

Fingers Crossed: The Proposed Ohio Trust Protector and Directed Trust Act

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Trust Protectors are here to stay

- ▶ We live in an increasingly complex world, requiring specialization
- ▶ Clients of all levels of sophistication employ a team of specialists to provide them with advice and guidance; many are looking to retaining a team after they pass away
- ▶ Several other factors point to the need for trust protectors:
 - ▶ Not everyone is good at everything
 - ▶ Trust arrangements are built to last generations
 - ▶ Tax laws remain volatile
 - ▶ In an environment with increasing litigation, some fiduciaries may only be willing to accept the role if there is a team assembled to complete the task

What is a Trust Protector?



- ▶ No standard definition
 - ▶ Someone who holds a variety of powers
 - ▶ NOT someone who has day to day administrative responsibilities
- ▶ A well drafted Trust Protector provision clearly describes:
 - ▶ Each power of the Trust Protector
 - ▶ When the power can be exercised
 - ▶ How the power is exercised, and
 - ▶ Who gets notice when a power is exercised

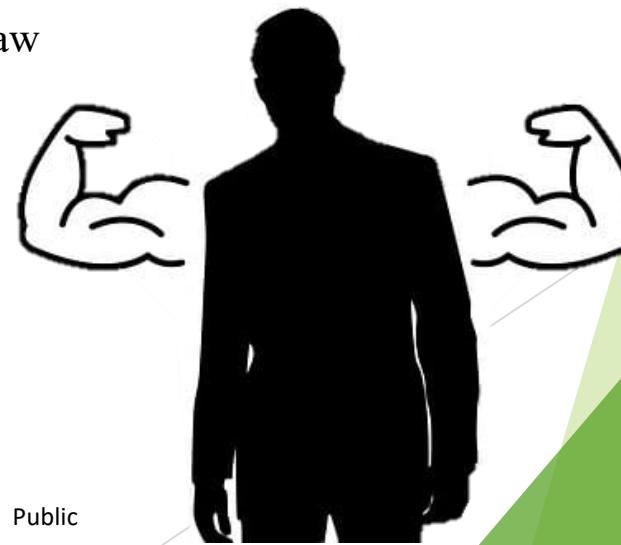
Power of Supervision

- ▶ The primary goal is to monitor the Trustee
- ▶ Powers are similar to those retained by a grantor over fiduciary in a revocable trust
- ▶ The Powers of Supervision include:
 - ▶ Power to direct, consent to, or veto investment decisions
 - ▶ Power to review and approve accounts
 - ▶ Power to remove and replace the Trustee



Power of Administration

- ▶ Alternative to existing law:
 - ▶ Court approved modification
 - ▶ Private Settlement Agreement/Nonjudicial Settlement Agreement
 - ▶ Decanting
- ▶ The Powers of Administration include the:
 - ▶ Power to modify in response to changes in the tax law or state law
 - ▶ Power to modify to change the tax status of the trust
 - ▶ Power to change the governing law
 - ▶ Power to terminate the trust



Power of Disposition

- ▶ These powers allow the Trust Protector to act as a virtual grantor
- ▶ The Powers of Disposition include the:
 - ▶ Power to direct distributions
 - ▶ Power to veto distributions
 - ▶ Power to grant or modify a power of appointment
 - ▶ Power to add or remove beneficiaries
 - ▶ Power to extend the date of withdrawal
 - ▶ Power to amend the trust
- ▶ *Be sure that you are not accidentally granting a general power of appointment to the Trust Protector!*



What about the Uniform Directed Trust Act?

