

1 State of Arkansas  
2 92nd General Assembly  
3 Regular Session, 2019

# A Bill

HOUSE BILL 1765

4  
5 By: Representative Maddox

## For An Act To Be Entitled

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

### Subtitle

12 TO ESTABLISH THE DIRECTED TRUST ACT.

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14  
15  
16 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

17  
18 SECTION 1. Arkansas Code § 28-73-103(19), concerning the definition of  
19 "terms of a trust" under the Arkansas Trust Code, is amended to read as  
20 follows:

21 (19) "Terms of a trust" means:

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

24 (i) expressed in the trust instrument; or

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

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

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

31 (ii) court order; or

32 (iii) a nonjudicial settlement agreement under § 28-  
33 73-111.

34  
35 SECTION 2. Arkansas Code § 28-73-105(b)(2), concerning the  
36 construction of the terms of a trust under the Arkansas Trust Code, is



1 amended to read as follows:

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

5  
 6 SECTION 3. Arkansas Code § 28-73-603(a), concerning a settlor’s powers  
 7 of revocation under the Arkansas Trust Code, is amended to read as follows:

8 (a) While a trust is revocable, ~~and the settlor has capacity to revoke~~  
 9 ~~the trust, rights of the beneficiaries are subject to the control of, and the~~  
 10 ~~duties of the trustee are owed exclusively to, the settlor~~ the trustee may  
 11 follow a direction of the settlor that is contrary to the terms of the trust.

12  
 13 SECTION 4. Arkansas Code § 28-73-808 is repealed.

14 ~~28-73-808. Powers to direct.~~

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

17 ~~(b) If the terms of a trust confer upon a person other than the~~  
 18 ~~settlor of a revocable trust power to direct certain actions of the trustee,~~  
 19 ~~the trustee shall act in accordance with an exercise of the power unless the~~  
 20 ~~attempted exercise is manifestly contrary to the terms of the trust or the~~  
 21 ~~trustee knows the attempted exercise would constitute a serious breach of a~~  
 22 ~~fiduciary duty that the person holding the power owes to the beneficiaries of~~  
 23 ~~the trust.~~

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

26 ~~(d) A person, other than a beneficiary, who holds a power to direct is~~  
 27 ~~presumptively a fiduciary who, as such, is required to act in good faith with~~  
 28 ~~regard to the purposes of the trust and the interests of the beneficiaries.~~  
 29 ~~The holder of a power to direct is liable for any loss that results from~~  
 30 ~~breach of a fiduciary duty.~~

31  
 32 SECTION 5. Arkansas Code Title 28 is amended to add a new chapter to  
 33 read as follows:

34 CHAPTER 76  
 35 DIRECTED TRUST ACT

1       28-76-101. Title.

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

3  
4       28-76-102. Definitions.

5       As used in this chapter:

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

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

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

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

17              (5) "Power of direction" means a power over a trust granted to a  
18 person by the terms of the trust to the extent the power is exercisable while  
19 the person is not serving as a trustee. The term includes a power over the  
20 investment, management, or distribution of trust property or other matters of  
21 trust administration. The term excludes the powers described in § 28-76-  
22 105(b).

23              (6) "Settlor" means a person, including a testator, that  
24 creates, or contributes property to, a trust. If more than one person creates  
25 or contributes property to a trust, each person is a settlor of the portion  
26 of the trust property attributable to that person's contribution except to  
27 the extent another person has the power to revoke or withdraw that portion.

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

31              (8) "Terms of a trust" means:

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

34                              (i) expressed in the trust instrument; or

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

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

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

5                   (ii) court order; or

6                   (iii) a nonjudicial settlement agreement under § 28-  
7 73-111.

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

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

15  
16                   28-76-103. Application – Principal place of administration.

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

20                   (1) If the trust was created before January 1, 2020, this  
21 chapter applies only to a decision or action occurring on or after January 1,  
22 2020.

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

26                   (b) Without precluding other means to establish a sufficient  
27 connection with the designated jurisdiction in a directed trust, terms of the  
28 trust which designate the principal place of administration of the trust are  
29 valid and controlling if:

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

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

34  
35                   28-76-104. Common law and principles of equity.

36                   The common law and principles of equity supplement this chapter, except

1 to the extent modified by this chapter or law of this state other than this  
2 chapter.

3  
4 28-76-105. Exclusions.

