

Kevin D. Millard

From: Kevin D. Millard
Sent: Tuesday, January 31, 2017 10:53 AM
To: Robert Sitkoff; Turney P. Berry; John Morley (john.morley@yale.edu)
Cc: Kelly Dickson Cooper
Subject: Directed Trust Act

Dear Rob, Turney, and John:

I have been attending the meetings of the drafting committee on the Uniform Directed Trust Act as an observer for the Trust & Estate section of the Colorado Bar Association. Our Colorado committee that has been following the drafting process has asked me to pass on two comments before the final meeting of the ULC drafting committee:

1. Section 8(a) of the October, 2016 draft says that, subject to subsection (b), “a directed trustee must take reasonable action to comply with the terms of a power of direction.” I made a note that that was going to be modified to clarify that the direction has to be consistent with the terms of the trust. The Colorado committee wants to make sure that it is clear what it means to be “consistent.” One of our members suggested that it means “not clearly contrary to the terms of the trust.” That, of course, is very similar to the first half of the test under UTC § 808 (“unless the attempted exercise is manifestly contrary to the terms of the trust”) and the ULC drafting committee has consistently rejected the UTC approach. The request from the Colorado committee is that the Directed Trust Act include language that is helpful guidance to a directed trustee as to what it means for a direction to be consistent with the terms of the trust. If the objection to the UTC approach is really to the second half of the UTC test (“the attempted exercise would constitute a serious breach of a fiduciary duty ...”), then maybe something along the lines of “not clearly [or manifestly] contrary to the terms of the trust” would work in the Directed Trust Act.
2. Section 3 of the Directed Trust Act is similar to section 5 of the Uniform Trust Decanting Act, but the Directed Trust Act provision deals only with the principal place of administration and not with a governing law provision in the trust document. Should the Directed Trust Act provide that the act will apply not only if the principal place of administration is in this state, but also if the trust document provides that it is governed by the law of this state, similar to section 5(2) of the Decanting Act? I don’t remember the drafting committee discussing this issue, but my memory may be faulty.

Please note my new contact information, below.

Regards,

Kevin D. Millard

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