

# The Cannon Estate Planning Teleconference Series

*Participant Guide*

# **Directed Trusts: Risks and Liabilities**

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# Directed Trusts: Risks and Liabilities

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## I. INTRODUCTION

### A. In General

Directed trusts, largely unknown in the United States just a few decades ago, are becoming increasingly common. In a directed trust, the trust instrument provides that a non-Trustee party (variously called a director, an advisor or a protector) has the power to direct the Trustee in carrying out one or more identified responsibilities. The protector has the power to direct the Trustee as to the matter under the protector's control, and often the Trustee has no discretion over that particular area of administration. Sometimes, a settlor will designate a protector to have authority over investment decisions, although a settlor may designate a protector to oversee other Trustee functions, such as distributions, as well. This arrangement is quite different from a delegated trust, where the Trustee contracts with another party to perform certain administrative services on the Trustee's behalf. That party acts as an agent of the Trustee, subject to the terms of the contractual relationship.<sup>1</sup>

### B. Investment Decisions

One of the most common types of directed trusts is one in which a settlor names a protector to direct investment decisions. A settlor might wish to name a family member as Trustee but may believe this person does not have the level of sophistication or time required to manage the trust's investments. Naming a protector to direct the Trustee as to the trust investments may sometimes be advisable, particularly for large trusts or those with unique assets that require special skills or knowledge. Another situation suited for a directed trust is where the settlor wishes to have many of the advantages of a corporate Trustee but simply prefers a particular individual to have superseding control over investments.

### C. Alternative Approach: Co-Trustee With Authority Over Selected Actions

Alternatively, a settlor may wish to designate a particular Co-Trustee to have exclusive control of selected fiduciary actions. An example would be a distribution Trustee having authority over discretionary payments to beneficiaries to the extent provided by the trust instrument. Another example would be an administrative Trustee empowered to hold legal title to and maintain custody of trust property, establish and monitor trust accounts, implement ministerial aspects of transactions, prepare and file tax returns and prepare and transmit accountings to beneficiaries.<sup>2</sup>

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<sup>1</sup> See, e.g., Uniform Trust Code ("UTC") § 807.

<sup>2</sup> See Gordon, *Slicing and Dicing of Trustees' Duties: When and How to Use Directed Trusts*, AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, Fall Meeting (September 15, 2008).

## **D. Self-Settled Trusts**

Settlors of so-called “self-settled trusts” wish to retain as much control as possible over fiduciary functions while protecting their assets from potential claims of creditors and from the grasp of a bankruptcy trustee should the settlor file a bankruptcy petition. One technique that may contribute to accomplishing this objective, in addition to providing generally for additional flexibility, is to vest certain powers in a trust protector. Generally, a disinterested third party serving as a trust protector can provide more flexibility than a Co-Trustee with specified, overriding powers because a third-party protector may have fewer fiduciary constraints and give rise to fewer conflicts of interest.

## **II. STATE LAWS AND DESIRABLE GOVERNING INSTRUMENT PROVISIONS REGARDING DIRECTED TRUSTS**

### **A. In General**

Many states have now adopted statutes setting the statutory framework for the powers and duties of directed Trustees and trust directors. Some of these statutes follow the Uniform Trust Code (“UTC”) while legislatures in other states have crafted their own statutes. Still, some states, including New York and California, have not yet enacted a directed trust statute. In July 2017, the National Conference of Commissioners on Uniform State Laws approved the Uniform Directed Trust Act (the “UDTA”), which provides comprehensive rules for directed trusts. The UDTA has been enacted in fifteen states.<sup>3</sup>

### **B. Uniform Trust Code**

Most states with directed trust statutes generally follow the approach under UTC § 808(b)–(d). *See, e.g.*, Fla. Stat. § 736.0808; Mass. Gen. L. ch. 203E, § 808; Mich. Comp. Laws § 700.7809.

Powers to Direct:

- 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

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<sup>3</sup> Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Maine, Michigan, Montana, Nebraska, New Mexico, Utah, Virginia, Washington and West Virginia.

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.

