

Title

Trust Protectors, Trust Directors, and the Uniform Directed Trust Act.

Text

The Uniform Directed Trust Act (the “Act”), approved July 19, 2017 by the National Conference of Commissioners on Uniform State Laws, purports to govern irrevocable directed trusts. For purposes of the Act a directed trust is a trust whose terms grant a power of direction to someone other than the trustee, such as a power over the investment, management, or distribution of trust property. That “someone” is a “trust director,” which is essentially another name for trust protector. A non-fiduciary power of appointment is not such a power of direction. General principles of equity, however, will govern whether a holder of a power of direction is actually either a true co-trustee or the holder of a non-fiduciary power of appointment. The Act makes no effort to regulate the critical threshold exercise of sorting out whether a designated trust director actually qualifies as such under the Act. The public policy that would be implemented by the Act is that a trust director is a fiduciary with an affirmative duty to act. A breach of the trust director’s fiduciary duty is a breach of trust. A beneficiary’s main recourse for misconduct by a trust director is an action against the director for breach of his fiduciary duty to the beneficiary. The directed trustee incurs secondary liability only to the extent of his own willful misconduct. It is black-letter law that neither the holder of a non-fiduciary power of appointment nor an agent-fiduciary has an affirmative duty to act. A trustee, on the other hand, does. Now, so also does a trust director. Subject to the limitations of his powers of direction and to legal title to the subject property being in someone else, under the Act the trust director essentially possesses all the rights, duties, obligations, and liabilities of a true trustee. Here is a link to the Act:

http://www.uniformlaws.org/shared/docs/divided%20trusteeship/2017AM_DirectedTrust_AsApproved.pdf.

Some traps for the unwary in the Act: (1) Under the Act, the directed trustee is liable only for his own “willful misconduct,” while under the UTC (§ 808(b)), he may not honor a direction that is “manifestly contrary to the terms of the trust or the [directed] trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” (2) While the Act is almost all about non-trustee trust directors, buried in the Act (§ 12) is some direction doctrine applicable to co-trustees! (3) The Act does not apply to powers to hire and fire trustees and trust directors (§5(b)(2)). Presumably background principles of equity will continue to regulate those types of directions. (4) The UTC (§808 cmt) and the Act (§9 cmt) treat veto powers differently when it comes to directed-trustee liability.

Under the Act, one who is vested under the terms of a pet trust with a power to seek the trust’s enforcement would owe fiduciary duties, but to whom? The Act doesn’t say. See UDTA § 6, cmt. All it says is that the enforcer is a trust director and thus regulated by the Act. Id. Pet trusts are covered generally in §9.9.5 of *Loring and Rounds: A Trustee’s Handbook* [pages 1565-1567 of the 2017 Edition], which section is reproduced in its entirety below.

Appendix

§9.9.5 Honorary Trusts (including Pet Trusts) [from *Loring and Rounds: A Trustee's Handbook*, with enhancements [pages 1565-1567 of the 2017 Edition].

Generally. Where the owner of property transfers it in trust for a specific noncharitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created.¹⁸⁰ This nontrust is sometimes referred to as an “honorary trust.”¹⁸¹ The terms are unenforceable by a beneficiary because there is none¹⁸² and by the attorney general because the purposes are noncharitable.¹⁸³ The transferee has two choices: to voluntarily carry out the terms of the unenforceable arrangement or to return the property to the transferor or his estate upon a resulting trust.¹⁸⁴ In no event will he be permitted to keep the property. Legislatures, of course, are free to carve out exceptions to the common law principle that dispositions for noncharitable purposes are unenforceable, and they have done so. Gravesite perpetual care statutes come to mind.¹⁸⁵

The Uniform Trust Code,¹⁸⁶ as well as the Uniform Probate Code,¹⁸⁷ would allow for the enforcement of two types of honorary dispositions: those for general but noncharitable purposes such as “a bequest of money to be distributed to such objects of benevolence as the trustee might select” and those for specific noncharitable purposes such as the care of a cemetery plot,¹⁸⁸ or perhaps even for the purpose of promoting fox hunting.¹⁸⁹ Who would enforce these trusts? A person appointed in the terms of the trust or, if no person is so appointed, a person selected by the court.¹⁹⁰ Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.¹⁹¹ An honorary trust authorized by either code, however, could not be enforced for more than twenty-one

¹⁸⁰Restatement (Second) of Trusts §124. The transferee, however, would have the power to apply the property to the designated purpose, unless such application is authorized or directed to be made at a time beyond the period of the rule against perpetuities, or the purpose is capricious. Restatement (Second) of Trusts §124.

¹⁸¹Restatement (Second) of Trusts §124 cmt. c; 2 Scott & Ascher §12.11; John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §909.1 (4th ed. 1942).

¹⁸²Restatement (Second) of Trusts §124 cmt. a. *See also* §5.1 of this handbook (who can be a beneficiary?).

¹⁸³Restatement (Second) of Trusts §124 cmt. a.

¹⁸⁴Restatement (Second) of Trusts §124 cmt. b.

¹⁸⁵*See generally* 2 Scott & Ascher §12.11.2; Rounds, *Protections Afforded to Massachusetts' Ancient Burial Grounds*, 73 Mass. L. Rev. 176 (1988).

¹⁸⁶UTC §§408 (Trust for Care of Animal), 409 (Noncharitable Trust Without Ascertainable Beneficiary).

¹⁸⁷UPC §2-907 (Honorary Trusts; Trusts for Pets).

