

David W. Tate, Esq. – blog posts re the new California directed trust provisions.

From October 30, 2023 through February 27, 2024, I made several blog posts in which I discussed the new California directed trust provisions. Below I have provided those posts in one document for ease of reading, beginning with the first post on October 30, 2023, and ending with the last two posts on February 27, 2024. There are a total of seven posts.

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CALIFORNIA ALLOWS DIRECTED TRUSTS BEGINNING JANUARY 1, 2024 - NOT JUST FOR THE REALLY WEALTHY (Posted October 30, 2023)

I have provided below a snapshot of the first part of California Senate Bill No. 801, which has been signed into law. The bill is just over 5 pages long, so it will take some reading, study and evaluation. However, the bill enacts "the California Uniform Directed Trust Act to provide a method for regulating trusts where a person who is not a trustee [i.e., the "trust director"] has been given a role in directing the trust." Thus, for California the bill creates a possible new means for directing how a trust is administered and adds the new roles and terms "directed trustee" and "trust director."

The California Uniform Directed Trust Act is contained at new Probate Code Sections 16600-16632. Probate Code Section 16608(a) states: "Subject to Section 16610, the terms of a trust may grant a power of direction to a trust director." The California Uniform Directed Trust Act primarily addresses the authority, limitation on authority, liability, and limitation on liability of the directed trustee and of the trust director, and the interactions and relationships between the directed trustee and the trust director. In no small part the terms and provisions that are stated in the trust will be determinative or instructive, assuming that those terms and provisions in fact pertain to the issues and situation at hand.

This is sure to create a lot of legal and estate planning discussion, and opportunities. Indeed, I will be covering the new legislation in greater detail. Directed trusts often are thought of as being just for the very wealthy; however, there may in fact be many different family relationships and dynamics, businesses and family businesses, and wealth, financial and estate planning situations in which the option of a directed trust might be considered with a directed trustee who can in some situations be subject to the power of direction by the trust director.

Below is the snapshot from the first part of California Senate Bill No. 801:

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SB-801 California Uniform Directed Trust Act. (2023-2024)

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Senate Bill No. 801
CHAPTER 721

An act to amend Sections 300 and 1304 of, and to add Chapter 6 (commencing with Section 16600) to Part 4 of Division 9 of, the Probate Code, relating to trusts.

[Approved by Governor October 10, 2023. Filed with Secretary of State October 10, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

SB 801, Allen, California Uniform Directed Trust Act.

Existing law establishes procedures for the creation, modification, and termination of a trust and regulates the administration of trusts by trustees on behalf of beneficiaries.

This bill would enact the California Uniform Directed Trust Act to provide a method for regulating trusts where a person who is not a trustee has been given a role in directing the trust. The bill would require the consent of the public administrator, public guardian, or public conservator before they are appointed to act as a trust director or directed trustee. The bill would set forth the duties and responsibilities of the trust director and the duties and responsibilities of the directed trustee, including specifying what powers may be given to a trust director and the information required to be exchanged by the trust director and the directed trustee. The bill would require a directed trustee to take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction, except that the directed trustee is not required to comply with a trust director's exercise or nonexercise of a power of direction to the extent that, by complying, the trustee would engage in willful misconduct. The bill would exempt from duties and liabilities under the act a trust director who is licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity. The bill would make conforming changes to related provisions.

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CONNECTION BETWEEN THE CALIFORNIA UNIFORM DIRECTED TRUST ACT AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS UNIFORM DIRECTED TRUST ACT (Posted December 8, 2023)

The new California Uniform Directed Trust Act, effective January 2024, is somewhat sparse on details. And with legislation and already existing statutes it is not uncommon for questions about interpretation to arise. Interpretation can be answered through cases that pertain to the relevant statute and also sometimes through legislative history. As the California Uniform Directed Trust Act is new, and there are no California cases that discuss the Act, the question arises whether there are other materials that apply or that might apply for the purpose of interpreting the California Act or at least certain provisions therein. This is also pertinent for my purposes as I will continue to discuss and blog about various provisions in the California Uniform Directed Trust Act.

The California Assembly Committee on Judiciary, June 6, 2023, hearing Synopsis in part states "This bill would enact the California Uniform Directed Trust Act, which, according to the author

and co-sponsors, is modeled on the National Commission's UDTA, but with minor modifications to reflect California law and drafting practices."

