

# Tulsa Estate Planning Forum

## Oklahoma Trust Act Amendment, effective November 1, 2012, Creating the Position of Trustee Advisor: Will this Help or Hinder Trust Administration?

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## Introduction to New Trust Advisor Statute

On April 25, 2012, Governor Mary Fallin signed into law House Bill 2257, which added to the Oklahoma Trust Act set forth in Title 62 §175.3 a description of a “Trust Advisor.” Prior to the passage of the statute, we had no specific provision for a Trustee Advisor, or Trust Protector, as found in various state statutes around the country, dealing with a specific office related to providing specialized consulting services to a Trustee. The new statute was signed in April, but it became effective November 1, 2012. The statute reads very similarly to a statute adopted by the State of Alaska (see attachment) that is almost verbatim and equivalent to our current statute. The new statute reads as follows:

“Trustee Advisor” means a person appointed by the terms of the trust instrument to act as an advisor to the trustee with regard to all or some of the matters relating to the property of the trust. Unless otherwise provided by the terms of the trust instrument, if a trustee advisor is appointed, the property and management of the trust and the exercise of all powers and discretionary acts exercisable by the trustee remain vested in the trustee as fully and effectively as if an advisor were not appointed, the trustee is not required to follow the advice of the trustee advisor, and the trustee advisor is not liable as or considered to be a trustee of the trust or a fiduciary when acting as an advisor to the trust.

I am not aware of a stand-alone Trust Advisor statute in the other states since the other states that have implemented Trust Advisor statutes have also put in place, as a corollary, a Trust Protector, who is typically granted more extraordinary powers than those of a Trust Advisor (see the Arizona statute attached, as well as the Idaho statute).

## Analysis of New Trust Advisor Statute

Often it is helpful to break down a new statute into its components and phrases in order to better understand its language, and apparent purpose.

### Components of the Statute:

- **Trustee advisor means a person.** According to the definition of “person” appearing in paragraph A of the *Oklahoma Trust Act* in Section 175.3 (the first page of the Act), a person “means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons”

having a joint or common interest.” Thus, a trustee advisor could consist of an individual or committee, so to speak, of more than one person, or an entity, such as a professional corporation such as a law firm, or CPA firm, or financial advisor, etc.

- **“[...] to act as an advisor to the trustee [...].”** This phrase appears to indicate that the Trustee Advisor is authorized to make recommendations, but whether or not the Trustee Advisor can give directives to the trustee is not clear from this initial use of the term “Advisor.”
- **“[...] with regard to all or some of the matters relating to the property of the trust.”** Notice here that the statute does **not** say “can make recommendations as to any provision of the trust,” but merely says “any matter related to the property of the trust.”

The statute consists of only two sentences. The first one, above recited, and a second, longer sentence, which is basically a default provision, as to how the trustee may respond to the advice given by the advisor, and whether or not there is any liability or fiduciary status placed upon the advisor. The default provision begins with **“[u]nless otherwise provided by the terms of the trust instrument [...].”** and then follows the default language.

- The default language empowers the trustee to basically ignore the advice of the trustee advisor since it clearly states **“[...] the trustee is not required to follow the advice of the trustee advisor [...].”** and further states that **“[...] the trustee advisor is not liable as or considered to be a trustee of the trust or a fiduciary [...].”**

Thus, my interpretive conclusions as to the default provision appear to be as follows:

- The trustee advisor is merely a consultant or advisor only, authorized to make recommendations to the trustee. The trustee is not obligated to follow the advice given or recommendations of the trustee advisor.
- It appears that no powers of the trustee set forth in the trust document are diminished, diluted, or even shared with the trustee advisor.
- No liability of the trustee is diminished, diluted, or even shared with the trustee advisor.
- The trustee advisor is not considered a trustee or fiduciary when acting as an advisor.

## “Unless Otherwise Provided By the Terms of the Trust Instrument...” Modifying the Provisions of the Statute – How Far Can the Draftsman Go?

