

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
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As Engrossed: S4/4/19
A Bill

HOUSE BILL 1765

By: Representative Maddox
By: Senator Maloch

For An Act To Be Entitled

AN ACT TO ESTABLISH THE UNIFORM DIRECTED TRUST ACT;
AND FOR OTHER PURPOSES.

Subtitle

TO ESTABLISH THE UNIFORM DIRECTED TRUST
ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 28-73-103(19), concerning the definition of "terms of a trust" under the Arkansas Trust Code, is amended to read as follows:

(19) "Terms of a trust" means:

(A) except as otherwise provided in § 28-76-102(8)(B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) as may be established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law;

(ii) court order; or

(iii) a nonjudicial settlement agreement under § 28-73-111.



SECTION 2. Arkansas Code § 28-73-105(b)(2), concerning the construction of the terms of a trust under the Arkansas Trust Code, is amended to read as follows:

(2) subject to § 28-76-109 and §§ 28-76-111 – 28-76-112 of the Directed Trust Act, the duty of a trustee to act in good faith and in accordance with the purposes of the trust;

SECTION 3. Arkansas Code § 28-73-603 is amended to read as follows:
28-73-603. Settlor's powers – Powers of withdrawal.

(a) To the extent a trust is revocable by a settlor, a trustee may follow a direction of the settlor that is contrary to the terms of the trust. To the extent a trust is revocable by a settlor in conjunction with a person other than a trustee or person holding an adverse interest, the trustee may follow a direction from the settlor and the other person holding the power to revoke even if the direction is contrary to the terms of the trust.

(b) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

~~(b)~~(c) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

SECTION 4. Arkansas Code § 28-73-808 is repealed.

~~28-73-808. Powers to direct.~~

~~(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.~~

~~(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the 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.~~

~~(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.~~

~~(d) A person, other than a beneficiary, who holds a power to direct is~~

~~presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.~~

SECTION 5. Arkansas Code Title 28 is amended to add a new chapter to read as follows:

CHAPTER 76

UNIFORM DIRECTED TRUST ACT

28-76-101. Title.

This chapter may be cited as the Uniform Directed Trust Act.

28-76-102. Definitions.

As used in this chapter:

(1) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust, this chapter, or law of this state other than this chapter pertaining to trusts.

(2) "Directed trust" means a trust for which the terms of the trust grant a power of direction.

(3) "Directed trustee" means a trustee that is subject to a trust director's power of direction.

(4) "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(5) "Power of direction" means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not serving as a trustee. The term includes a power over the investment, management, or distribution of trust property or other matters of trust administration. The term excludes the powers described in § 28-76-105(b).

(6) "Settlor" means a person, including a testator, that creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to

the extent another person has the power to revoke or withdraw that portion.

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

(8) "Terms of a trust" means:

(A) except as otherwise provided in subparagraph (8)(B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accordance with applicable law;

(ii) court order; or

(iii) a nonjudicial settlement agreement under § 28-73-111.

(9) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary or settlor of the trust.

(10) "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

28-76-103. Application – Principal place of administration.

(a) This chapter applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(1) If the trust was created before January 1, 2020, this chapter applies only to a decision or action occurring on or after January 1, 2020.

(2) If the principal place of administration of the trust is changed to this state on or after January 1, 2020, this chapter applies only to a decision or action occurring on or after the date of the change.

(b) Without precluding other means to establish a sufficient

connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of administration of the trust are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

28-76-104. Common law and principles of equity.

The common law and principles of equity supplement this chapter, except to the extent modified by this chapter or law of this state other than this chapter.

28-76-105. Exclusions.

(a) In this section, "power of appointment" means a power that enables a person acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over trust property.

(b) This chapter does not apply to a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a settlor over a trust to the extent the settlor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary under § 28-73-301 et seq. with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(B) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the United States Internal Revenue Code of 1986, as amended.

(c) Unless the terms of a trust provide otherwise, a power granted to a person to designate a recipient of an ownership interest in or power of

appointment over trust property which is exercisable while the person is not serving as a trustee is a power of appointment and not a power of direction.

28-76-106. Powers of trust director.

(a) Subject to § 28-76-107, the terms of a trust may grant a power of direction to a trust director.

(b) Unless the terms of a trust provide otherwise:

(1) a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director under subsection (a); and

(2) trust directors with joint powers must act by majority decision.

28-76-107. Limitations on trust director.

A trust director is subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power under § 28-76-106(b)(1) regarding:

(1) a payback provision in the terms of a trust necessary to comply with the reimbursement requirements of Medicaid law in Section 1917 of the Social Security Act, 42 U.S.C. Section 1396p(d)(4)(A), as amended; and

(2) a charitable interest in the trust, including notice regarding the interest to the Attorney General.

