



## So, you want to be a trustee? A primer for the care of your trust

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In most jurisdictions, lawyers rarely, if ever, serve as trustees of the trusts established by their clients. The fiduciary obligations of a trustee are broad, and it often makes good sense to designate a bank or responsible family member to serve as trustee. Since at least the late 19th century, however, many clients in Boston and throughout New England have asked their estate planning lawyers, who know their legal and financial affairs best, to serve as trustees. Over the years, those responsibilities have helped sustain the practices of lawyers in small and large firms alike, many of them with established trust departments. Now, as the legal profession evolves and lawyers develop new skills, more practitioners are considering taking on active trusteeships. This article provides a brief overview of some of the more significant obligations of a trustee of a private trust, including making distributions, asset custody and investment management, record keeping, and legal and tax compliance.

### Duties and Distributions

The duties and powers of a trustee are defined by relevant state and federal law, and by the terms, both expressed and implied, of the governing trust instrument. The trustee's core obligation is to administer the trust for the benefit of the beneficiaries in accordance with the settlor's intent. The trust instrument provides the "rules of the road" with respect to how it should be administered, including identifying beneficiaries, establishing distribution standards, and outlining both reporting obligations and the scope of permissible investments. Generally, if the trust instrument contemplates a particular action, it may be undertaken if the trustee determines it is in the best interest of the beneficiaries and does not violate public policy.

In addition to the terms of the trust, the parameters of a trustee's powers are defined by a large body of trust and tax law. Any potential trustee should familiarize herself with the Massachusetts Uniform Trust Code (MUTC), which provides the framework and "default rules" within which Massachusetts trusts should be administered. See Mass. Gen. L. ch. 203E (2012). The MUTC also outlines avenues to the court, if and when judicial intervention is appropriate, and it establishes certain duties that cannot be avoided. These du-



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ties include, but are not limited to: (1) duties of skill, care, and loyalty (*see id.* at §§ 802, 804, 806); (2) duty to furnish information to, and communicate with, beneficiaries (*id.* at § 813); (3) duty to avoid conflicts of interest (*id.* at § 802); (4) duty to segregate property (*id.* at § 810); (5) duty of impartiality regarding current and future beneficiaries (*id.* at § 803); and (6) duty to enforce and defend claims of the trust (*id.* at § 811).

In addition to the MUTC, a trustee must understand the Massachusetts Prudent Investor Act (MPIA), G.L.c. 203C, which addresses fiduciary investment authority as it concerns the investment performance of the trust portfolio as a whole. Broadly stated, the MPIA permits a trustee to invest assets under the "modern investment portfolio," or "total return" theories, an important evolution from prior standards. Equally important is the Massachusetts Principal and Income Act, G.L.c. 203D, which establishes, in part, duties relating to determining appropriate distributions of trust property to current beneficiaries. A successful trustee understands the im-

portance, and interrelation, of both the MPIA and Principal and Income Act and takes them into consideration when setting investment policies and making distribution decisions. Massachusetts case law also provides a rich source of trust law principles (a discussion beyond the scope of this article).

Once familiar with the trust document and relevant laws, and upon acceptance of the trusteeship, the real work of administration begins. First, and perhaps foremost, a trustee makes distributions to current beneficiaries while still preserving trust principal for future beneficiaries. When making distributions, a trustee must respect the express provisions of the trust, which range from an "ascertainable standard" to broad discretion. Whatever the case may be, a trustee making distributions should keep in mind the current and future financial needs of current beneficiaries, while remembering the interests of future beneficiaries (involving the duty of impartiality).

### Asset Custody and Investment Management

Ensuring that trust property is preserved for current and future beneficiaries is a key fiduciary responsibility. Avoidable loss in asset value may be the most significant liability risk faced by a trustee. Assets must be invested in a "prudent" manner, so a cautious trustee will develop a written trust investment policy and will review that policy at least every year. While a trustee should not ignore the essential responsibility to determine the basic asset allocation targets of a trust (i.e., between equity and fixed income investments), both the MUTC and the MPIA permit trustees to "delegate" investment responsibilities to other professionals to make investment decisions. See G.L.c. 203E, § 807; G.L.c. 203C, § 10. If an investment advisor is selected and monitored with care, delegation of these tasks can greatly reduce the trustee's personal risk for liabilities associated with losses. *Id.* Importantly, a lawyer should not provide specific investment advice (or advertise investment services) unless she is a Registered Investment Advisor under applicable federal and state securities laws. *E.g.*, G.L.c. 110A, § 201.

### Record Keeping and Communications

A trustee must maintain complete and accurate records and make them

available for review by "qualified beneficiaries" (as defined in the MUTC) and government agencies. This includes general record keeping (written records pertaining to the financial assets of the trust) and records of trustee actions (meeting minutes, letters, and memos relating to trust management). With adequate record keeping, a trustee will be positioned to fulfill her responsibility of accounting (i.e., providing annual financial reports concerning trust income and principal) to all interested persons. See G.L.c. 203E, § 813. A modern trustee should provide regular and complete reports to beneficiaries, since failure to communicate adequately may be a violation of duties contained in the trust instrument (and the MUTC) and may result in feelings of mistrust, even if unwarranted. *Id.*

### Tax Considerations

A trustee must also ensure compliance with tax reporting and payment obligations. In general, every irrevocable trust is a "taxpayer," requiring trustees to file annual federal and state income tax returns. See Federal Form 1041; Massachusetts Form 2. The trustee may also be responsible for the payment of federal and state income taxes. Applicable income tax rules are complicated and differ in important respects from the rules that apply to individuals, so a cautious trustee will consult regularly with his or her tax professional, preferably before the trust is funded. A trustee must also always understand, and plan for, the gift, estate and generation skipping transfer tax consequences of particular trusts.

As this article, which provides only a glimpse into trustee obligations, demonstrates, serving as a trustee is an area in which a lawyer should not practice without sufficient research, support and preparation. Most trusts are established for families, and all families, at some point, struggle with internal conflict. A trustee who puts her fiduciary obligations first may not always be popular with all beneficiaries, but she will fulfill the role expected of her under the trust and applicable law. Serving as a trustee is a long-term commitment. With the right lawyer in place, trust settlors and beneficiaries will have someone objectively dealing with difficult family scenarios, addressing complex legal and tax issues, supervising investments wisely, and handling record keeping for many years to come. It's tricky work, but nothing we can't be entrusted to do. ■