It is unclear what powers, or latitude, or authority the trustee advisor can be given in the trust instrument.

- Some might consider the language “[u]nless otherwise provided by the terms of the trust instrument [...]” to be referencing the liability issue of the trustee advisor as a fiduciary, etc. Others might interpret this phrase to mean that the trustee advisor can be given all kinds of power to issue directives to the trustee as to the discretionary acts exercisable by the trustee, as well as the exercise of “all powers” that had been granted by the trust document.
- The default provision uses the phrase “[...] and management of the trust [...]”. The term management could include all kinds of issues related to the trust operation, and not merely those issues related to property of the trust.

Typically, trustee advisors (based on similar state statutes) seem to be granted the right or power to consult only with the trustee as to investments of trust property, including buying and selling assets, etc., as well as making recommendations as to distributions by the trustee to beneficiaries whereby the trustee is given discretion as to how much, when, or to whom to make distributions, etc. However, the Idaho Statute empowers an “investment trust advisor” to issue directives to the trustee:

...the investment trust advisor has the power to [...] direct the trustee with respect to the retention, purchase, sale, or encumbrance of trust property and the investment and reinvestment of principal and income of the trust[.]

### Unanswered Questions

The problem with the new Act authorizing a trustee advisor is that there was not passed, along with it, a trust protector statute which often contain broad powers given to the trust protector to modify the terms of the trust, to terminate the trust, to change the classification or rights of beneficiaries, etc. (See examples of the Alaska and Idaho statutes attached hereto.)

There are many unanswered questions regarding the application of this trust advisor statute, some of which are the following:

1. If extensive powers are given to the trust advisor via the trust document, why not make the trust advisor a co-trustee?
2. By the terms of the trust document, could the trustee be required or directed to consult with the trustee advisor, but not required to follow the trustee advisor's advice?
3. Would the trustee have to document that the trustee had consulted with the trustee advisor to avoid violating the terms of the trust if the terms required consultation with the trustee advisor?
4. Could the trustee be required by the terms of the trust document to follow the advice of the trustee advisor? In which event, is it no longer "advice" but instead a "directive"?
5. What kind of matters are "related to the property and management of the trust"?
  - ♦ Buying and selling assets by the trust?
  - ♦ Portfolio Management?
  - ♦ Type and timing of property distributions, such as principal and income?
  - ♦ Other?
6. Can the trustee advisor make recommendations, or even directives, regarding which beneficiaries of a class can receive a distribution? Is this a question relating to the "property" of the trust, or has the action/directive moved beyond "property" to "persons" *i.e.*, who gets to share in the distributions? (This appears to be, more likely, a power granted to a trust protector.)
7. Can the trustee advisor remove and replace the trustee? Does this have to do with "management" of the trust?
8. Can the trustee change the applicable "choice of law?" (*i.e.*, which state law applies). Is this a property (law) question?

## Conclusion

It is uncertain as to the purpose of the passage of this statute, other than an attempt to provide some third party involvement in the management of a trust, rather than relying on the trustee alone to make all of those decisions. Although I believe that a trustee advisor can be a useful addition and team player to the trustee assisting in providing better management of the trust for the benefit of the beneficiaries, particularly those who have disability issues or other personal problems, the statute is not particularly enlightening as to how far the default provision can be modified by the terms of the trust instrument or, more specifically, what powers can be granted to the trustee advisor, or is he merely limited to the role of a consultant and nothing more?

Perhaps if a trust protector statute is also passed, the role of the trustee advisor will be seen to be more limited (which may be its actual legislative intention), but without the passage of a trust protector statute, it is difficult to know if our legislature attempted to combine into the trust advisor role various powers that can be set forth in the trust document itself. Obviously, further legislative action or clarification by the courts may be required to resolve this issue.

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# An Act

ENROLLED HOUSE  
BILL NO. 2257

By: Sherrer and McCullough of  
the House

and

Burrage and Ivester of the  
Senate

An Act relating to property; amending 60 O.S. 2011,  
Section 175.3, which relates to the Oklahoma Trust  
Act; adding definition for trustee advisor; and  
providing an effective date.