### **C. Uniform Directed Trust Act**

Section 2(5) of the UDTA defines a power of direction as “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.” Thus, the UDTA applies very broadly to any powers with respect to a trust held by someone other than a Trustee (except to the extent exclusions apply) including a power over the “investment, management, or distribution of trust property or other matters of trust administration.” The UDTA appears to authorize the creation of a directed trust that can specify powers of direction (such as investments and distributions), but the statute does not prescribe any default powers. The UDTA does state that, unless the trust agreement provides otherwise, a trust director “may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the director,” (for example, providing accountings, employing advisors and initiating litigation to enforce the powers).<sup>4</sup>

The UDTA also specifies that the trust director has the same fiduciary duties and liabilities as a Trustee and that the duties of the trust director can vary to the same extent that the duties of a Trustee can vary.<sup>5</sup> Moreover, the duties of a trust director can be “triggered,” meaning that the trust director would be under no duty to act unless and until he or she was requested to do so by a beneficiary.<sup>6</sup>

The UDTA also specifies the fiduciary obligations of the directed Trustee. The Act follows the approach of the Delaware statute, referenced below, which limits the liability of the directed Trustee to “reasonable action to comply with a trust director’s exercise or nonexercise of a power of direction,” except that “a directed trustee must not comply with a trust director’s exercise or nonexercise of a power of direction...to the extent that by complying the trustee would engage in willful misconduct.”<sup>7</sup>

## **III. WAYS TO DIVIDE DUTIES AND RESPONSIBILITIES OF TRUST ADMINISTRATION BETWEEN TRUSTEE AND TRUST PROTECTOR**

### **A. Considerations When Using a Trust Protector**

One of the primary drawbacks of using a trust protector is that it creates a greater administrative burden for the Trustee and consequentially increases costs. Use of a protector can also result in some delay in the Trustees exercising their powers and discretions while they await the consent of the protector. These problems can be exacerbated by poor trust design. It is imperative that the trust instrument clearly identify the administrative tasks that are to be directed

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<sup>4</sup> See Akers, *Heckerling Musings and Estate Planning Current Developments*, May 2018, at <http://www.bessemertrust.com>.

<sup>5</sup> Uniform Directed Trust Act (“UDTA”) §8(a).

<sup>6</sup> UDTA §8(a), Comment.

<sup>7</sup> UDTA § 9(a)-(b).



and the timeframe in which such direction is to apply. Ensuring there is a clear delineation of duties can help to avoid conflicts and misunderstandings.

The case of *Shelton v. Tamposi*<sup>8</sup> provides a cautionary tale for those who design and administer directed trusts and shows that the trust instrument must make clear who is in charge when investment and distribution decisions are placed in different hands. In *Shelton*, the sole Trustee was in charge of distributions, and investment directors were responsible for investment and management of trust assets. The investment directors had sole authority to direct the retention or sale of all trust assets and to direct the purchase of property. The Trustee claimed she could require the investment directors to sell illiquid investments to make funds available for distributions. Affirming the lower court, the New Hampshire Supreme Court disagreed and held that the distribution authority of the Trustee was subordinate to that of the investment directors.

A trust protector is sometimes considered when the Trustee will hold nontraditional assets, such as intellectual property, livestock, closely-held business interests, artwork, oil, gas and other minerals and certain real estate such as farm and ranch property, timberland and commercial property. The general duties of a Trustee holding nontraditional assets are presumptively similar to a Trustee's duties regarding other trust assets, but the management of these assets may require the involvement of a trust protector with specialized knowledge concerning such assets.

## **B. Designing Directed Trust Provisions**

### **1. Veto and Consent Powers**

Some trust instruments provide that, in a context in which a trust protector has overriding authority, the Trustee must submit a proposed transaction to the trust protector thereby affording the protector the opportunity to approve or veto the proposed transaction. With regard to veto powers, the trust instrument should define when the Trustee may act if the trust protector does not respond. Typically, veto provisions allow the Trustee to act if a trust protector does not expressly veto a distribution or transaction or if the trust protector does not respond within a specified time (*e.g.*, 30 days) after notice to the trust protector of the proposed distribution or transaction. A related issue is whether every single transaction technically within the trust protector's "jurisdiction" must be subject to the trust protector's veto or consent. It is usually advisable to allow the Trustee to administer the trust without nitpicking disruption and require the trust protector's approval only for significant transactions (*e.g.*, over a specified dollar amount or regarding the sale of closely-held business interests or certain other property).