The California Uniform Directed Trust Act at new Cal. Probate Code section 16630 also states as follows: "In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Thus, on the issue of interpreting the new California Uniform Directed Trust Act, in addition to eventual cases, and the already existing California legislative history (if any of it is relevant), it can be said that the National Uniform Directed Trust Act and provisions and materials thereunder or relating thereto also are or may be relevant and citable, depending on the view of the Court that is hearing the matter.

In future posts I will be covering the California Uniform Directed Trust Act in greater and greater detail, including scenarios and situations where having a directed trust and a trust director might be helpful.

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**THE CALIFORNIA UNIFORM DIRECTED TRUST – TRUST DIRECTOR POWERS,
AND UNDER THE NATIONAL UNIFORM DIRECTED TRUST ACT (Posted December
9, 2023)**

The question arises, under the new California Uniform Directed Trust Act, what powers can a trust director have? The California statutes do not directly answer that question (see Cal. Probate Code Sections 16600 and 16602 below). Certainly the trust as drafted will in some manner specify the trust director's powers. Depending on how those powers are worded, they might be broad or they might be more specific, or both. Hopefully the powers will not be vague; however, as with any wording, and with sometimes uncertain or changing situations, wording that initially seemed clear might not end up being so. And, in some circumstances it is certain that Court approval, review, application, or interpretation will be desired and sought. Undoubtedly that will also be options and opportunities for mediation and uncertainty, disagreement or dispute resolution. Please also be mindful that there will be many posts on these topics both now and into the future - this post is only one of my posts - this is a complicated topic - you should read all of my posts, and also see the disclaimer below.

With respect to trust director powers, the California Uniform Directed Trust Act provides the following at Cal. Probate Code Sections 16600 and 16602:

California Probate Code Section 16600

- (a) This chapter shall be known, and may be cited, as the California Uniform Directed Trust Act.
- (b) The Legislature finds and declares all of the following:
 - (1) This chapter governs an arrangement commonly known as a directed trust
 - (2) In a directed trust, the terms of the trust grant a person other than a trustee a power over some aspect of the trust's administration.
 - (3) Under this chapter, this power is called a power of direction, the person that holds the power is called a trust director, a trustee that is subject to the power is called a directed trustee, and the trust is a directed trust.

California Probate Code Section 16602

For purposes of this chapter, the following definitions shall apply:

- (a) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this chapter, or law of this state other than this chapter pertaining to trusts.
- (b) "Directed trust" means a trust for which the terms of the trust grant a power of direction.
- (c) "Directed trustee" means a trustee that is subject to a trust director's power of direction.
- (d) "Power of direction" means 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 a trustee. Power of direction includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in subdivision (a) of Section 16606.
- (e) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.
- (f) "Terms of a trust" means either of the following:
 - (1) The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established by other evidence that has been admitted in a judicial proceeding.

(2) The trust's provisions as established, determined, or amended by a trustee or trust director in accordance with applicable law, the exercise of a power of appointment in accordance with applicable law, a court order, or other binding modification, including, but not limited to, under Section 15404.

(g) "Trust director" means 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.

Thus, under the new California Uniform Directed Trust Act, the trust director's powers are those powers that are provided and determined by the terms of the trust and generally (but vaguely) include a power over the investment, management, or distribution of trust property or other matters of trust administration, but exclude the powers described in subdivision (a) of Section 16606. However, see also the definition of the "Terms of a trust" above in Section 16602, which in in some circumstances may be more broad than the written terms of the trust instrument as "established by other evidence that has been admitted in a judicial proceeding."

As I have previously blogged, materials under the National Conference of Commissioners on Uniform State Laws Uniform Directed Trust Act might also be relevant. Thus, the following are the provisions and some of the materials pertaining to trust director powers under Section 6 of the National Uniform Directed Trust Act - note, however, that the specific trust at issue is not required to contain each power that is listed below in the Comment, and, as also indicated in the Comment, the specific powers that are listed are not limiting or comprehensive.

The following is wording from Section 6 (Powers of Trust Director) and some of the other related materials from the National Uniform Directed Trust Act:

SECTION 6. POWERS OF TRUST DIRECTOR.

(a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust director.