SUBJECT: Oklahoma Trust Act

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 60 O.S. 2011, Section 175.3, is  
amended to read as follows:

Section 175.3 As used in this act unless the context or subject  
matter otherwise requires:

A. "Person" means an individual, a corporation, a partnership,  
an association, a joint stock company, a business trust, an  
unincorporated organization, or two or more persons having a joint  
or common interest.

B. "Trustor" means the maker, creator, donor, settlor, grantor,  
of a trust and the testator or testatrix of a will containing trust  
provisions.

C. "Trustee" includes trustees, a corporate trustee and the  
judicially ordered successor of the corporate trustee in the event  
of assumption by a financial institution of fiduciary accounts for  
all trusts of the corporate trustee in existence on the date of the  
assumption, including testamentary trusts which come into existence

after the date of assumption, as well as a natural person and a successor or substitute trustee. Provided, a successor in interest shall include a judicially ordered successor in the event of an assumption by a financial institution of fiduciary accounts for all trusts in existence on the date of the assumption, together with those testamentary trusts which come into existence after the date of assumption.

D. "Relative" means a spouse, ancestor, descendant, brother, or sister, by blood or adoption.

E. "Affiliate" means any person directly or indirectly controlling or controlled by another person, or any person under direct or indirect common control with another person. It includes, but is not limited to, any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange. It does not include a bank, trust company or affiliate of a bank or trust company which is providing services to an investment company or trust as investment ~~adviser~~ advisor, sponsor, distributor, custodian, transfer agent, administrator, registrar or otherwise.

F. "Trust" means an express trust only, and does not include so called "business trusts".

G. "Principal" means any real or personal property which has been so set aside or limited by the owner thereof, or a person thereto, legally empowered that it and any substitutions for it are eventually to be conveyed, delivered, or paid to a person, while the return therefrom, or use thereof, or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person.

H. "Income" means the return derived from principal.

I. "Tenant" means the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.

J. "Remainderman" means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law.



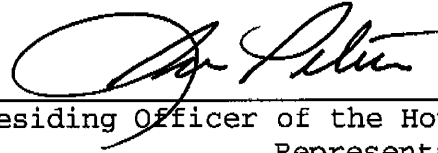
K. "Beneficiary" means any person entitled to receive from a trust any benefit of whatsoever kind or character.

L. "Trustee's compensation," as used in this act, means the normal, recurring fee of the trustee for services in the management and administration of the trust estate, irrespective of the manner of computation of such fee. "Trustee's commission," as used in this act, means the fee of the trustee for services rendered, other than in the normal management and administration of the trust estate, and includes extraordinary services, remuneration of the trustee for acceptance, distribution, termination, and all other fees of similar nature, as distinguished from regularly recurring compensation for management and supervision of the trust estate by the trustee.

M. "Trustee advisor" means a person appointed by the terms of the trust instrument to act as an advisor to the trustee with regard to all or some of the matters relating to the property of the trust. Unless otherwise provided by the terms of the trust instrument, if a trustee advisor is appointed, the property and management of the trust and the exercise of all powers and discretionary acts exercisable by the trustee remain vested in the trustee as fully and effectively as if an advisor were not appointed, the trustee is not required to follow the advice of the trustee advisor, and the trustee advisor is not liable as or considered to be a trustee of the trust or a fiduciary when acting as an advisor to the trust.

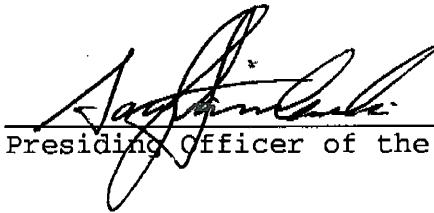
SECTION 2. This act shall become effective November 1, 2012.

Passed the House of Representatives the 7th day of March, 2012.



Presiding Officer of the House of Representatives

Passed the Senate the 18th day of April, 2012.