### **2. Trustee Removal and Replacement Powers**

Giving an independent trust protector, rather than beneficiaries, the authority to remove and replace Trustees may be desirable because such a provision can help ensure that the removal right cannot be abused. Such a power will discourage the notion that there is a so-called Trustee "revolving door," in which Trustees are influenced in their decision-making by their apprehension that any decision that is not acceptable to a beneficiary with removal powers will

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<sup>8</sup> *Shelton v. Tamposi*, 62 A.3d 741 (N.H. 2013).

result in the current Trustee's dismissal. Alternatively, the requirement of some appropriate cause for removal can be strengthened by a trust provision stating, in effect, that, if the trust protector believes a proposed removal is improper, he or she may delay the removal and institute a specified dispute resolution proceeding, such as a court proceeding or arbitration.

### **3. *Powers Involving Administrative Matters***

In addition, administrative matters involving a trust protector should be considered and addressed in the trust instrument much in the same way they are considered and addressed for the Trustee. Questions of compensation and reimbursement for reasonable expenses, the employment of agents and tax counsel, indemnification and access to all trust records are issues that may be addressed.<sup>9</sup> Further, the trust instrument may provide that a trust protector may resign and how resignation is accomplished. In addition, any trust protector should be required to acknowledge his, her or its acceptance of the office in writing. The trust instrument should also contain provisions allowing the Trustee to act during any period where there is no trust protector serving, as could happen, for example, if a trust protector dies or becomes incapacitated and a successor is not quickly appointed.

### **4. *Avoiding Conflicts of Interest***

To ensure that the trust protector is not influenced by conflicts of interest and that the settlor, the beneficiaries and the individual trust protector avoid undesired tax and other legal consequences, the trust instrument should prohibit: (a) the trust protector from appointing as Trustee him or herself, his or her spouse, any relatives of the trust protector or any individuals in business with the trust protector; and (b) the appointment as trust protector of the settlor, the settlor's spouse, any trust beneficiaries or any other person who has contributed property to the trust.<sup>10</sup> A disinterested party serving as trust protector will usually be safer and provide greater flexibility.<sup>11</sup>

Ultimately, the settlor and the practitioner should have the trust purposes in mind early in the estate planning process and attempt to anticipate reasonably the powers that would most likely assist in carrying out the trust purposes and that would be better held in the hands of someone other than the Trustee. The practitioner must be mindful, however, that some of these choices may have tax, fiduciary and/or creditor protection ramifications.

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<sup>9</sup> See Bove, "The Trust Protector: Trust(y) Watchdog or Expensive Exotic Pet?" 30 EST. PLAN. 390 (Aug. 2003).

<sup>10</sup> See Treas. Reg. § 25.2511-1(g)(2); Rev. Rul. 95-58, 1995-2 C.B. 191.

<sup>11</sup> For a case in which trust protectors who had strong, objective ties to the settlor and consistently acted in accordance of the settlor's wishes were essentially considered the puppets and alter egos of the settlor, see *Securities and Exchange Commission v. Wyly*, 56 F.Supp.3d 394 (S.D.N.Y. 2014).

#### **IV. NATURE OF A TRUST PROTECTOR AND WHETHER A TRUST PROTECTOR IS OR SHOULD BE A FIDUCIARY**

##### **A. Common Trust Protector Powers**

While there is no standard laundry list of powers to be given to a trust protector, following are powers commonly conferred by a trust instrument on a protector:

- Overseeing the discretionary distribution decisions or investment decisions of a Trustee, whether the Trustee is an individual or a corporate Trustee. Such power may include the power to direct or veto distributions of trust income or principal or investment decisions. This may be particularly important if the principal asset of the trust is a closely-held business interest, an art collection or other unique property. The trust instrument could provide for at least one trust protector whose consent is required for the distribution of trust property to the beneficiary, thereby limiting such beneficiary's interest so as to avoid creditor claims and to keep trust assets out of such beneficiary's bankruptcy estate.
- Removing, adding and replacing a Trustee, trust advisor or committee member without court approval.
- Adding or removing beneficiaries.
- Changing the situs and governing law of the trust, which may include the removal and replacement of Trustees to accomplish such a change.
- Consenting to the exercise of a power of appointment. The settlor may wish to provide that any exercise of a power of appointment is subject to the trust protector's consent to protect against undue influence upon the donee of the power.
- Granting a general power of appointment to a beneficiary to achieve a basis step-up for trust assets after having examined the income and transfer tax consequences of so doing.
- Approving Trustee accounts.
- Arbitrating disputes among beneficiaries and the Trustee.
- Terminating the trust.
- Modifying a trust instrument's administrative or dispositive provisions to maintain tax advantages, to adapt to changing circumstances involving beneficiaries or to deal with new state or federal laws or regulations. If a trust modification is within the exclusive authority of the trust protector, the Trustee ordinarily would be protected from liability for following the protector's instructions with regard to the modification.