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

8 (b) This chapter does not apply to a:

9 (1) power of appointment;

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

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

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

15 (A) the beneficiary; or

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

19 (5) power over a trust if:

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

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

25 (c) Unless the terms of a trust provide otherwise, a power granted to  
26 a person to designate a recipient of an ownership interest in or power of  
27 appointment over trust property which is exercisable while the person is not  
28 servicing as a trustee is a power of appointment and not a power of direction.

29  
30 28-76-106. Powers of trust director.

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

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

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

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

3  
4           28-76-107. Limitations on trust director.

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

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

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

13  
14           28-76-108. Duty and liability of trust director.

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

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

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

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

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

27           (b) Unless the terms of a trust provide otherwise, if a trust director  
28 is licensed, certified, or otherwise authorized or permitted by law other  
29 than this chapter to provide health care in the ordinary course of the  
30 director's business or practice of a profession, to the extent the director  
31 acts in that capacity, the director has no duty or liability under this  
32 chapter.

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

35  
36           28-76-109. Duty and liability of directed trustee.

1       (a) A directed trustee is not liable, either individually or as a  
2 fiduciary, for any of the following:

3           (1) any loss that results from compliance with a direction of  
4 the trust director, including any loss that results from the trust director's  
5 breaching fiduciary responsibilities or acting beyond the trust director's  
6 scope of authority; or

7           (2) any loss that results from a failure to take any action  
8 proposed by a directed trustee that requires a prior authorization of the  
9 trust director if the directed trustee timely sought but failed to obtain  
10 that authorization.

11       (b) Absent contrary provisions in the governing instrument, the  
12 actions of the directed trustee, including communications with the trust  
13 director and others carrying out, recording, and reporting actions taken at  
14 the trust director's direction pertaining to matters within the scope of  
15 authority of the trust director, is an administrative action taken by the  
16 directed trustee solely to allow the directed trustee to perform the duties  
17 assigned to the directed trustee under the governing instrument, and the  
18 administrative actions shall not constitute an undertaking by the directed  
19 trustee to monitor, participate in, or otherwise take any fiduciary  
20 responsibility for actions within the scope of authority of the trust  
21 director.

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

25       (d) A directed trustee that has reasonable doubt about its duty under  
26 this section may petition the court for instructions.

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

29  
30       28-76-110. Duty to provide information to trust director or trustee.

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

33           (1) the powers or duties of the trustee; and

34           (2) the powers or duties of the director.

35       (b) Subject to § 28-76-111, a trust director shall provide information  
36 to a trustee or another trust director to the extent the information is

1 reasonably related both to:

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

3 (2) the powers or duties of the trustee or other director.

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

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

10  
11 28-76-111. No duty to monitor, inform, or advise.

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

13 (1) a trustee does not have a duty to:

14 (A) monitor a trust director; or

15 (B) inform or give advice to a settlor, beneficiary,  
16 trustee, or trust director concerning an instance in which the trustee might  
17 have acted differently than the director; and

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

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

21 (1) a trust director does not have a duty to:

22 (A) monitor a trustee or another trust director; or

23 (B) inform or give advice to a settlor, beneficiary,  
24 trustee, or another trust director concerning an instance in which the  
25 director might have acted differently than a trustee or another trust  
26 director; and

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

29  
30 28-76-112. Application to trustee.

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

36



1       28-76-113. Limitation of action against trust director.

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

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

10  
11       28-76-114. Defenses in action against trust director.

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

16  
17       28-76-115. Jurisdiction over trust director.

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

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

23  
24       28-76-116. Office of trust director.

25       Unless the terms of a trust provide otherwise, the rules applicable to  
26 a trustee apply to a trust director regarding the following matters:

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

33  
34       28-76-117. Uniformity of application and construction.

35       In applying and construing this act, consideration must be given to the  
36 need to promote uniformity of the law with respect to its subject matter

1 among states that enact it.

2  
3 28-76-118. Relation to the Electronic Signatures and Global National  
4 Commerce Act.

5 This chapter modifies, limits, or supersedes the Electronic Signatures  
6 in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does  
7 not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section  
8 7001(c), or authorize electronic delivery of any of the notices described in  
9 Section 103(b) of that act, 15 U.S.C. Section 7003(b).

10  
11 SECTION 6. EFFECTIVE DATE. This act shall be effective on and after  
12 January 1, 2020.