

Michigan's New Directed and Divided Trust Laws
Can Mere Mortals Use This?
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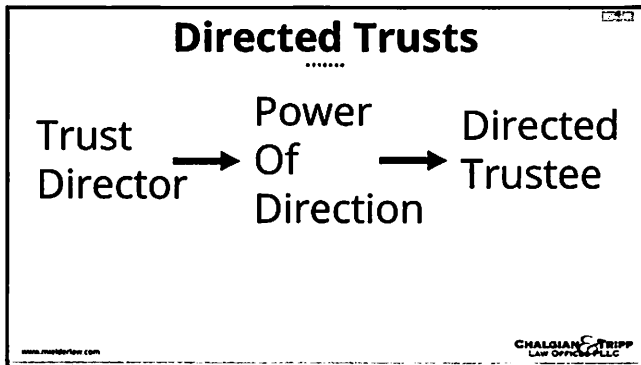
Directed Trusts vs. **Divided Trusts**
 MCL 700.7703a vs. MCL 700.7703b
 Based on the Uniform Directed Trust Act vs. A Michigan Original!
 Replaces Trust Protector Law

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Why???

- Trustee Intent
- Let Experts Do What They Do Best
- Manage Non-Traditional Assets
- Increase # of Fiduciaries?
- Creative Trust Options / Modernize Trusts

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Trust Director

- Someone who is granted a "power of direction."
- Nobody cares what they are called.
- Must otherwise qualify as a Trustee - Individual or Bank.
- Can be beneficiary/settlor.

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Power of Direction:

1. A power granted by the terms of the trust while person is not serving as Trustee.
2. Includes a power over the investment, management, or distribution of trust property or other matters of trust administration.
3. Does not include certain powers described in the statute.

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Directed Trustee

- Directed Trustee "shall" exercise power of direction.
- Not liable for complying with a power of direction unless colluding with or defrauding directed trustee.
- Greater relief from liability than a Trustee had from Trust Protectors had - old MCL 700.7809.



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- Did I give someone other than the Trustee a power to do something in my Trust?
- Is it a power excluded under 700.7703a?
- Did I really want to relieve the Trustee of that duty?
- Do I want the non-Trustee who I gave the power to 'do something' to have fiduciary duties?

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Excluded Powers

1. A power of appointment intended to be held by a donee in a nonfiduciary capacity.

e.g., H gives to W for W's life then to H's descendants as W might appoint by will.

Trust terms could always impose a fiduciary duty.

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Excluded Powers

2. Power to appoint or remove a trustee or trust director.

Trust terms could always impose a fiduciary duty.

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Excluded Powers

3. Power of a settlor over a trust to the extent that a settlor has the power to revoke the trust.

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Excluded Powers

4. A power of a beneficiary over a trust to the extent it only impacts the beneficiary.

e.g., A beneficiary releasing Trustee of liability that only impacts the beneficiary = ok. Release of liability that could impact other beneficiaries = subject to fiduciary duty.

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Excluded Powers

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5. Power held in a nonfiduciary capacity to achieve the settlor's tax objectives.

e.g., Power to substitute property

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Powers of Direction

- 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.

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Powers of Direction

- 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.

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Powers of Direction

- 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.
- Release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.

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Powers of Direction

- Etc., etc., etc.....
- "a power over the investment, management, or distribution of trust property or other matters of trust administration."

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Did I want to release Trustee of Liability?


- Not liable for complying with a power of direction unless colluding with or defrauding directed trustee.
- Also, no duty to:
 - Monitor Trust Director
 - Inform or give advice concerning an instance in which the trustee might have acted differently.
- There is a duty to share information with Trust Director.



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I have a power of direction. Do I want the Trust Director to have a fiduciary duty?


- A Trust Director has same fiduciary duty as Trustee in exercise or nonexercise of a power of direction.
- Applies to existing trusts for actions taken after March 29, 2019.
- Do I want boilerplate exemptions in case I inadvertently created a power of direction?