##### **B. Fiduciary Duty of Trust Protectors**

There is minimal authority in the United States discussing the issue of whether a trust protector will be considered a fiduciary and if so, to what extent.<sup>12</sup> Section 808(d) of the UTC seems to indicate that a trust protector is a fiduciary: "A person, other than a beneficiary, who

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<sup>12</sup> See Bove, *supra*.

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.” The use of the word “presumptively” implies that a trust instrument may provide that a trust protector is not a fiduciary.<sup>13</sup>

Under the UDTA, a trust director generally has the same extent of fiduciary duty and potential liability as a Trustee would have under similar circumstances.<sup>14</sup> Unlike Section 808(d) of the UTC, however, it seems doubtful that, under the UDTA, a trust director can be completely absolved of fiduciary duties.<sup>15</sup>

In Alaska and Arizona, a trust protector shall not be liable as a fiduciary or Trustee unless so mandated in the trust instrument.<sup>16</sup> Some state statutes explicitly hold trust directors liable for losses that result from breach of fiduciary duty.<sup>17</sup>

Although some clients may wish to specify that the trust protector is a fiduciary so that the protector must act in the beneficiaries’ best interests, the client should keep in mind a fiduciary standard may increase disputes because the beneficiaries will have the ability to enforce the trust protector’s fiduciary duty if one or more of the beneficiaries believe that duty has been violated. In addition, potential trust protectors may be less likely to serve if they know that they will be subject to a fiduciary standard. One may reasonably question whether there is any functional difference between a trust protector with fiduciary duties and a Co-Trustee with prescribed powers. Note that some prospective Trustees (particularly corporate fiduciaries) lack enthusiasm for accepting appointment under a trust instrument that designates a trust protector that is not a fiduciary.

## **V. POTENTIAL LIABILITY OF DIRECTED TRUSTEES**

### **A. Restatement of the Law (Third) of Trusts**

RESTATEMENT (THIRD) OF TRUSTS § 75 (2011) states as follows:

Except in cases covered by § 74 (involving powers of revocation and other ownership-equivalent powers), if the terms of a trust reserve to the settlor or confer upon another a power to direct or otherwise control certain conduct of the trustee, the trustee has a duty to act in accordance with the requirements of the trust provision reserving or conferring the power and to comply with any exercise of that power, unless *the attempted exercise is contrary to the terms of the trust or power*

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<sup>13</sup> See Ausness, “The Role of Trust Protectors in American Trust Law,” Real Property, Trust and Estate Law Journal (Summer 2010).

<sup>14</sup> UDTA § 8(a).

<sup>15</sup> *Ibid.*

<sup>16</sup> Alaska Stat. § 13.36.370(d); Ariz. Rev. Stat. § 14-10818(D).

<sup>17</sup> See Ohio Rev. Code § 5808.08(D) (“a person other than a beneficiary who holds a power to direct...is presumptively a fiduciary”).

*or the trustee knows or has reason to believe that the attempted exercise violates a fiduciary duty that the power holder owes to the beneficiaries.*

(Emphasis added.)

## **B. Uniform Trust Code**

Similarly, UTC § 808(b) provides as follows:

(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.*

(Emphasis added.)