28-76-108. Duty and liability of trust director.

(a) Subject to subsection (b), with respect to a power of direction or further power under § 28-76-106(b)(1):

(1) a trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power:

(A) if the power is held individually, as a sole trustee in a like position and under similar circumstances; or

(B) if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances; and

(2) the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this chapter 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 chapter.

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

28-76-109. Duty and liability of directed trustee.

(a) A directed trustee shall take reasonable action to comply with a trust director's direction given to the directed trustee by a trust director acting within the scope of the powers expressly granted to the trust director in the trust instrument, and except as otherwise provided in the trust instrument, the directed trustee is not liable for:

(1) any loss that results directly or indirectly from any act taken or omitted as a result of the reasonable action of the directed trustee to comply with the direction of the trust director or the failure of the trust director to provide consent; and

(2) whenever a directed trust reserves to a trust director the authority to direct the making or retention of any investment, to the exclusion of the directed trustee, the directed trustee shall not be liable for any loss resulting from the making or retention of any investment under such direction.

(b) Absent contrary provisions in the governing instrument, the actions of a directed trustee taken under subsection (a) of this section to comply with a direction of a trust director are administrative actions taken by the directed trustee solely to allow the directed trustee to perform the duties assigned to the directed trustee under the governing instrument and the administrative actions shall not constitute an undertaking by the directed trustee to participate in or otherwise take any fiduciary responsibility for the direction of a trust director.

(c) In an action against a directed trustee under this section, the burden to prove the matter by clear and convincing evidence is on the person seeking to hold the directed trustee liable.

(d) A directed trustee that has reasonable doubt about its duty under

this section may petition the court for instructions.

(e) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

28-76-110. Duty to provide information to trust director or trustee.

(a) Subject to § 28-76-111, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the trustee; and
- (2) the powers or duties of the director.

(b) Subject to § 28-76-111, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

- (1) the powers or duties of the director; and
- (2) the powers or duties of the trustee or other director.

(c) A trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.

(d) A trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance.

28-76-111. No duty to monitor, inform, or advise.

(a) Unless the terms of a trust provide otherwise:

- (1) a trustee does not have a duty to:
 - (A) monitor a trust director; or
 - (B) inform or give advice to a settlor, beneficiary,

trustee, or trust director concerning an instance in which the trustee might have acted differently than the director; and

(2) by taking an action described in paragraph (1), a trustee does not assume the duty excluded by paragraph (1).

(b) Unless the terms of a trust provide otherwise:

- (1) a trust director does not have a duty to:
 - (A) monitor a trustee or another trust director; or
 - (B) inform or give advice to a settlor, beneficiary,

trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust

director; and

(2) by taking an action described in paragraph (1), a trust director does not assume the duty excluded by paragraph (1).

28-76-112. Application to trustee.

The terms of a trust may relieve a cotrustee from duty and liability with respect to another cotrustee's exercise or nonexercise of a power of the other cotrustee to the same extent that in a directed trust a directed trustee is relieved from duty and liability with respect to a trust director's power of direction under §§ 28-76-109 – 28-76-111.

28-76-113. Limitation of action against trust director.

(a) An action against a trust director for breach of trust must be commenced within the same limitation period as § 28-73-1005 for an action for breach of trust against a trustee in a like position and under similar circumstances.

(b) A report or accounting has the same effect on the limitation period for an action against a trust director for breach of trust that the report or accounting would have under § 28-73-1005 in an action for breach of trust against a trustee in a like position and under similar circumstances.

28-76-114. Defenses in action against trust director.

In an action against a trust director for breach of trust, the director may assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

28-76-115. Jurisdiction over trust director.

(a) By accepting appointment as a trust director of a trust subject to this chapter, the director submits to personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

28-76-116. Office of trust director.

Unless the terms of a trust provide otherwise, the rules applicable to

a trustee apply to a trust director regarding the following matters:

- (1) acceptance under § 28-73-701;
- (2) giving of bond to secure performance under § 28-73-702;
- (3) reasonable compensation under § 28-73-708;
- (4) resignation under § 28-73-705;
- (5) removal under § 28-73-706; and
- (6) vacancy and appointment of successor under § 28-73-704.

28-76-117. Uniformity of application and construction.

In applying and construing this act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

28-76-118. Relation to the Electronic Signatures and Global National Commerce Act.

This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 6. EFFECTIVE DATE. This act shall be effective on and after January 1, 2020.

/s/Maddox