5-811(1)(a)(I), (2)(a)(I)



# No Duty to Warn

## Default Rule

A trustee has no duty to “inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director.”

C.R.S. § 15-16-811(1)(a)(II)



# No Duty to Warn

## Default Rule

Similarly, a trust director is relieved of such a duty with respect to situations in which he or she might have acted differently than the trustee or another director.

C.R.S. § 15-16-811(2)(a)(II)



# No Duty to Warn

## Relief from Duty is Retroactive

A trustee or director has no duty to warn regarding an instance in which she or he “might *have acted* differently.”

Does a trustee or director have a duty that is prospective in nature — relating to actions not yet taken, presumably of which he or she has knowledge and against which some preventative measures might be effective?





# No Duty to Warn

## No Assumption of Ongoing Duty

If a directed trustee gives information or advice regarding an instance in which the trustee might have acted differently than a trust director, the trustee does not assume a duty to do so.

C.R.S. § 15-16-811(1)(b)



# Office of Trust Director

## Same Rules as a Trustee

- Acceptance of Appointment
- Giving of Bond
- Reasonable Compensation
- Petitioning Court for Instruction
- Resignation
- Removal
- Vacancy/Successor Appointment

C.R.S. § 15-16-816



# Limitation of Actions Against Trust Director

## Same Rules as a Trustee

“An action against a trust director for breach of trust must be commenced within the same limitations period as an action against a trustee for a similar breach of trust . . . .”

C.R.S. § 15-16-813(1)



# Limitation of Actions Against Trust Director

## Default Rule

A beneficiary must bring an action for breach of trust within 3 years after the first to occur of (a) the removal or resignation of the trust director, (b) the termination of the beneficiary's interest in the trust, or (c) the termination of the trust, or against the director's estate within 1 year after his/her death.

*See* C.R.S. §§ 15-5-1005(3), 15-16-813(1),  
15-12-803(1)(a), 15-15-103(8)



# Limitation of Actions Against Trust Director

## Reduced Limitations Period Available

“A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date that the beneficiary . . . was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.”

C.R.S. § 15-5-1005(1)



# Drafting and Practical Considerations

## Clearly Define Responsibilities

Think through and clearly define in the trust instrument the functions being allocated between the trustee and trust director, and the powers that each will need for a successful overall administration.



# Drafting and Practical Considerations

## Clearly Define Responsibilities

Example: A professional investment adviser is given a power of direction regarding investment of trust assets. Consider the following:

- What is the scope of the power of direction?
- Will the director act with discretion?



# Drafting and Practical Considerations

## Clearly Define Responsibilities

- Which power is superior — the trustee's power of distribution or the director's investment power?
- What form will directions to the trustee take?
- Who will have custody of the assets managed by the trust director?





# Drafting and Practical Considerations

## Clearly Define Responsibilities

- How will the trustee know that the director isn't making distributions to beneficiaries?
- With respect to the assets managed by the trust director, who will allocate receipts and disbursements to principal and/or income?
- Who will be responsible for valuing assets?



# Drafting and Practical Considerations

## Clearly Define Responsibilities

- How will the trustee access the funds needed to make distributions and pay trust expenses?
- If the trustee can maintain an account, how and where will those funds be invested, and who decides?
- Is the trust director willing to unilaterally set the investment policy for the trust?



# Drafting and Practical Considerations

## Clearly Define Responsibilities

At the outset of a directed trust administration, the trustee and trust director should meet to identify the areas in which they will need to work together to discharge their respective obligations and the mechanics of how they will do so.

Memorialize in a written memorandum of understanding, which can be amended as needed.



# Drafting and Practical Considerations

## Select Fiduciaries Who Will Work Well Together

The trustee and trust director will need to interact throughout the trust's administration and share information with each other.

The ability to work productively together is critical to a successful administration.



# Drafting and Practical Considerations

## Plan for Trust Director Succession

- If the trust director is no longer willing or able to serve, will a successor director be appointed? Who? What is the process for selecting a successor?
- What are the characteristics that a successor trust director should have?
- Should the director's powers revert to the trustee?



# Drafting and Practical Considerations

## Should a Trustee or Director be Given a Duty to Monitor or Warn?

- Directed trust structure breaks down and begins to operate more like a delegation
- Potential unintended consequences, including lack of willingness of fiduciaries to serve, increased costs, and even acrimony among fiduciaries



# Drafting and Practical Considerations

## Consider Overall Fiduciary Fees

Generally, the more fiduciaries involved in administering a trust, the greater the overall fees the trust will pay.



# Drafting and Practical Considerations

## Converting a Trust to a Directed Trust

- Nonjudicial Settlement Agreement (C.R.S. § 15-5-111)
- Judicial Modification (C.R.S. § 15-5-411)
- Trust Decanting (C.R.S. § 15-16-901 *et seq.*)





# Questions