## **C. Individual State Law Approaches Regarding Liability of Directed Trustees**

Several state statutes limit the liability of a directed Trustee much more comprehensively than UTC § 808. Some statutes generally protect the directed Trustee from liability when the directed Trustee follows the trust director's instructions.<sup>18</sup> Others impose liability on a directed Trustee only if the directed Trustee's action or inaction results from willful misconduct<sup>19</sup> or willful misconduct or gross negligence.<sup>20</sup> An Illinois statute provides for three categories of "directors" (distribution trust advisor, investment trust advisor, trust protector), affirmatively imposes fiduciary duties on these trust directors, and generally absolves the directed Trustee from liability for carrying out a director's instructions.<sup>21</sup> In Ohio, a directed Trustee (an "excluded fiduciary") is not liable for loss resulting from compliance with an authorized direction of the trust director, and, to the extent the power of direction relates to any investment, the directed Trustee generally has no obligation to perform investment reviews or make investment recommendations.<sup>22</sup> In Missouri, a directed Trustee is not accountable or liable for any loss resulting directly or indirectly from any act or omission of a trust protector or from following a trust protector's written directions and is absolved from liability for executing the decisions or instructions of a trust protector or monitoring the trust protector's actions or inactions.<sup>23</sup> In Nevada, a trust instrument may designate a person to direct a Trustee on investment and distribution decisions, and the directed Trustee is not liable for loss resulting from following such directions.<sup>24</sup>

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<sup>18</sup> See, e.g., Ind. Code § 30-4-3-9(a).

<sup>19</sup> See, e.g., 12 Del. C. § 3313.

<sup>20</sup> See, e.g., S.D.C.L. §§ 55-1B-2, -5.

<sup>21</sup> 760 ILCS 5/16.3.

<sup>22</sup> Ohio Rev. Code § 5815.25.

<sup>23</sup> Mo. Rev. Stat. § 456.8-808.

<sup>24</sup> Nev. Rev. Stat. § 163.5549.

## **D. Case Law Regarding Liability of Directed Trustees**

Trustee liability in the context of directed trusts is based on the extent to which a directed Trustee is permitted or required, under the governing instrument and applicable state law, to follow directions from another party. Liability may also arise from the inaction of a directed Trustee if that Trustee is under a legal obligation to monitor the director's actions. Given the relative novelty of state statutes specifically dealing with liability of directed Trustees, this area of law remains largely unresolved in the courts.

### **1. *Duemler v. Wilmington Trust Company***

In *Duemler v. Wilmington Trust Company*, 2004 Del. Ch. LEXIS 206 (2004), the investment director, R. Leigh Duemler, sued Wilmington Trust Company, the directed Trustee, claiming that it had breached its fiduciary duty by not providing him with timely financial information that would have allowed him to make a recommendation and avoid investment loss. The trust company defended itself relying on the Delaware directed trust statute (12 Del. C. § 3313), which provides, in pertinent part:

If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable for any loss resulting directly or indirectly from any such act.

The Court of Chancery of Delaware issued an unpublished order exonerating the directed Trustee. The court found no willful misconduct on the part of the trust company, saying that:

This case may provide at least some foundation for directed trustees of Delaware trusts to rely on the exculpatory provisions of the Delaware statute. As long as the directed trustee does not engage in willful misconduct, that trustee should be able to rely on the statute to avoid liability. The decision also underscores the investment director's duty to keep informed - meaning that the director should take action to obtain relevant information rather than wait for or rely on information from the directed trustee.

### **2. *Rollins v. Branch Banking & Trust Co. of Virginia***

*Rollins v. Branch Banking & Trust Co. of Virginia*<sup>25</sup> also involved the duties of a directed Trustee. The trust instrument conferred the power to retain, sell or purchase investments exclusively on the beneficiaries. The trusts were funded with shares of stock in two textile companies. Upon funding, the beneficiaries directed the Trustee to hold an over-concentrated position in textiles securities. The Trustee sold the stock twenty years later at the direction of the beneficiaries for a fraction of its original value.

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<sup>25</sup> *Rollins v. Branch Banking & Trust Co. of Virginia*, 56 Va. Cir. 147 (2001).

The beneficiaries sued, claiming that the Trustee failed to diversify and failed to warn the beneficiaries of the declining condition of the trust investments. In addressing the first claim, the court examined Code of Virginia § 26-5.2 (predecessor to Code of Virginia § 64.2-779, Virginia’s version of the UDTA), which provided that, when a trust instrument reserves investment authority in an advisor or similar party to the exclusion of the Trustee, “the excluded fiduciary or co-fiduciary shall be liable, if at all, only as a ministerial agent and shall not be liable as fiduciary or co-fiduciary for any loss resulting from the making or retention of any investment pursuant to such authorized direction.” Observing that “the statute clearly prohibited the law from imposing liability on the trustee for failing to do what he had no ability to do,” the court concluded the Trustee could not be liable for failure to diversify trust investments when the beneficiaries held investment authority under the terms of the trust.

