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THE LAW FIRM OF  
**BOVE & LANGA**  
A PROFESSIONAL CORPORATION

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To: Clients and Friends  
From: The Attorneys at Bove & Langa  
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## THE BOVE & LANGA REPORT

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### ALL ABOUT FIDUCIARIES

A trustee, an executor, a health care agent, a guardian, a custodian, an attorney-in-fact, a trust protector, and an investment advisor all walk into a bar . . . . sounds like the beginning of a really bad joke, right? But there is little that is funny about being a “*fiduciary*” – a person or entity who owes the duties of good faith, trust, confidence, and candor to another, either directly or through a trust or other legal document. Fiduciaries abound within the well thought-out estate plan: it is a serious position, because the fiduciary who breaches the “fiduciary duty” it owes to another can be held personally responsible for any damages that result. Our clients and friends are often called upon to appoint fiduciaries, and even to serve themselves as a fiduciary. Therefore, we’ve prepared this Report to help you navigate those waters. So, how many fiduciaries does it take to change a light bulb? Only one, but it does so with great care.



**The Players:** Most of you know the important fiduciaries in a common estate plan, but let’s have a quick review. The main fiduciary in a trust is the *trustee* – the person holding, managing, and distributing trust property for the benefit of all the trust beneficiaries. The not-so-common trust fiduciaries are the “*trust protector*” and the “*investment advisor*”, both of whom you will meet later in this Report. Property not held in trust during your lifetime can be managed by your “*attorney-in-fact*”, the fiduciary appointed in your durable power of attorney to handle financial matters on your behalf, even if you become incompetent. If you do become incompetent and have not executed a durable power of attorney (none of our clients!), the Probate Court can appoint the fiduciary called a “*guardian*” to manage your individually owned (non-trust) property and to manage your living arrangements (you are called the “*ward*” when a guardian is appointed), all with Court oversight. Where you can manage on your own, but just need help with your financial affairs, in the absence of a durable power the Probate Court will appoint a “*conservator*” as the fiduciary to manage your assets and leave you to make your own personal decisions regarding where you live and such. Health care problems? If you are unable to communicate your own wishes to your medical care providers, your

“*health care agent*” does so under your health care proxy. Finally, at the end of your life, your “*executor*” assumes the fiduciary duty under your Will to see that your individually owned assets end up where your Will puts them, typically into your trust\* and the “*guardian*” nominated in your Will is appointed by the Probate Court to care for your minor children.



**Quick Mind, Kind Heart:** Review over, now comes the hard part: the actual placement of confidence and trust in another person – your selection of the fiduciaries to serve in your estate plan. For life partners, often the first choice is an easy one: you simply select one another to serve in the initial fiduciary positions. “I’ll be your executor, and you’ll be mine.” The choice of a successor fiduciary is a different matter. How to decide? You might follow Ronald Reagan’s advice that you can tell a lot about a person’s character by the way he eats jelly beans, or you might keep in mind these considerations:

**Trustee:** In every trust, the trustee should be someone who is detail-oriented, reliable, and able to work well with the trust’s advisors (typically investment, legal, and accounting advisors). The ability to connect and communicate with the beneficiaries is an important trustee quality where a trust grants the trustee broad discretionary decision-making power over distributions, which is very typical in a trust providing for minor children or containing asset protection features. In certain situations, you may also want to consider the use of a professional trustee, such as an accountant or lawyer, or an institutional trustee, such as a trust company, either as a co-trustee with a family member or as the sole trustee. For example, if you anticipate family squabbles, a disinterested professional trustee can be a calming influence. Or, if a large amount of wealth is involved, the financial strength of an institutional trustee can give your family the peace of mind that the trust beneficiaries will be compensated in the event of a breach of a fiduciary duty – the bank will probably be able to pay damages; Aunt Penny may not. Or, there may be a special needs beneficiary that requires special knowledge of the professional trustee.