¹⁸⁸UTC §409 cmt. *See also* 6 Scott & Ascher §39.7.5 (confirming that a trust for the perpetual maintenance of a grave or a tomb is generally considered noncharitable, unless the deceased was a well-known public figure such as perhaps a president or a general).

¹⁸⁹*See* 2 Scott & Ascher §12.11.6.

¹⁹⁰UTC §409(2).

¹⁹¹UTC §409(3). The property may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. UTC §409(3).

years.¹⁹² Again, legislatures would be free to carve out exceptions. Most perpetual care trusts, for example, have been exempted by statute from the durational requirements of the rule against perpetuities.

The Restatement (Third) of Trusts would enforce certain honorary trusts¹⁹³ as purpose adapted trusts. The topic of purpose trusts is covered in Section 9.27 of this handbook. The adapted trust is covered in Section 9.29 of this handbook.

Trusts for Pets/Trusts for Animals. In one case, a testator bequeathed in trust his horses and dogs for their maintenance as long as any of them should live. Though unenforceable, the trust was held not to violate the rule against perpetuities.¹⁹⁴ Prof. John Chipman Gray was not so sure: “Can a gift over be made to take effect upon the death of any animal however longevous—an elephant, a crow, a carp, a crocodile, or a toad?”¹⁹⁵

At common law, an honorary trust for the care of an animal was unenforceable because there was no person authorized to enforce the trustee’s obligations.¹⁹⁶ That having been said, a resulting trust did not necessarily arise, provided there was someone ready and willing to carry out its terms.¹⁹⁷

The Uniform Trust Code provides that a trust may be created to provide for the care of an animal alive during the settlor’s lifetime.¹⁹⁸ “The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor’s lifetime, upon the death of the last surviving animal.”¹⁹⁹ The trust may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.²⁰⁰ “A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.”²⁰¹ Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor’s successors in interest.²⁰² The Uniform Probate Code also provides for the enforcement of trusts for pets/animals,²⁰³ as does the Restatement (Third) of Trusts.²⁰⁴ As to the tax considerations, the reader is referred to Gerry W. Beyer and Jonathan P. Wilkerson.²⁰⁵ The Uniform Trust Decanting Act, specifically §23, would regulate and set ground rules for the decanting of UTC animal trusts. Decanting is taken up generally in Section 3.5.3.2(a) of this handbook. Under the Uniform Directed Trust Act (UDTA), see generally §3.2.6 of this handbook, one who is vested by the terms of a pet trust with a power to seek the trust’s enforcement would owe fiduciary duties, but to whom? The Act doesn’t say. All it says is that the enforcer would be a trust director subject to regulation by the UDTA.¹

¹⁹²UTC §409(3) §409(1). See 2 Scott & Ascher §12.11.1 (discussing the applicability of various manifestations of the rule against perpetuities, statutory and otherwise, to honorary trusts); John Chipman Gray, *The Rule Against Perpetuities*, Appendix H §909.1 (4th ed. 1942) (application of the rule against perpetuities to honorary trusts).

¹⁹³Restatement (Third) of Trusts §47 cmt. a.

¹⁹⁴*In re Dean*, [1889] 41 Ch. D. 552 (Eng.).

¹⁹⁵John Chipman Gray, *The Rule Against Perpetuities* §896.3 (4th ed. 1942).

¹⁹⁶2 Scott & Ascher §12.11.3; Uniform Trust Code §408 cmt.

¹⁹⁷See, e.g., *In re Searight’s Estate*, 95 N.E.2d 779 (Ohio Ct. App. 1950).

¹⁹⁸UTC §408(a).

¹⁹⁹UTC §408(a).

²⁰⁰UTC §408(b).

²⁰¹UTC §408(b).

²⁰²UTC §408(c). Property of a trust for the care of an animal may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. UTC §408(c).

²⁰³UPC §2-907(b).

²⁰⁴Restatement (Third) of Trusts §47 cmt. f.

²⁰⁵*Max’s Taxes: A Tax-Based Analysis of Pet Trusts*, 43 U. Rich. L. Rev. 1219 (2009).

¹ Uniform Directed Trust Act § 6, cmt.

Recall that the UDTA imposes fiduciary status on trust directors.²

When it comes to caring for a pet after its owner has died, the honorary trust may not be the only option that involves a trust.²⁰⁶ One might, for example, create a garden-variety express trust *for the benefit of human beings* that does not violate the Rule Against Perpetuities. The trust would *in part* be funded with the subject pet, the pet being property and a trust being a fiduciary relationship with respect thereto.²⁰⁷ The governing instrument would have appropriately strong pet retention language. The trustee also might be relieved of the duty to make the pet productive. The equitable interests of the human beneficiaries would be subject to the condition precedent that at least one of them assumes custody of the pet and cares for it. Title to the pet, however, would remain in the trustee.²⁰⁸

² Uniform Directed Trust Act § 8(a)(1)(A).

²⁰⁶ Or, as one wag has phrased it, the honorary trust may not be only way to “skin the cat” when it comes to caring for a pet after its owner has died.

²⁰⁷ See generally Chapter 1 of this handbook.

²⁰⁸ But see Wesley J. Smith, *So Three Cows Walk into Court ...*, 14(41) *The Weekly Standard*, at 14, 15 (“But animal standing would do more than just plunge the entire animal industry into chaos. In one fell swoop, it would both undermine the status of animals as property and elevate them with the force of law toward legal personhood”).