As to the second claim, however, the court stated that the Trustee had a duty to keep the beneficiaries informed of the condition of the trust investments and stated that the statute “does not excuse a Trustee from liability for failing to participate in the administration of the trust or for failing to attempt to prevent a breach of trust.” Prior to a final resolution on the merits of the latter claim, the beneficiaries settled with the Trustee.

### **3. *In re Helen Rivas Trust***

In *In re Helen Rivas Trust*,<sup>26</sup> the trust in question was held for the benefit of the University of Rochester in Rochester, New York (the “University”). The trust instrument established an investment advisory committee (the “Advisory Committee”) of three individuals, two named by the University and one named by the Trustee. The Advisory Committee had all powers over the management of investments.

In 2009, the Advisory Committee directed the investment of all trust assets in the University’s long-term investment pool (“LTIP”). The Trustee sought an interpretation of the trust instrument by a court to determine whether the investment in the LTIP was proper. In its holding, among other things, the court refused to give effect to the trust provision purporting to absolve the Trustee from responsibility regarding investments and found that the investment of trust assets in the LTIP essentially was an impermissible delegation of investment duties.

### **4. *Mennen v. Wilmington Trust Company***

In *Mennen v. Wilmington Trust Company*,<sup>27</sup> C.A. No. 8432-ML; 2015 Del Ch. LEXIS 122 (April 24, 2015), the trust instrument conferred the power to retain, sell or purchase investments exclusively on the trust beneficiaries. The beneficiaries directed the Trustee to hold an over-concentrated position in certain stocks. Twenty years later, at the direction of the beneficiaries, the Trustee sold the stock for a fraction of its original value. The beneficiaries sued for \$25 million, claiming the Trustee failed to diversify and failed to warn the beneficiaries of the declining value of the stock.

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<sup>26</sup> *In re Helen Rivas Trust*, 2011 NY Slip Op 50008U, 30 Misc.3d 1207(A) (Monroe County Surr. Ct. 2011).

<sup>27</sup> *Mennen v. Wilmington Trust Company*, C.A. No. 8432-ML; 2015 Del Ch. LEXIS 122 (April 24, 2015).

The trial court noted: “Because the trust agreement modified the trustees’ default duties and exculpated the trustees from liability unless they acted in bad faith or with wilful misconduct, a showing that the trustees committed a lesser breach of trust will not result in the judgment the beneficiaries seek.” Ultimately, the corporate Trustee settled out of court, so whether the Trustee’s reliance on the beneficiaries’ direction was appropriate was not determined on appeal.

#### **E. Ultimate Responsibility**

When a traditional, non-directed trust experiences a loss as a result of negligence, recklessness or willful misconduct, the culpable, ultimately responsible party is the Trustee. In a directed trust context, however, identifying the culpable, ultimately responsible party may not be clear. It must initially be determined whether the loss occurred in connection with an aspect of trust administration for which the director had authority under the governing instrument. If the director had authority for that aspect of trust administration, it would then need to be determined whether the director was, under the governing instrument and applicable state law, solely responsible for the loss or whether the Trustee should properly share such responsibility.

Many directed trust statutes sanction the use of trust provisions specifying that the director is not a fiduciary.<sup>28</sup> Moreover, in some states (*e.g.*, South Dakota, Delaware, Ohio, Missouri), a directed Trustee has little if any liability for following the directions of the director. It would therefore seem that the practical ability of a directed trust beneficiary to recover damages for the trust may be elusive.

Directed trustees should not conclude, however, that they are off the hook in all states and in all circumstances. As demonstrated above, directed trust statutes vary considerably in terms of the circumstances in and extent to which they confer protection from liability on Trustees. Furthermore, in egregious cases, such as where a directed Trustee turns a blind eye to a director’s blatant malfeasance, courts will likely find a way to give victimized beneficiaries a meaningful remedy.