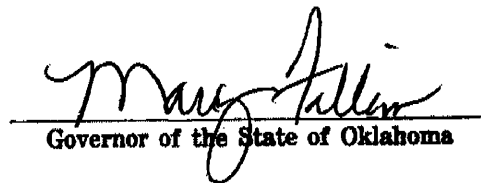
Presiding Officer of the Senate

**OFFICE OF THE GOVERNOR**

Received by the Governor this 19<sup>th</sup>  
day of April, 20 12,  
at 11:29 o'clock A.M.

By: Jessica R. Byers

Approved by the Governor of the State of Oklahoma the 25<sup>th</sup> day of  
April, 20 12, at 3:43 o'clock P.M.

  
Governor of the State of Oklahoma

**OFFICE OF THE SECRETARY OF STATE**

Received by the Secretary of State this  
25<sup>th</sup> day of April, 20 12,  
at 5:20 o'clock P.M.

By: Michelle R. Day



Sec. 13.36.370. Trust protector.

(a) A trust instrument may provide for the appointment of a disinterested third party to act as a trust protector.

(b) A trust protector appointed under (a) of this section has the powers, delegations, and functions conferred on the protector by the trust instrument, which may include the power to

(1) remove and appoint a trustee;

(2) modify or amend the trust instrument to achieve favorable tax status or to respond to changes in 26 U.S.C. (Internal Revenue Code) or state law, or the rulings and regulations under those laws;

(3) increase or decrease the interests of any beneficiary to the trust; and

(4) modify the terms of a power of appointment granted by the trust.

(c) A modification authorized under (b) of this section may not

(1) grant a beneficial interest to an individual or a class of individuals unless the individual or class of individuals is specifically provided for under the trust instrument;

(2) modify the beneficial interest of a governmental unit in a trust created under AS 47.07.020 (f).

(d) Subject to the terms of the trust instrument, a trust protector is not liable or accountable as a trustee or fiduciary because of an act or omission of the trust protector taken when performing the function of a trust protector under the trust instrument.

Sec. 13.36.375. Trustee advisor.

(a) A trust instrument may provide for the appointment of a person to act as an advisor to the trustee with regard to all or some of the matters relating to the property of the trust.

(b) Unless the terms of the trust instrument provide otherwise, if an advisor is appointed under (a) of this section, the property and management of the trust and the exercise of all powers and discretionary acts exercisable by the trustee remain vested in the trustee as fully and effectively as if an advisor were not appointed, the trustee is not required to follow the advice of the advisor, and the advisor is not liable as or considered to be a trustee of the trust or a fiduciary when acting as an advisor to the trust.

Sec. 13.36.390. Definitions.

In this chapter,

(1) "party in interest" means, if the trust is

(A) revocable and if the settlor is incapacitated, the settlor's legal representative under applicable law or the settlor's agent under a durable power of attorney; or



# Idaho Statutes

## TITLE 15 UNIFORM PROBATE CODE

### CHAPTER 7 TRUST ADMINISTRATION

#### PART 5. TRUST PROTECTOR

15-7-501. TRUST PROTECTOR. (1) Definition of terms:

(a) "Distribution trust advisor" means a person given authority by the trust instrument to exercise all or any portions of the powers and discretions set forth in subsection (11) of this section.

(b) "Excluded fiduciary" means any fiduciary excluded from exercising certain powers under the instrument, which powers may be exercised by the grantor or a trust advisor or a trust protector.

(c) "Fiduciary" means a trustee under any testamentary or other trust, an executor, administrator, or personal representative of a decedent's estate, or any other party, including a trust advisor or a trust protector, who is acting in a fiduciary capacity for any person, trust or estate.

(d) "Instrument" means any revocable or irrevocable trust document whether created inter vivos or testamentary.

(e) "Investment trust advisor" means a person given authority by the trust instrument to exercise all or any portions of the powers and discretions set forth in subsection (10) of this section.

(f) "Trust advisor" means a distribution trust advisor or an investment advisor.

