Arkansas Enacts a version of the Uniform Directed Trust Act: Relief for Corporate Trustees begins in 2020

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In recent years it has become more common to grant multiple parties various powers over trust property within a trust. Of course there is still a trustee, owing the classic fiduciary duty to the beneficiaries, but now trusts increasingly provide for nontrustees, sometimes called “trust protectors” or “trust directors,” who have powers over some aspect of trust administration—such as investment strategy, or management decisions for a family business. When such persons exercise their power as nontrustees, to whom do they owe fiduciary duty? Do they even owe fiduciary duty? What about the regular trustee? The law’s answers to these questions are either contradictory or non-existent in many states. Understandably then, there needs to be some clarity for situations where a trust grants multiple parties various powers over trust property.

In an attempt to settle the law and answer these questions, the Uniform Law Commission drafted the Uniform Directed Trust Act in 2017. It is designed to solve the problems that arise where the trust instrument itself grants powers to a third party other than the trustee, and that third party (who is termed a “trust director” under the Act) exercises (or fails to exercise) those powers. The Arkansas Legislature recently adopted Arkansas’ version of the Uniform Act with an effective date of January 1, 2020. The Arkansas Act tracks the Uniform Act almost verbatim except for 1 major difference.

Under the Act a trust director has the same fiduciary duty (and thus liability) to the trust beneficiaries that a trustee would in a similar position under current law. This approach has been adopted in every state that has either has the Uniform Act or has created its own law on the trust director issue. Bottom line: even if you’re not a trustee, and you are doing something that, under the trust instrument, you’re not directly answerable to the trustee for (such managing a family business or an investment portfolio) you still owe fiduciary duty to the beneficiaries *as if you were the trustee*.

Okay, that answers one question; but what is the regular trustee supposed to do while the trust director is acting? The Arkansas Legislature decided to throw out the Uniform Law’s “willful misconduct” standard for a regular trustee. In Arkansas, *unless the terms of the trust instrument provide otherwise*, the directed trustee is **not liable** for: (i) any loss that results directly or indirectly from any act taken (or failure to act) as a result of the reasonable action of the regular trustee to comply with the trust director; and (ii) any loss resulting from the making or retention of any investment, whenever a trust reserves to a trust director the authority to direct the making or retention of that investment.

With this major change in its adoption of the Uniform Act, Arkansas has aligned itself with states that do not hold regular trustees liable when the trust director is acting. Only time will tell if this standard is the better one for beneficiaries than willful misconduct standard. What is certain is that, liability-wise, regular trustees in Arkansas will have a good start to 2020. Hopefully, this new law will create greater certainty; and, by so doing, create more opportunity for trust settlors and drafters to incorporate a trust director into their trusts.