



Liability of a Trustee When a Settlor Possesses a Power to Direct

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A trustee of a revocable trust might find herself in a difficult situation if the settlor of that revocable trust directs her to perform an act that is contrary to the terms of the trust. Would following the direction of the settlor expose the trustee to liability to the beneficiaries of the revocable trust? The answer depends upon the extent to which the settlor's direction differs from the terms of the revocable trust, and the law under which the revocable trust is governed.

The Uniform Trust Code (the "UTC") permits a trustee to follow a direction of a settlor of a revocable trust that deviates from the terms of the trust, without fear of liability, if the act that the trustee is directed to perform is not manifestly contrary to the terms of the trust. However, under the UTC, the trustee will not be protected from liability if the trustee follows the direction of a settlor when the trustee knows that the exercise would constitute a serious breach of a fiduciary duty that the trustee owes to the beneficiaries of the trust.

Unlike the UTC, Ohio law does not impose the same limitations upon the settlor's ability to direct the trustee, or upon the trustee's ability to follow the settlor's direction. R.C. § 5808.08 (A), which governs a settlor's power of trust modification, simply states: "[w]hile a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust." The reason for this distinction is that, under Ohio law, during the life of the settlor, the trustee owes a fiduciary duty to the settlor, and not to the beneficiaries, of a revocable trust.

Furthermore, R.C. § 5806.03 states: "[d]uring the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee, including the duties to inform and report under section 5808.13 of the Revised Code, are owed exclusively to the settlor." Thus, Ohio courts have explained that, when a trustee follows the direction of a settlor, performing acts contrary to the terms of the revocable trust, the trustee cannot be liable to the beneficiaries of the trust for a breach of trust. Again, this is because the trustee owes no fiduciary duty to the beneficiaries at the time of the performance of the contrary act.

Thus, it is crucial for the trustee of a revocable trust to understand to whom she owes a duty at any given time, and, if the holder of that duty is the settlor, the ability of the settlor to direct the trustee, including any limitations thereto. Because these are questions of law that depend upon the law governing the trust, sophisticated and experienced trust, estate, and probate litigation counsel should be consulted to help avoid potential liability.

This article provides an overview and summary of the matters described therein. It is not intended to be and should not be construed as legal advice on the particular subject.