(b) Unless the terms of a trust provide otherwise: (1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under subsection (a); and

(2) trust directors with joint powers must act by majority decision.

Comment

Validating a trust director. Subsection (a) validates a provision for a trust director in the terms of a trust. This subsection does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust. A trust director may be named by the terms of the trust, by a procedure prescribed by the terms of the trust, or in accordance with Section 16(6).

Breadth of subsection (a). Without limiting the definition of a “power of direction” in Section 2(5), the drafting committee specifically contemplated that subsection (a) would validate terms of a trust that grant a power to a trust director to:

- acquire, dispose of, exchange, or retain an investment;
- make or take loans;
- vote proxies for securities held in trust;
- adopt a particular valuation of trust property or determine the frequency or methodology of valuation;
- adjust between principal and income or convert to a unitrust;
- manage a business held in the trust;
- select a custodian for trust assets;
- modify, reform, terminate, or decant a trust;
- direct a trustee’s or another director’s delegation of the trustee’s or other director’s powers;
- change the principal place of administration, situs, or governing law of the trust;
- ascertain the happening of an event that affects the administration of the trust;
- determine the capacity of a trustee, settlor, director, or beneficiary of the trust;
- determine the compensation to be paid to a trustee or trust director;
- prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;
- grant permission before a trustee or another director may exercise a power of the trustee or other director; or
- release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

This subsection does not, however, override the background law that regulates the formation of a trust, such as the requirements that a trust be lawful, not contrary to public policy, and possible to achieve. *See, e.g.*, Uniform Trust Code § 404 (2000); Restatement (Third) of Trusts §§ 29–30 (2003).

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**SELECT CALIFORNIA DIRECTED TRUSTEE AND TRUSTEE DIRECTOR
LIABILITY PROBATE CODE SECTIONS FOR THE NEW CALIFORNIA DIRECTED
TRUST STATUTES (Posted January 7, 2024)**

I have provided below a pdf of select California directed trustee and trustee director liability Probate Code sections for the new California directed trust statutes. The Probate Code sections that I have provided below are select color-coded sections from a longer document. Thus, for example, I have not included any of the green color-coded sections.

The first part of the below pdf pertains to the California directed trustee liability sections. The second part of the below pdf pertains to the California trustee director liability sections.

The legislation became effective January 1, 2024; however, the legislation specifies that it also applies to directed trusts that were created or formed prior to January 1, 2024.

Although the sections make reference to directed trustee and trustee director liability in circumstances of willful misconduct, liability variously depends on or can depend on the wording of the specific trust in question, the reasonableness of the directed trustee's or trustee director's actions, the knowledge that the directed trustee or the trustee director has or should have about the situation, applicable law(s), and/or "willful" misconduct as that conduct is defined and determined by the trier of fact. Probate Code §16630 further provides that in applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it - i.e., reference to the Uniform Directed Trust Act.

The following are select color-coded California directed trustee and trustee director liability Probate Code sections for the new California directed trust statutes. Please see also my other posts discussing the new California Uniform Directed Trust Act and statutes.

[california-directed-trust-statutes-re-trustee-director-and-directed-trustee-liability-for-blog-01072024-1Download](#)

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California Directed Trust Statutes Re Directed Trustee Liability

Black not bold = generally and introduction
 Green bold = generally directed trusts
 Black bold = directed trustee
 Red bold = trustee director
 Blue bold = applicable to both trustee director and directed trustee
 Orange bold (1) = other – applicable but strangely worded

SEC. 3. Chapter 6 (commencing with Section 16600) is added to Part 4 of Division 9 of the Probate Code, to read:

CHAPTER 6. California Uniform Directed Trust Act

Probate Code § 16600. (a) This chapter shall be known, and may be cited, as the California Uniform Directed Trust Act.

(b) The Legislature finds and declares all of the following:

(4) A directed trustee is required to take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction.

(5) Except for willful misconduct, a directed trustee is liable only for its own breach of trust in executing a direction and not for the trust director's breach of trust in exercising or not exercising the power of direction.

Probate Code § 16602. For purposes of this chapter, the following definitions shall apply:

(a) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this chapter, or law of this state other than this chapter pertaining to trusts.

(b) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(c) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(d) "Power of direction" means 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 a trustee.