**Guardian of Your Minor Children:** This is perhaps the toughest decision you will make. You obviously want someone who will love your children as their own, who is young enough to be in it for the long haul, and who might be willing to move to where you currently live to provide continuity for the children (if this is important to you). It is natural to name a loving couple (your sister and brother-in-law, your best friends), but it is best to name only one person in the event the loving couple dissolves into a bitter divorce where each wants your children. It may be hard to name only one, but if you don’t, you are leaving the decision to the Probate Court. Something else to consider is that the guardian should be someone other than the trustee of your trust. Why? Because the trustee has to provide a financial statement (an “*account*”) of the trust assets, management, and distributions each year to the trust’s beneficiaries. This account would be provided to the guardian of your minor children, who presumably are beneficiaries of your trust at your death. If the trustee and the guardian are the same person, there is no independent review of the account. Not good. Finally, don’t eliminate a good candidate simply due to the financial burden caring for your children might create. Your trust can provide for payments to build an addition onto a guardian’s home, to help educate the guardian’s children, or to provide a retirement annuity for the guardian.

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\* Our website at [bovelanga.com](http://bovelanga.com) has a comprehensive checklist of executor duties on its home page.

**Your Own Guardian or Conservator:** In most instances, you can avoid the need for a Court appointed guardian – and Court oversight of your life – by executing a durable power of attorney, a health care proxy, and a funded revocable trust. The fiduciaries you put in place are sufficient. That said, there are limited circumstances where a Court appointed guardian is necessary. When nominating someone in your durable power of attorney for the Court to appoint if the need arises, look for someone with the careful diligence of a trustee (there may be financial and legal decisions to be made), and a parent’s loving heart (there may be personal lifestyle decisions to be made). A cross between the Buddha and Warren Buffet would be about right.

**Attorney-In-Fact:** Again, you are looking for an individual who is trustworthy and detail oriented, and many times the same person you selected to serve as the trustee in your trust is a great choice to serve as your attorney-in-fact.

**Health care agent:** Your health care agent is often a member of your own family, someone you are comfortable speaking to about your feelings concerning the last moments of your life, and who is strong enough emotionally to make difficult decisions concerning life and death.



**Show Me The Money – Investment Guidelines For Trustees:** In these most uncertain of times, can a trustee decide to eliminate all risk by taking cash and burying it under the trustee’s house (or place of business)? Although that may sound like a good investment strategy based on the current market upheaval, this “no risk” strategy would be as improper as an “all risk” strategy based upon gambling all the trust assets on the dot.com craze of the early 2000’s (even if successful). Or, suppose Dad’s trust is 80% comprised of General Motors stock, which he loves. Can you as trustee continue to hold it just to keep Dad happy? What if General Motors drops to a stock market low not seen since the 1950’s?

As trustee, you need to look at what investment strategy is set forth in the trust document (if any), have knowledge of applicable state law, and an understanding of how the courts will interpret that law. Let’s look at these first two guidelines, starting with the trust itself. There may be a statement that the trustee is to hold all General Motors stock during Dad’s lifetime unless directed by Dad to sell it. As such, Dad is acting as an “*investment advisor*” to the trust and where an investment advisor is included within a trust the fiduciary position is typically coupled with exculpatory language allowing the trustee to follow the investment advisor’s directions without incurring any liability if the advice turns out to result in a loss to the trust.

Turning to state law, unless otherwise altered by the trust itself, in Massachusetts a trustee has the statutory duty to manage trust assets in compliance with the “prudent investor rule”, which states that “a trustee shall invest and manage trust assets as a prudent investor would, considering the purposes, terms, and other circumstances of the trust” while exercising reasonable care, skill, and caution. While the trustee must keep in mind the purpose of the trust and the intentions of the settlor, the trustee must consider diversification of investments as a key part of an investment strategy and would not be able to blindly maintain the investments as transferred to the trust by the settlor - even if General Motors was Dad’s favorite stock. In determining an investment strategy, a trustee must be mindful of

beneficiaries' circumstances such as health, age, other sources of income and assets, and implement the strategy accordingly. A trustee does not need to be an investment guru, and particularly in the current investment climate, it is very important for a trustee to engage appropriate outside investment advisors to review and direct investment strategy.

Where you are deciding to name an investment advisor within the trust itself (you, your own advisor, or whomever) or where the trustee is hiring someone to provide investment advice to the trustee, keep in mind, you want someone with a good investment track record over time, not someone who strolls down the street whistling "I've got a horse right here, his name is Paul Revere ....."