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<sup>28</sup> See, *e.g.*, Mo. Rev. Stat. § 456.8-808.6.





## **Participant Survey**

We would love to hear your feedback for today's teleconference:

### **Directed Trusts: Risks and Liabilities**

**September 21, 2021**

**Please use this link to tell us what you think.**

[https://join.pathlms.com/Cannon\\_Evaluation\\_092121](https://join.pathlms.com/Cannon_Evaluation_092121)

**Pennsylvania Attorneys**, please complete the required PA CLE survey found here, <https://www.surveymonkey.com/r/CFI-PACLE>



# CANNON<sup>®</sup>

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## Certificate of Attendance

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(Participant Name)

Has successfully completed the Cannon Financial Institute, Inc. course:

### **Directed Trusts: Risks and Liabilities**

**September 21, 2021**

Laurie Sebestyen  
Professional Education Coordinator

- |  |                         |
|--|-------------------------|
| <ul style="list-style-type: none"><li>• <b>Certified Public Accountant</b><br/>In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour.<br/>Instructional delivery method: Group-Internet-Based<br/>NASBA #103655; Field of Study-Specialized Knowledge; Knowledge Level-Intermediate</li></ul>  | <b>1.5 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Enrolled Agent (IRS)</b><br/>Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.<br/>Course # VRUGV-T-00149-21-O</li></ul> | <b>1.0 credit hour</b>  |
| <ul style="list-style-type: none"><li>• <b>Certified Financial Planner (CFP<sup>™</sup>)</b><br/>Course # 275025</li></ul>   | <b>1.5 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Accredited Fiduciary Investment Manager (AFIM<sup>™</sup>)</b></li></ul>  | <b>1.5 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Wealth Strategists (CWS<sup>®</sup>)</b></li></ul>  | <b>2.0 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Investment Management Analyst (CIMA<sup>®</sup>)</b><br/>Course # 21CFI008<br/><b>If you hold the CIMA<sup>®</sup>, CIMC<sup>®</sup> or CPWA<sup>®</sup> certification, you may report this pre-accepted CE program online by logging into your My IMCA account at <a href="http://www.imca.org/user">www.imca.org/user</a></b></li></ul>   | <b>1.5 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Trust and Fiduciary Advisor (CTFA<sup>™</sup>)</b></li></ul>  | <b>2.0 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Retirement Services Professional (CRSP<sup>™</sup>)</b></li></ul>   | <b>2.0 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Retirement Plan Professional (CRPP<sup>™</sup>)</b></li></ul>   | <b>2.0 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Trust Operations Professional (CTOP<sup>™</sup>)</b></li></ul>  | <b>2.0 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Certified Fiduciary and Investment Risk Specialist (CFIRS<sup>™</sup>)</b></li></ul>  | <b>2.0 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Chartered Life Underwriter &amp; Chartered Financial Consultant (**No Individual State Insurance Credit Available)</b></li></ul>  | <b>1.5 credit hours</b> |
| <ul style="list-style-type: none"><li>• <b>Fiduciary Investment Risk Management Association (FIRMA<sup>®</sup>)</b></li></ul>  | <b>2.0 credit hours</b> |



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*Certificate of Attendance*

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(Participant Name)

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(Attorney Bar # or Social Security #)

Has successfully completed the Cannon Financial Institute, Inc. course:

**Directed Trusts: Risks and Liabilities**

**September 21, 2021**



Laurie Sebestyen  
Professional Education Coordinator

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Continuing Legal Education Credits for this course are as follows:

**The following states have been approved for 1.5 hours of General Credit:** (Course number is indicated in parenthesis): Alabama, Arkansas (TWE76640), California, Delaware, Georgia, Idaho, Illinois, Iowa (356984), Kansas, Kentucky (225620), Louisiana, Maine (057861), Minnesota (336451), Mississippi, Montana (32658), Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee (Distance Ed), Texas (174114339), Utah, Vermont, Virginia, Washington, Wisconsin, & Wyoming

**These states have been approved for the following General Credit:** Colorado – 2 hours, Florida - 2 hours (2008262N), Missouri – 1.8 hours (663463), Oklahoma – 2 hours, West Virginia – 1.8 hours

**The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit:** District of Columbia, Maryland, Massachusetts, Michigan & South Dakota

