

MATTER OF TRUST

Missouri has a new directed trust law – now what?

Missouri has a new statute regarding directed trusts. A directed trust is one in which the grantor appoints both a trustee and another person, sometimes called a trust protector, to perform one or more duties traditionally belonging to the trustee.

While the concept is not new, it is being used much more frequently than in the past.

A directed trust may be appropriate if, for example, you have a trusted financial adviser that you use and you would like that person to continue providing advice after you stop serving as trustee, because of incapacity or death. Few financial advisers have trust powers, however, and therefore cannot be your successor trustee.

The successor trustee named in your trust will be responsible for prudently managing your assets, and they will close accounts managed by other advisers. Since the trustee is legally responsible for managing your assets, they need to control them.

As a solution to this dilemma, many states have begun passing legislation to clarify the roles that the trust protector may play. Missouri also has a statute regarding directed trusts. Under Missouri law, you may bifurcate, or split up, the responsibilities of the trustee, so that the trustee handles the administration of the trust, and the financial adviser, named as a trust protector, directs the investment of the assets.



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The successor trustee is willing to permit your trust adviser to make the financial investment decisions if you so specify in your trust instrument, because the statute exempts the trustee from liability when following the directions of the trust protector. In other words, if the trust protector makes poor investment decisions, the trustee following directions within the scope of the powers granted to the trust protector will not be liable. In fact, Missouri's statute is very favorable for both the trust protector and the trustee, imposing liability upon them only for acting in bad faith or with reckless indifference.

The foregoing is one example of how you may use the directed trust statute. While it may be the most common bifurcation of duties and responsibilities, there are many other powers that you may grant to a trust protector, including the power to:

- remove and appoint a trustee or successor trustee;
- modify or amend the trust to save taxes;
- change the trust terms to reflect legal changes;
- correct errors and resolve ambiguities that might otherwise require court construction;
- change beneficiaries' interests; and
- terminate a trust or change the law governing it to another state.

These powers are not exclusive. Other powers may be granted to the trust protector if set forth in the instrument.

There are certain powers that a trust protector may not exercise, including to:

- use a power for their own benefit;
- reduce or eliminate an income interest of a beneficiary of certain kinds of trusts;
- exercise a power resulting in a taxable gift; and
- remove a requirement to pay back a government entity for benefits provided to a beneficiary on the death of that beneficiary.

In 1986, the state of Delaware was the first to enact a directed trust law. Some trust companies will only accept trusts governed by Delaware law, since it is the oldest

law and there is a body of case law establishing legal precedents that provide more certainty and clarity for trustees.

The laws of other states, such as Missouri, that more recently enacted legislation, have not been tested in court and provide less certainty as to the outcome.

Some trust companies have apparently decided that

the risk of serving with bifurcated powers outweighs the financial gain, especially since they may only receive half the normal fee of serving as trustee, with the other half of the fee going to the trust protector.

The directed trust is a more complicated instrument and more time-consuming to draft than a regular trust because of the options to customize and bifurcate the powers of the trustee and the trust protector. Before finalizing a directed trust, one should meet with the parties to be named as successor trustee and trust protector to be sure they will agree to and accept the division of duties you wish to set forth in your trust instrument.

» **Missouri's statute is very favorable for both the trust protector and the trustee.**

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