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THE TERMS OF THE CALIFORNIA DIRECTED TRUST PROVIDE THAT THE TRUSTEE DIRECTOR CAN NEVER BE LIABLE TO A BENEFICIARY – NOW WHAT – WHAT WOULD THE CALIFORNIA DIRECTED TRUST ACT HOLD? (Posted January 16, 2024)

The question posed in the heading to this post is a scenario that is referenced in the National Directed Trust Act. The following is the short answer for California: under the California Uniform Directed Trust Act a fiduciary trustee director's conduct and liability can be limited for

conduct and culpability that are below the level of willful misconduct (i.e., that do not constitute willful misconduct) if the provisions of the trust so specify, and if the conduct in question is by law within the scope and authority of a trustee director, and if the conduct in question is within the scope and authority of the specific trustee director in question as specified by the terms of the specific directed trust.

Laws, regulations, instruments, and other materials that you may want to consider when evaluating the above issues at least include the following:

- The provisions of the specific directed trust in question.
- In appropriate circumstances and when necessary, the trustor's intent and wishes.
- The legal definition of willful misconduct.
- The California Uniform Directed Trust Act, including for example new Cal. Probate Code §§16608, 16612, 16614 and 16630 (and perhaps also Probate Code §16618 as related).
- The National Uniform Directed Trust Act including for example Section 8 (Duty and Liability of Trust Director) and Comments thereafter (*Extended discretion*, and *Exculpation or exoneration*, and possibility including the Restatement (Third) of Trusts and the Uniform Trust Code).
- California Assembly Committee on Judiciary, June 6, 2023, hearing Synopsis which in part states "This bill would enact the California Uniform Directed Trust Act, which, according to the author and co-sponsors, is modeled on the National Commission's UDTA, but with minor modifications to reflect California law and drafting practices."
- See also and consider already existing California Probate Code §16461 as relevant to the specific circumstances in question ((b) A provision in the trust instrument is not effective to relieve the trustee of liability (1) for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from a breach of trust).

On this blog you will find additional prior posts about the new California directed trusts - additional posts will also be following as I have a list of directed trust scenarios that I will be covering.

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CAN THE DIRECTOR TRUSTEE PAY HER/HIS ATTORNEYS' FEES OUT OF THE DIRECTED TRUST UNDER THE CALIFORNIA DIRECTED TRUST ACT? (Posted February 27, 2024)

Can the director trustee pay her/his attorneys' fees out of the directed trust under the California Directed Trust Act? In certain circumstances a related question might be whether the director Trustee can do so without Court approval. And yet another related question might be, with respect to the specific trust in question, does the director trustee have authority and access to the trust's money accounts?

First look at the terms and provisions of the specific directed trust that is at issue. What do those terms and provisions say, and does the director trustee have authority and access to the directed trust's money accounts?

More broadly, however, and even if the trust does contain appropriate terms and provisions and even if the director trustee does have authority and access to the directed trust's money accounts, also consider the provisions in the California Directed Trust Act, any relevant provisions in the National Uniform Directed Trust Act, and whether it is or might be the directed trustee who independently or separately will pay or be paying the director trustee's attorneys' fees.

In addition to the discussion above, under the California Directed Trust Act consider Probate Code sections 16608, 16612, 16614, 16628, and 16630. In general, Probate Code section 16608 broadly states the powers, terms and provisions that pertain to the director trustee, and that the director trustee is required to take reasonable action to comply with the powers, terms and provisions specified in the trust except for willful misconduct (if that is what the trust provisions so provide). In relevant part, section 16612 provides that the terms of the trust may vary the director trustee's duty or liability, but that the director trustee has a fiduciary duty and liabilities. Section 16614 is one of the sections that provides for director trustee duties and liabilities. Section 16628 states that unless the terms of the trust provide otherwise, the rules applicable to a trustee apply to a director trustee regarding the matters and Probate Code sections that are specified in section 16620 including sections 15600 and 15601; section 15602; section 15681; resignation or removal under Article 3; and the vacancy and appointment of a successor under section 15660. Section 16630 further states that in applying the California Directed Trust Act, "consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Turning to the National Uniform Directed Trust Act, in addition to the discussion above, under the UDTA consider Section 14 (Defenses in Action Against Trust Director) which contains the following Comment:

Attorney's fees and indemnification. Attorney's fees and indemnification for a trust director are governed by Section 6(b)(1), which establishes a default rule that allows a trust director to

exercise “any further power appropriate to the exercise or nonexercise of a power of direction granted to the director.” By default, therefore, a trust director has a power to incur attorney’s fees and other expenses and to direct indemnification for them if doing so would be “appropriate” to the exercise of the director’s express powers.