Purpose and Intent of UDTA

- ▶ Adopted in 2017
- ▶ Establishes a mandatory minimum fiduciary duty for a Trust Protector
 - ▶ Section 8 – same standard as a trustee in a like position
 - ▶ Drafter can incorporate higher standard
- ▶ Define duty and liability for a Directed Trustee
- ▶ Adopted in 21 jurisdictions, including many which are Ohio adjacent

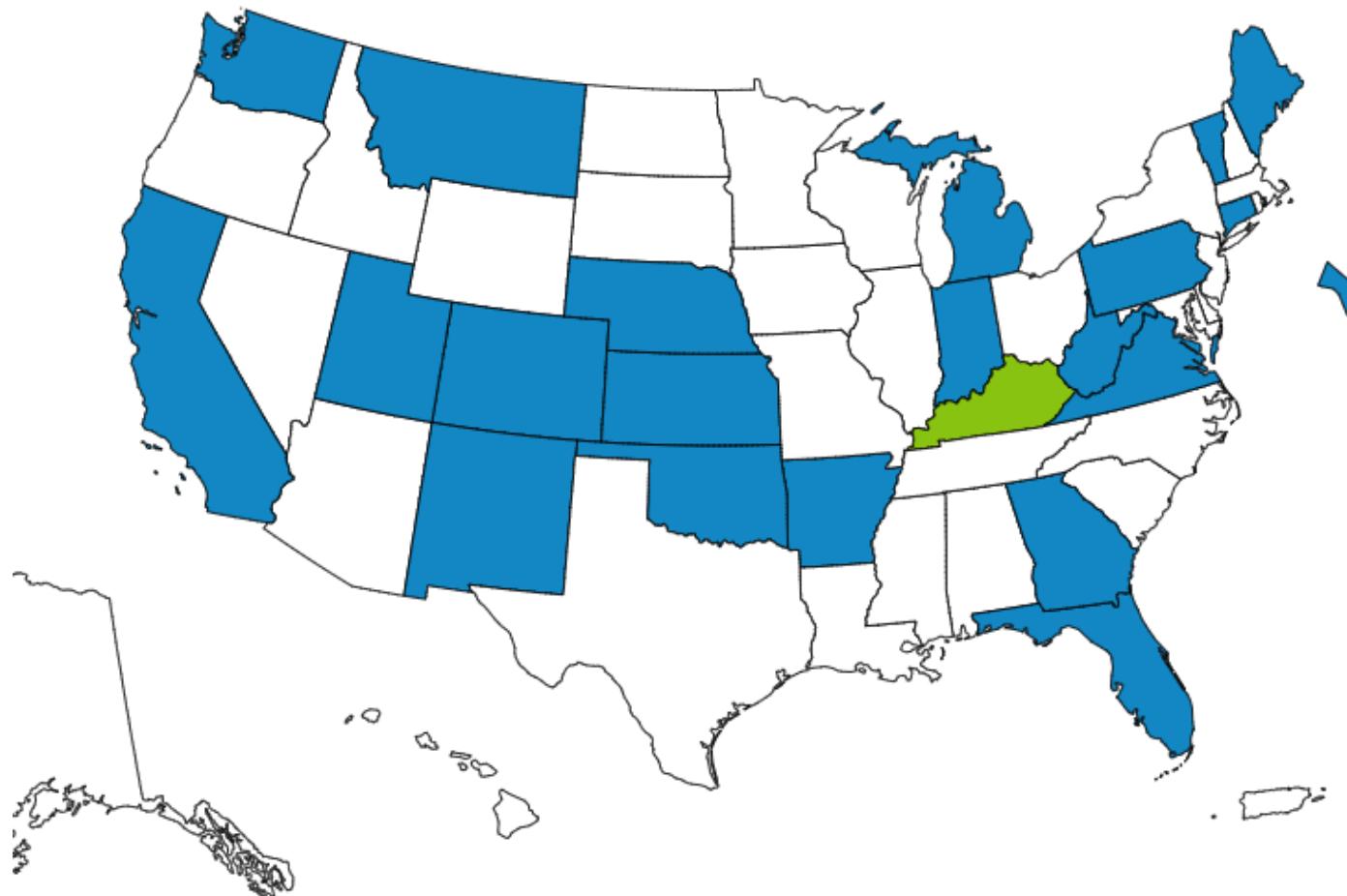


Map

Bill List

Summary

Enactment History



Trust Director's Authority and Responsibility

- ▶ Section 6 - Broadly applies to any power of direction
- ▶ Limited exceptions to mandatory minimum fiduciary standard:
 1. Power of appointment;
 2. Power to appoint or remove a trustee or Trust Director;
 3. Power of a settlor over a revocable trust;
 4. Power of a beneficiary over a trust that affects the beneficial interest of the beneficiary or another represented by the beneficiary; and
 5. Power over a trust if the trust provides that the power is held in a nonfiduciary capacity and the power must be held in a nonfiduciary capacity for federal tax purposes.

Directed Trustee's Duty and Responsibility

- ▶ Directed Trustee must take reasonable action to comply with Trust Direction
- ▶ Only liable for “willful misconduct” in following Trust Direction
- ▶ Following Trust Direction which is a breach of trust by Trust Director is NOT a breach of trust by Directed Trust if the Trust Direction is within the scope of Trust Director’s authority
- ▶ No duty to determine whether the Trust Direction is reasonable
- ▶ Directed Trustee can seek instructions from court on how to proceed

Ohio's Proposed Solution: The Ohio Trust Protector and Directed Trust Act



What is a Protector?

- ▶ Issue 1: How is the role of trust protector defined?
- ▶ Current Ohio law does not have a definition
- ▶ Solution: The statute creates some standard definitions
 - ▶ Power of Direction
 - ▶ Trust Directives
 - ▶ Protectors

The Problem with a Fiduciary Standard

- ▶ Issue 2: Is the protector a fiduciary? And what happens when they aren't?
- ▶ Are there scenarios where needed flexibility, and desire of the clients, may require a non-fiduciary standard
 - ▶ A trusted trust officer moves from one Bank to another
