

# The What, Why and Who of Directed Trusts

## Presented By

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# What is a Directed Trust?

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- Tennessee’s statute provides a definition – trust, court order, or agreement of “qualified beneficiaries gives one or more persons the authority to direct or consent to a fiduciary’s proposed investment, distribution, or other decision
- In Tennessee – trust advisors and trust protectors are specified in the statute
- Examples of powers that may be directed by third parties
  - Investment decisions
  - Management decisions
  - Distribution decisions

# Directed Trusts Are Not New to Tennessee

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- Original statute allowing directed trusts enacted in 1987 – Tennessee may have been second state to have directed trusts
- Deals with vesting investment decisions or management in third party
- Excluded fiduciary relieved of liability for investment retention, or sale or any other management or administrative decision

# In 2013, Tennessee Modified its Version of the Uniform Trust Code

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- The 2013 changes adopted robust provisions regarding directed trusts
  - Clarify that an excluded fiduciary is not liable for actions of trust advisor or trust protector
  - Limit duties of oversight and reporting for trust advisors or protectors

# Delegated Duties are Not the Same as Directed Duties

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- Under Tennessee law, a trustee may delegate duties that a prudent trustee of comparable skills would delegate
- Must exercise reasonable care, skill and caution in selecting an agent
- Must monitor performance periodically
- More responsibility of trustee (and potential liability)
- Must determine whether a prudent trustee with comparable skills would delegate
- Must exercise reasonable care and skill in selecting the person to whom the duties will be delegated (with directed trust, settlor or grantor determines to whom the duties will be delegated) and must then monitor performance
- Trustee is not liable if it carries out the above duties

# "Excluded Fiduciary"

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- Under Tennessee law, an excluded fiduciary is a trustee, trust protector or trust advisor who is excluded from exercising a power or duty or where the duty is reserved to another person
- If you are an excluded fiduciary with respect to investment decisions, distribution decisions or other decisions, unless the trust provides to the contrary, you have no duty to:
  - Review, inquire or investigate
  - Recommend or consult
  - Communicate with beneficiaries regarding differing opinions

# Why Would You Want a Trust Protector or Advisor?

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- The Tennessee statute describes trust protectors and trust advisors
- May be an individual or a committee that has a power or duty with respect to a trust
- Powers of trust protector or trust advisor may include the power to:
  - Approve distributions
  - Modify trust
  - Perform a trustee duty
  - Direct distributions
  - Veto distributions
  - Direct the acquisition, disposition or retention of any trust investment or consent to action or inaction relating to investments of trust assets
  - Direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the trust instrument

# Trust Protectors and Advisors Are Fiduciaries

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- Must act in good faith
- Must act in accordance with the terms and purposes of the trust
- Must act in the interests of the beneficiaries

# An "Excluded Fiduciary" Is Not Liable For:

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(a) Loss resulting from following directions of a trustee, trust advisor or trust protector, including but not limited to, any loss from the trustee, trust advisor or trust protector breaching fiduciary responsibilities or acting beyond the trustee's, trust advisor's or trust protector's scope of authority;

(b) any loss resulting from any action or inaction of a trustee, trust advisor, or trust protector; or

(c) any loss caused by the failure of the trustee, trust advisor or trust protector to take an action proposed by the excluded fiduciary where the action require the consent of such party and the excluded fiduciary timely sought their consent.

- Statute of Limitations
  - One year following adequate disclosure
  - Otherwise three years from earlier of resignation or removal, termination of beneficiary's interest or termination of trust

# Who Might Consider Naming a Trust Protector or Advisor?

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- A settlor or testator who has concerns regarding
  - Family-owned business assets
  - Special family circumstances
  - Special assets

# How to Create a Directed Trust

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- New wills and trusts – designation of trust advisors and protectors
  - Division of duties between trustee and trust advisors
  - Adoption of favorable state law (Tennessee for example)
- Existing trusts
  - Review of applicable provisions
  - Addition of provisions by agreement of “qualified beneficiaries” or by court order
    - Nonjudicial modification
    - Nonjudicial settlement agreement
  - Decanting to new trust

# How Does Testator, Grantor or Settlor Ensure that the More Favorable Law of Tennessee Governs the Directed Trust?

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- Tennessee law provides that the validity, construction and administration are determined by the law of the state specified in the governing "trust instrument"
- Where the state jurisdiction provision provides that Tennessee law will govern
  - Tennessee and its courts will have jurisdiction over a trust created in a foreign jurisdiction
  - The validity, construction and administration will be determined by the laws of Tennessee
  - The statute provides that this will include the powers, obligations, liabilities and rights of the trustees and other fiduciaries
  - This will also include all powers conferred on a trustee or any other fiduciary

# Questions?

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