



“Clients, like everyone else, want it all, particularly when it comes to estate plans.”

GETTING CLOSER TO “HAVING IT ALL”

DIRECTED TRUSTS: A UNIQUE DIRECTION FOR TRUST PLANNING BY NICOLE M. VANCE, ESQ.

In many respects, we all want the best of both worlds, to have our cake and eat it too, to have it all. For instance, given one hour, we want to spend the time with family but have it to ourselves, work on client matters but use the time for billing, have fun but devote the hour to errands, and on and on. This is simple human nature, but is especially true with those who ... might ... possibly ... slightly ... tend towards that (insert gasp), “Type A” personality. I certainly don’t know anyone with such tendencies.

Personally, I merely aspire to be the best wife, mom, daughter, sister, friend, employee, citizen and person, and these aspirations never conflict. Contrarily, I am unbelievably successful at being the best of everything, all of the time. Note: this is where you become captivated and continue reading, expecting an amazingly entertaining journey into a delusional, narcissistic mind. Alas, I admit the key word here is “unbelievably.” Nevertheless, believing one is the best at everything is certainly a nice fantasy. More importantly, I hope my attempt to entice you to continue reading works. But how does the idea of “wanting it all” apply to directed trusts?

Clients, like everyone else, want it all, particularly when it comes to estate plans. They want to maintain control over assets, while reaping tax and asset protection advantages,

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to provide inheritances to children, yet limit spending and to give to charity, yet retain assets for heirs. Fortunately, the estate planning world is one of creativity, and a client often can have his or her cake and eat it too. The directed trust is one such example, and the purpose of this article is to provide a general overview of directed trusts.^{1,2}

Who should understand directed trusts?

Everyone who has, or intends to have, a trust should be aware of the directed option. In addition, advisors must understand directed trusts, be they attorneys, accountants, financial advisors, trust officers, bankers or other professionals who counsel clients.

“Directed trusts are becoming more acceptable, due to increased client demand.”

What is a directed trust?

Directed trusts are not new,³ but are gaining popularity. A directed trust is a trust that appoints an outside advisor to handle certain aspects of the trust administration, traditionally managed by the trustee. The trustee is not liable for the directing advisor’s decisions, nor does the trustee have monitoring or oversight responsibilities.⁴ Directed trusts involve various participants and are often confused with delegated trusts.

1. Directed Trust Participants

The trust document defines the trust participants and their respective roles. Participants typically include the directed trustee and one or more trust advisors.

Directed Trustee

The trustee is a “directed trustee,” because other advisors direct the trustee regarding specific matters. For example, investment decisions may be the responsibility of an investment advisor, who therefore directs the trustee regarding investments. The directed trustee is also known as an administrative trustee.

A directed trustee’s duties are defined by trust agreement and state law. They include opening and maintaining trust bank accounts, taking ownership and title of trust property, preparing and distributing statements, providing fiduciary accountings, preparing/coordinating preparation of tax returns, following investment or other instructions and performing related administrative responsibilities. Duties may also include

making beneficiary distributions if the trustee is the distribution trustee. If not, the trustee follows another advisor’s distribution instructions.

Trust Advisors

The advisors directing the trustee are trust advisors, or directing advisors. These include investment advisors, distribution advisors, trust protectors, and independent or special trustees. Again, duties are defined by agreement and state law, and most often include directing the trustee in the areas of investments or distributions, but may also involve family business management or other administration matters.

2. Delegated Versus Directed Trusts

Although often confused, delegated and directed trusts are very different. In delegated trusts, the document names an investment or other advisor, but the designated trustee remains the sole trustee, responsible for all for delegated matters. Thus, in the investment context, the trustee contracts with the named advisor to handle investments, but retains all fiduciary responsibility and liability for investment matters. Accordingly, unlike a directed trustee, the trustee of a delegated trust has ongoing monitoring and oversight duties.

Most professional fiduciaries do not accept delegated trusts, due to increased liability and the resultant need for comprehensive advisor oversight. Historically, these fiduciaries also disliked directed trusts, because they prefer to manage the investments themselves rather than work with outside advisors. This said, directed trusts are becoming more acceptable, due to increased client demand.

Why consider a directed trust?

Given the ever-changing world of planning, clients more frequently want to retain flexibility and control over their trusts, while still relying on advisors’ specialized expertise. Such flexibility and control, combined with outside professional expertise, is the essence of directed trust planning, where multiple parties, rather than a single trustee, handle the trust administration.

Directed trusts are frequently used for clients who want their investment advisor to manage investments, but also need a corporate trustee’s experience and longevity for non-investment matters. In such cases, directed trusts are advantageous because the investment advisor can handle specialized investments not favored by corporate trustees, such as long-term concentrated stock positions or other legacy holdings, hedge funds and alternative investments. Directed trusts are also preferred by clients with special-needs children, closely-held businesses or other unique circumstances, simply

due to the peace of mind that comes from having a trusted advisor, intimately familiar with personal circumstances, handle their needs. Finally, directed trusts can be a viable alternative to private trust companies created to serve as trustees of family members' trusts.⁵

How to establish a directed trust?

