

ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998

700.7703a Rules of construction; nonfiduciary powers under a trust; power of direction to trust director; duties and limitations of trust director and trustee; liability; applicability of rules to trusteeship; definitions.

Sec. 7703a. (1) Excepting the rules of construction in subsection (2), this section does not apply to:

- (a) A power of appointment that is intended to be held by the donee in a nonfiduciary capacity.
- (b) A power that is intended to be held in a nonfiduciary capacity that enables the holder to create a power of appointment, regardless of whether the created power is intended to be held by the donee of the created power in a fiduciary or a nonfiduciary capacity.
- (c) A power to appoint or remove a trustee or trust director.
- (d) A power of a settlor over a trust to the extent the settlor has a power to revoke the trust.
- (e) A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects either of the following:
 - (i) The beneficial interest of the beneficiary.
 - (ii) The beneficial interest of another beneficiary represented by the beneficiary under part 3 of this article with respect to the exercise or nonexercise of the power.
- (f) A power over a trust if both of the following apply:
 - (i) The terms of the trust provide that the power is held in a nonfiduciary capacity.
 - (ii) The power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the internal revenue code of 1986, 26 USC 1 to 9834.

(2) All of the following rules of construction apply to powers under a trust:

(a) A power described in subsection (1) that is intended to be held in a nonfiduciary capacity is not subject to fiduciary constraint and may be exercised by the holder in any manner consistent with the scope of the power and any express requirements or limitations imposed by the terms of the trust. A trustee shall take action to comply with the exercise or nonexercise of a power described in this subdivision. A trustee is not liable for taking an action required under this subdivision. However, a trustee shall not comply with the exercise or nonexercise of a power described in this subdivision if the exercise or nonexercise was obtained with the trustee's collusion or by the trustee's fraud and compliance would be in pursuance of that collusion or fraud.

(b) Except as provided in subdivision (c), all of the following powers are intended to be held in a nonfiduciary capacity if granted to a person other than a trustee of the trust:

(i) A power of appointment, including a power of appointment in the form of a power to do any of the following:

- (A) Adjust between principal and income.
- (B) Convert to or from a unitrust.
- (C) Modify, reform, or terminate the trust.
- (D) Distribute trust assets in further trust.

(ii) A power that enables the holder to create a power of appointment.

(c) A power to do any of the following is intended to be held in a fiduciary capacity even though the holder is not a trustee of the trust if the holder otherwise does not have a beneficial interest in the trust:

- (i) Adjust between principal and income.
- (ii) Convert to or from a unitrust.
- (iii) Modify, reform, or terminate the trust.
- (iv) Distribute trust assets in further trust.

(3) Subject to subsection (4), the terms of a trust may grant a power of direction to a trust director. Both of the following rules of construction apply to powers of direction:

(a) A trust director may exercise any further power appropriate to the exercise or nonexercise of the director's power of direction.

(b) Trust directors with joint powers must act by majority decision.

(4) 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 a further power under subsection (3)(a) regarding both of the following:

(a) A payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of Medicaid law in section 1917 of the social security act, 42 USC 1396p(d)(4)(A).

(b) A charitable interest in the trust, including required notices regarding the interest to the attorney general.

(5) Subject to subsection (6), both of the following apply with respect to a power of direction or a further power under subsection (3)(a):

(a) A trust director has the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a like position and under similar circumstances if the power is held individually or, if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.

(b) A term of a trust that relieves a trust director from liability for breach of fiduciary duty is unenforceable to the extent that either of the following applies:

(i) The term relieves the trust director of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

(ii) The term was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor.

(6) 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.

(7) A directed trustee shall take action to comply with the exercise or nonexercise of a power of direction or further power of a trust director under subsection (3)(a). A directed trustee is not liable for taking an action required under this subsection. However, a directed trustee shall not comply with the exercise or nonexercise of a power described in this subsection if the exercise or nonexercise was obtained with the directed trustee's collusion or by the directed trustee's fraud and compliance would be in pursuance of that collusion or fraud.

(8) An exercise of a power of direction under which a trust director may release a trustee or another trust director from liability for breach of trust is not effective if any of the following apply:

(a) The breach involved the trustee's or other director's bad faith or reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

(b) The release was induced by improper conduct of the trustee or other director in procuring the release.

(c) At the time of the release, the director did not know the material facts relating to the breach.

(9) Subject to subsection (11), a trustee shall provide information to a trust director to the extent the information is reasonably related to both of the following:

(a) The powers or duties of the trustee.

(b) The powers or duties of the director.

(10) Subject to subsection (13), a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related to both of the following:

(a) The powers or duties of the director.

(b) The powers or duties of the trustee or other director.

(11) A trustee does not have a duty to do either of the following:

(a) Monitor a trust director.

(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.

(12) By taking an action described in subsection (11), a trustee does not assume the duty excluded by subsection (11).

(13) A trust director does not have a duty to do either of the following:

(a) Monitor a trustee or another trust director.

(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.

(14) By taking an action described in subsection (13), a trust director does not assume the duty excluded by subsection (13).

(15) 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 if the trustee's reliance is not in bad faith.

(16) 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 if the trust director's reliance is not in bad faith.

(17) An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(18) 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 in an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(19) 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.

(20) By accepting appointment as a trust director, the director submits personally to jurisdiction in this state regarding any matter related to a power or duty of the director. This section does not preclude use of another method to obtain jurisdiction over a trust director.

(21) The rules applicable to a trusteeship apply to a trust directorship regarding all of the following matters:

(a) Acceptance under section 7701(1).

(b) Giving of bond to secure performance under section 7702.

(c) Reasonable compensation under section 7708.

(d) Resignation under section 7705.

(e) Removal under section 7706.

(f) Vacancy and appointment of successors under section 7704, treating any instance in which 2 or more trust directors have the same power of direction as analogous to a cotrusteeship for purposes of section 7704(2).

(22) The application of this section with respect to a given trust is subject to both of the following:

(a) If the trust was created before the effective date of the amendatory act that added this section, this section applies only to decisions or actions taken on or after that date.

(b) If the trust's principal place of administration is changed to this state on or after the effective date of the amendatory act that added this section, this section applies only to decisions or actions taken on or after the date of the change.

(23) In applying and construing the provisions of this section that are based on the uniform directed trust act, weight should be given to the goal of promoting uniformity in the law on directed trusteeships among the states that have enacted the uniform directed trust act.

(24) As used in section:

(a) "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 or by this article.

(b) "Directed trustee" means a trustee that is subject to a power of direction.

(c) "Donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

(d) "Power of appointment" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

(e) "Power of direction" means a power over a trust granted by the terms of the trust to the extent the power is exercisable while the person to whom it is granted is not serving as a trustee. Power of direction includes a power over the investment, management, or distribution of trust property or other matters of trust administration. Power of direction does not include the powers described in subsection (1).

(f) "Trust director" means an organization permitted to exercise trust powers in this state as described in section 1105(2) of the banking code of 1999, 1999 PA 276, MCL 487.11105, or an individual, if that person is granted a power of direction whether or not either of the following applies:

(i) The terms of the trust refer to the person as a trust director.

(ii) The person is a beneficiary or settlor of the trust.

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