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A trust's terms can relieve a director from liability except for:

- Acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
- The term was inserted as the result of an abuse by the trust director or a fiduciary or confidential relationship to the settlor.




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Health Care Professional Liability Exception

If a trust director is licensed, certified, or otherwise authorized or permitted by law other than this section to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this section. MCL 7703a(6).



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Thoughts for Special Needs / Discretionary Trust / DINK Planning

- Discretionary distributions.
- Residency and care decisions.
- Big purchases - e.g., houses, cars.
- Medication / Treatment assurance - carrot and stick.
- Spendthrift protection.
- Care management direction.

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Thoughts for Special Needs / Discretionary Trust / DINK Planning

- Modification and amendment of Trust.
- Trigger SNT provisions.
- Trigger Medicaid planning?
- Decanting powers.
- Manage closely held or unique assets.
- Retirement benefit management.
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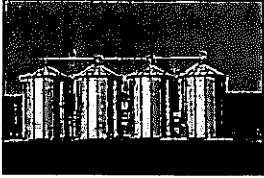


- What do we call people who are assisting/advising Trustee, but who do not have a power of direction? (Note: Comments say this is to combine concepts of "trust protector" and "trust advisor.")
- What if Trust Director hasn't accepted? Do I have them accept at the creation of trust?
- Can I give the Trustee the affirmative duty to retain powers until a Trust Director has accepted and is in place?
- What about someone who has a passive right? E.g., A right to review accountings.
- How do we draft to prevent Trustee from getting rid of liability? Delegation vs. direction?

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Divided Trusts - MCL 700.7703b

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Investment Trustee

Distributions Trustee

Resultant Trustee

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Aggregate Trust

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Investment Trustee

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- Investment Trustee = Investment Function
- What's an investment function?
 - How you define it in the Trust document

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Distributions Trustee

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- Distribution Trustee - Administering discretionary distributions for the benefit of the trust beneficiaries affected by the specified discretionary trust provisions.

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Resultant Trustee

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- **Resultant Trustee - Everything not allocated to the an investment trustee and distributions trustees.**

Note: Arguably the most important role.

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Aggregate Trust Duties

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• **Considered co-trustees for purposes of:**

- Taking, holding, transferring, and defending title to trust property.
- Determining venue and interested persons in proceedings concerning the aggregate trust.
- Liability for taxes.
- To tattle on a co-trustee to a settlor or a beneficiary. **BUT** no duty to actually do this.

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Divided Trusts – MCL 700.7703b

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- Investment Trustee
- Distributions Trustee
- Resultant Trustee

- **Not liable for act or omission of another separate trustee.**
- **No duty to monitor the actions of the other separate trustees.**
- **No duty to notify or warn a settlor or beneficiary of a breach of trust or possible breach of trust on the part of another separate trustee.**
- **No duty to ensure a vacancy in a separate trusteeship is filled.**

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Required Provisions under MCL 700.7703b

- If there is a separate investment trustee, define the investment function.
- If there is a separate distributions trustee, define the discretionary trust provision(s) that this person can exercise discretion under.
- For a trust with a separate investment trustee, whether the separate investment trustee or resultant trustee will determine the investment allocation policy

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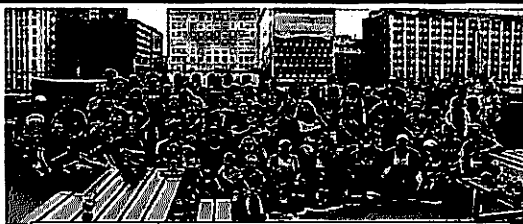
Required Provisions under MCL 700.7703b

- Define which separate trustee is responsible for:
- Allocating receipts and disbursements to income and principal, unless the trust is a unitrust.
 - Tax compliance and interacting with governmental agencies.
 - Defending challenges to the purpose or validity of the trust.
 - Whether to make loans to trust beneficiaries, enterprises in which a beneficiary has an ownership interest, and enterprises in which the aggregate trust has an ownership interest

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Thank You!

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