**The following states have special circumstances:**

Alaska-Attorneys can use this certificate to submit to Alaska State Bar

Arizona-On honor system

Connecticut-Attorneys can use this certificate to submit to Connecticut MCLE

Hawaii- Attorneys can use this certificate for Hawaii CLE for 1.5 General credits (Reciprocity Rule)

Indiana-Site Coordinators must apply for credit as the sponsor for participants to receive credit

New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit and self-report their attendance.*

New Jersey-Attorneys can use this certificate for New Jersey CLE for 1.5 General credits (Reciprocity Rule)

New York-Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, DE, GA, KY, LA, MS, NM, NC, ND, OK. Type of credit: Areas of Professional Practice 1.5 Credits

\*\*\*\*As required by the following State Bars, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Illinois, Kansas, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, and West Virginia. \*\*\*\*

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Any questions regarding CE credit, please contact Laurie Sebestyen at (706) 353-3346.

Fax (706) 353-3994, Email [lsebestyen@CannonFinancial.com](mailto:lsebestyen@CannonFinancial.com)

649-4 S. Milledge Ave., Athens, Georgia 30605

## CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

### **To be Completed by the Provider**

Provider: Cannon Financial Institute (CA Provider #12179)

Subject Matter/Title: Directed Trusts: Risks and Liabilities

Date and Time of Activity: September 21, 2021, 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,  
10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics:

Elimination of Bias in the Legal Profession:

Competence:

### **To Be Completed by the Attorney after Participation in the Above-Name Activity**

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: \_\_\_\_\_

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics: \_\_\_\_\_

Elimination of Bias in the Legal Profession: \_\_\_\_\_

Competence: \_\_\_\_\_

Attorney Signature: \_\_\_\_\_

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.



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## *Certificate of Attendance*

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(Participant Name)

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(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

### **Directed Trusts: Risks and Liabilities (792994)**

**September 21, 2021**



Laurie Sebestyen  
Professional Education Coordinator

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Continuing Legal Education Credits for this course are as follows:

Colorado – 2.0 General Credits

\*\*\*\*As required by the State of Colorado, attorneys must submit their own credits.

# Virginia MCLE Board

## CERTIFICATION OF ATTENDANCE (FORM 2D)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia  
and the MCLE Board Regulations.

Certify Your Attendance Online at [www.vsb.org](http://www.vsb.org)

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

A \$100 fee will be assessed for failure to comply with either deadline.

Member Name: \_\_\_\_\_ VSB Member Number: \_\_\_\_\_  
Address: \_\_\_\_\_ Daytime Phone: \_\_\_\_\_  
\_\_\_\_\_  
Email: \_\_\_\_\_  
\_\_\_\_\_  
City State Zip

Course ID Number: NII0590

Sponsor: Cannon Financial Institute

Course/Program Title: Directed Trusts: Risks and Liabilities

Live Interactive \* Approved CLE Credits (Ethics Credits): 1.5 (0.0)

Date of telephone/webcast: \_\_\_\_\_ Location(s): \_\_\_\_\_

### By my signature below I certify

- \_\_\_\_ I attended a total of \_\_\_\_\_ (hrs/mins) of **approved CLE**, of which (\_\_\_\_\_) (hrs/mins) were in **approved Ethics**.  
Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)  
\_\_\_\_ The sessions I am claiming had written instructional materials to cover the subject.  
\_\_\_\_ I participated in this program in a setting physically suitable to the course.  
\_\_\_\_ I was given the opportunity to interact with the presenter (in real time if live interactive or other method if pre-recorded).  
\_\_\_\_ I understand I may not receive credit for any course/segment which is not materially different in substance than a course/segment  
for which credit has been previously given during the same completion period or the completion period immediately prior.  
\_\_\_\_ I understand that a materially false statement shall be subject to appropriate disciplinary action.

\* NOTE: A maximum of 8.0 hours from pre-recorded courses may be applied to meet your yearly MCLE requirement. Minimum of 4.0  
hours from live interactive courses required.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

This form may be mailed to:  
Virginia MCLE Board  
Virginia State Bar  
1111 East Main Street, Suite 700  
Richmond, VA 23219-0026  
(804) 775-0577  
[www.vsb.org](http://www.vsb.org)