In relevant part the UDTA at Section 6 (Powers of Trust Director) states:

(a) Subject to Section 7, the terms of a trust may grant a power of direction to a trust director.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director may exercise any further power appropriate to the exercise or nonexercised of a power of direction granted to the director under subsection (a); and

(2) trust directors with joint powers must act by majority decision (unless the terms of the trust provide otherwise).

In relevant part the Comment for Section 6 further states that the drafting committee specifically contemplated that subsection (a) would validate terms of a trust that granted a power to a trust director to:

“[P]rosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;”

See also the Comment pertaining to Section 6(b) which (if so provided in the terms and provisions of the specific trust) provides the director trustee with authority and further appropriate powers to carryout her or his other powers including (1) to incur such reasonable costs; * * * * (4) to prosecute, defend, or join an action, claim or judicial proceeding relating to a trust; and (5) to employ a professional to assist or advise the director in the exercise or nonexercised of the director’s powers.

However, also be aware that the Comment to Section 6 in pertinent part states the following which might or might not be relevant to your specific circumstance: “This subsection does not, however, override the background law that regulates the formation of a trust, such as the requirement that a trust be lawful, not contrary to public policy, and possible to achieve.”

This will be a developing area of law. However, my view is that if the specific trust in question states that the director trustee’s attorneys’ fees will be or shall be paid then there is authority and power to do so. However, even in that circumstance if the director trustee’s attorneys’ fees are going to be significant or if they are going to be incurred on or for a subject matter about which a Court might have questions, consider whether or not to petition the Court for prior approval of the payment of those fees, and in other circumstances where the payment of the director trustee’s attorneys’ fees is less certain under the powers, terms and provisions of the specific trust at issue, again consider whether or not to petition the Court for prior approval of payment.

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TWO ADDITIONAL DIRECTOR TRUSTEE POWERS LISTED IN THE NATIONAL UNIFORM DIRECTED TRUST ACT: THE POWER TO DETERMINE THE CAPACITY OF VARIOUS PEOPLE, AND THE POWER TO RELEASE A TRUSTEE OR DIRECTOR TRUSTEE FROM LIABILITY (Posted February 27, 2024)

In this last post in my series of posts about the new California Directed Trust Act I highlight two very interesting possible additional director trustee powers that are listed in Section 6 of the national Uniform Directed Trust Act. If you will recall (yes, please read my prior posts in this series), the California Directed Trust Act does not contain an item by item list of possible director trustee powers – instead and for the most part the California Act states that the powers of the director trustee are those powers that are stated in the authority, terms and provisions that are provided in the specific directed trust. Additionally, however, the California Directed Trust Act at Cal. Probate Code §16630 states that in applying the California Directed Trust Act, “consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” Thus, reference to the national Uniform Directed Trust Act (UDTA) can be appropriate and relevant although I would not necessarily conclude that the UDTA provisions are automatically applicable or are the law in California.

Unlike the California Directed Trust Act, the UDTA does contain a non-exhaustive list of possible director trustee powers in Section 6 (Powers of Trust Director). Remember, however, that the wording of the specific directed trust itself must provide for and contain the specific terms and provisions for the director trustee’s authority and power. Most director trustee authority and power provisions will pertain to the administration and management of the trust and of the assets that are in the trust. However, the following are two additional and interesting possible director trustee powers that are listed in Section 6 of the UDTA:

- The power to determine the capacity of a trustee, settlor, director, or beneficiary.
- The power to release a trustee or another trust director (director trustee) from liability for an action proposed or previously taken by the trustee or other director (director trustee).

As you might imagine the two above-described powers, if they are included in the terms and provisions of the specific directed trust certainly will cause and require considerable discussion and evaluation, and perhaps likely consideration by a Court. This post is the last in my initial series of posts about the new California Uniform Directed Trust Act. Please do read my several prior posts. I will continue to write directed trust posts as this new area of California law

develops and as there are situations involving directed trusts or in which a directed trust might have been useful or relevant.

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