 - ▶ A fiduciary needs to determine when and how to sell an operating business
- ▶ If the protector is subject to a fiduciary standard, just like a trustee, then what is the utility in appointing a different person to complete essentially the same task?

Standard of Conduct

- ▶ Current Ohio law creates a default fiduciary standard (ORC Section 5808.08(D))
- ▶ When serving as a fiduciary
 - ▶ Trust Protector must act in good faith
 - ▶ Trust Protector owes duty to beneficiaries
- ▶ When serving as a non-fiduciary what standard should be used (if any)?
 - ▶ Reasonable?
 - ▶ Reckless?
 - ▶ Willful misconduct?



A New Floor

- ▶ A new Willful Conduct standard: “intentional wrongdoing, not mere negligence, gross negligence or recklessness.”
- ▶ Wrongdoing: “malicious conduct or conduct designed to defraud or seek an unconscionable advantage.”



Liability of the Trustee

- ▶ Is the Trustee immune when directed?
- ▶ Current Ohio law (ORC Section 5815.25)
 - ▶ Excluded fiduciary
 - ▶ Only applies to administrative and investment powers/duties
- ▶ Unanswered questions:
 - ▶ Duty to notify beneficiaries?
 - ▶ Duty to inform Trust Protector?
- ▶ These issues can be resolved through careful drafting



New Rights and Responsibilities

- ▶ A trustee must now be subject to the willful conduct standard
- ▶ The trustee can request that a protector reduce their requests to writing and can seek judicial clarification if needed
- ▶ The trustee and protector each must provide information to the other when it is reasonably related to powers and duties
- ▶ Each is only liable for breach of trust if reliance on information is deemed “willful misconduct”

Who's Left Holding the Bag?

- ▶ The current Ohio law creates potential scenarios where aggrieved beneficiaries may be left without legal recourse
- ▶ Example: a trust protector is empowered to direct trust investments, without the limits of a fiduciary standard. The protector instructs the trustee to buy an investment that turns out to be a Ponzi scheme. Who is liable?
- ▶ The proposed Protector Act instead creates liability for BOTH parties when their actions are considered willful conduct

Questions?