Setting up a new directed trust is relatively simple, and even changing an existing irrevocable trust to a directed trust structure is possible. Whether creating or modifying, three elements are critical: client commitment, experienced counsel and specific language. For an existing irrevocable trust, a viable means of updating the trust is also essential. Finally, various other factors should be considered in establishing a directed trust.

1. Client Commitment

Estate planning requires client commitment. This is particularly true with directed trusts, given the multiple advisors involved and the consequential need for increased communication and coordination. Too often, clients experience analysis paralysis upon recognizing all of the decisions to be made and the time required to implement a trust. The ensuing effect is that the process shuts down before it even starts. Client commitment, willingness to make tough decisions and ability to focus on the plan through its completion are of paramount importance.

2. Experienced Counsel

Qualified counsel is absolutely necessary when it comes to handling the technical elements of directed trust planning and advancing the planning process — all while making the overwhelming seem manageable. Therefore, clients should seek counsel with experience, both in drafting and working with directed trusts. Experienced counsel understands specific language requirements and can incorporate into the trust as necessary.

3. Specific Language

Language typically required for directed trusts includes the following:

1. Expression of intent to create a directed trust, along with specific reference to applicable state statutes (NRS §163.553 to §163.556 in Nevada);
2. Definition of the directed trustee and trust advisors;
3. Distinct division of roles and statement of grantor's intent with respect to each;
4. Unambiguous appointment of named individual(s) for each role;
5. Detailed description of the responsibilities of each role, along with a statement that the directed trustee follow the direction of the trust advisors and has no monitoring or oversight responsibilities;
6. Statement that the trust advisors, as well as the directed trustee, are fiduciaries;



7. Limitations of liability and appropriate hold harmless and release language, clearly stating that the directed trustee has no liability for actions taken, failed to be taken or directed by the trust advisors, and the trust advisors have no liability for actions taken, failed to be taken or directed by the directed trustee;
8. Provision addressing delegation of duties for each role; and
9. Succession plan for each role.

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Additionally, in cases where a corporate fiduciary is the directed trustee, it is advisable to understand any fiduciary-

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specific requirements and confirm there are no current issues administering the trust as drafted. Note, most corporate fiduciaries will not accept future trustee appointments, but will review trust documents to determine whether administration issues exist.

4. *Converting an Existing Trust to a Directed Trust*

The case for trust modification generally arises when circumstances change and trust revision would further the trust's purpose or the grantor's intent, such as the desire for directed trust status.⁶ In such instances, there are various ways to change an existing irrevocable trust to a directed trust format, including:

1. Exercise of trust protector powers to change situs, principal place of administration and governing law;
2. Application of local trust modification statutes;
3. Non-judicial settlement agreements;
4. Decanting;
5. Court-approved modification; and

6. Even virtual representation, which can preclude future beneficiaries from challenging issues addressed by earlier trust beneficiaries or grantors.

Nevada is an ideal jurisdiction for such changes, given its progressive and advantageous trust laws.

5. *Other Considerations*

Various other factors should be considered when determining suitability of a directed trust. These include long-term costs of administration (including trustee and advisor fees), family dynamics, advisor succession plan and trustee/advisor liability. As with any estate planning strategy, individual circumstances ultimately dictate whether or not a directed trust makes sense.

When to implement a directed trust?

Now is the time! Whether creating or updating an estate plan, if the client wants a directed trust, it is critically important to ensure the necessary language is included in the planning

documents. This is true regardless of a client's other expressions of intent — absent a trust with specific directed trust provisions, heirs will be left with the challenge of proving their loved one's intent, a significant difficulty at best.

In conclusion, I pose the following challenge — find one client who rejects the option of greater flexibility and control when offered in the estate planning context. Given that clients consistently embrace, if not demand, such planning options, this will be difficult. Should you be successful, congratulate yourself, as I have yet to find a client that doesn't "want it all." Fortunately, the directed trust strategy gets clients that much closer to actually having it all. ■

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1. This article is provided for informational purposes only. It is not intended to provide, nor should be construed as, tax, legal, financial, accounting or other professional advice. Please consult your professional advisor to determine tax, legal or other issues with regards to your specific facts and circumstance.
 2. For purposes of this article, directed trusts are discussed in the context of Nevada law; however, it is important to note that directed trust laws vary from state to state. Thus, observations and conclusions in this article may differ when addressed outside the context of Nevada law.
 3. The first directed trust legislation was enacted by Delaware in 1986.

4. For purposes of this article, directed trusts are discussed in the context of Nevada law; however, it is important to note that the duties of a directed trustee vary from state to state, and some jurisdictions require ongoing monitoring and oversight of trust advisors by the directed trustee.
5. See Richard W. Nenno, "Directed Trusts: Making Them Work," *BNA Tax Management Estates, Gifts and Trusts Journal* (March 2013).
6. See Al W. King, III, and Pierce H. McDowell, "Delegated vs. Directed Trusts," *Trusts & Estates* (July 2006).



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