(g) "Trust protector" means any disinterested third party whose appointment is provided for in the trust instrument.

(2) Liability limits of excluded fiduciary. An excluded fiduciary is not liable, either individually or as a fiduciary, for either of the following:

(a) Any loss that results from compliance with a direction of the trust advisor;

(b) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the trust advisor if that excluded fiduciary timely sought but failed to obtain that authorization.

Any excluded fiduciary is also relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the trust advisor had authority to direct the acquisition, disposition or retention of any such investment.

(3) Death of grantor. An excluded fiduciary may continue to follow the direction of the trust advisor upon the incapacity or death of the grantor if the instrument so allows.

(4) When trust advisor considered as fiduciary. If one (1) or more trust advisors are given authority by the terms of a governing instrument to direct, consent to, or disapprove a fiduciary's investment decisions, or proposed investment decisions, such trust advisors shall be considered to be fiduciaries when exercising such authority unless the governing instrument provides otherwise.

(5) Excluded fiduciary's liability for loss if trust protector appointed. If an instrument appoints a trust protector, the excluded fiduciary is not liable for any loss resulting from any action taken upon such trust protector's direction.

(6) Powers and discretions of trust protector. The powers and discretions of a trust protector shall be as provided in the governing instrument and may, in the best interests of the trust, be exercised or not exercised in the sole and absolute discretion of the trust protector and shall be binding on all other persons. Such powers and discretion may include the following:

(a) To modify or amend the trust instrument to achieve favorable tax status or because of changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;

(b) To increase or decrease the interests of any beneficiaries to the trust;

(c) To modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;

(d) To terminate the trust;

(e) To veto or direct trust distributions;

(f) To change situs or governing law of the trust, or both;

(g) To appoint a successor trust protector;

(h) To interpret terms of the trust instrument at the request of the trustee;

(i) To advise the trustee on matters concerning a beneficiary; and

(j) To amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust.

(7) Submission to court jurisdiction -- Effect on trust advisor or trust protector. By accepting an appointment to serve as a trust advisor or trust protector of a trust that is subject to the laws of this state, the trust advisor or the trust protector submits to the jurisdiction of the courts of Idaho even if investment advisory agreements or other related agreements provide otherwise, and the trust advisor or trust protector may be made a party to any action or proceeding if issues relate to a decision or action of the trust advisor or trust protector.

(8) Powers of trust protector incorporated by reference in will or trust instrument. Any of the powers enumerated in subsection (6) of this section, as they exist at the time of the signing of a will by a testator or testatrix or at the time of the signing of a trust instrument by a trustor may be, by appropriate reference made thereto, incorporated in whole or in part in such will or trust instrument by a clearly expressed intention of a testator or testatrix of a will or trustor of a trust instrument.

(9) Investment trust advisor or distribution trust advisor provided for in trust instrument. A trust instrument governed by the laws of Idaho may provide for a person to act as an investment trust advisor or a distribution trust advisor, respectively, with regard to investment decisions or discretionary distributions.

(10) Powers and discretions of investment trust advisor. The powers and discretions of an investment trust advisor shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the investment trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of

the document provide otherwise, the investment trust advisor has the power to perform the following:

(a) Direct the trustee with respect to the retention, purchase, sale or encumbrance of trust property and the investment and reinvestment of principal and income of the trust;

(b) Vote proxies for securities held in trust; and

(c) Select one (1) or more investment advisors, managers or counselors, including the trustee, and delegate to them any of its powers.

(11) Powers and discretions of distribution trust advisor. The powers and discretions of a distribution trust advisor shall be provided in the trust instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the distribution trust advisor and are binding on any other person and any other interested party, fiduciary, and excluded fiduciary. Unless the terms of the document provide otherwise, the distribution trust advisor shall direct the trustee with regard to all discretionary distributions to beneficiaries.

**History:**

[15-7-501, added 1999, ch. 331, sec. 1, p. 893; am. 2007, ch. 68, sec. 2, p. 178.]

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