### **Passing The Torch From One Fiduciary To The Next – Putting “Success”**

**In “Succession”:** You have a great line of fiduciaries in place within each estate plan document, but you are still not done. What can you do to insure that the succession from one fiduciary to the next is a smooth transaction? How do you get old Uncle Jason to step down as trustee for the good of the trust and let the next successor take over? To accomplish the goal of seamless succession, each document must carefully set forth who will have the power to remove a fiduciary and how that power will be exercised. Can removal be for any reason? Is a personality clash enough, or does bad faith have to be shown? Can the power to remove be exercised at any time? Or should it be exercisable in a limited fashion, say once every two years to give a new fiduciary the chance to get settled and prove its worth. Your decision may depend on the fiduciary. You may want to limit the power to remove a trustee, but have no limits on removing an investment advisor. And what about the fiduciary who is stepping down, what protections should be provided to that person? Often a retiring or removed trustee will want a “release” from the trust’s beneficiaries which, in effect, let’s the trustee off the hook for anything adverse that may have happened during the trusteeship. The new fiduciary, too, must be protected and will want to review the prior fiduciary’s “accounts” for accuracy prior to assuming the fiduciary position, especially if the fiduciary is to be a trustee or a guardian.



**Letting Your Wishes Be Known:** The year is 2050 and the trust you created as part of your estate plan for your children and grandchildren is in place. The person you named as trustee gets a call from your youngest child asking for \$140,000 to pay his legal fees in a messy divorce. He also wants the trustee to pay \$15,000 for credit card debt run up by his 19 year old daughter. And yet another beneficiary wants a new car. Would you go for a Honda or a Hummer?

Under the trust, you have given the trustee broad discretion to make payments to or for the beneficiaries. Would you approve of the trustee making any or all of these payments? Isn't the trustee supposed to do what she thinks you would do? How would she know what you would do in these or other unusual circumstances? And what about distributions for “health, maintenance, education and support” referenced in the trust? Would you agree that “education” could include a year in Provence to study French cooking or a six month deep sea diving expedition in the South Pacific?

It is agreed by experienced trust attorneys that the inclusion of such examples or anything similar in the body of the trust would do little more than confuse the issue, hamper the trustee’s exercise of

discretion, and encourage beneficiaries to create reasons for distribution. For these reasons, instead we strongly recommend that clients with trusts that are to continue beyond their lives for children and other beneficiaries prepare a non-binding “letter of wishes”, separate from the trust, that the trustee can use as an informal guide and a resource as to the client’s personal wishes on the use and implementation of the trust funds. Your letter might include examples illustrating your philosophy towards beneficiary lifestyles and enhancement of opportunities for beneficiaries, recommending liberal distributions for certain matters or even withholding of benefits so as not to discourage work and industriousness. In our opinion (but clients may decide for themselves), the letter should not be binding on the trustee because, if not binding, the letter may be withheld from the beneficiaries. For reasons suggested above, with such a letter you will have the opportunity to continue to offer your thoughts to assist the Trustee in managing your trust in a manner consistent with your wishes.



**Supervising The Trust:** The trustee of a trust is in many respects like the president or CEO of a company (except, we hope, for the outrageous compensation). That is to say, the trustee typically decides how the trust will be managed, how the trust funds will be distributed and to which of the beneficiaries, whom he will hire to assist, and how the funds will be invested. Unlike a company president or CEO, however, there is no board of directors or shareholders that can fire him. Unless otherwise specifically provided in the trust (as discussed above), the beneficiaries must resort to costly litigation to fire the trustee or cause him to answer to a formal complaint.

Similarly, even though trusts are typically established to carry on for years, even generations, they are often drafted in ways that are unable to accommodate unforeseen changes in circumstances. For instance, what can we do where a trust created in Massachusetts ends up with all the beneficiaries located in other states or even other countries? Or where an individual whom the settlor of the trust would have wanted as a beneficiary was somehow overlooked or not anticipated? Or where the trust calls for a distribution to be made to a beneficiary who is in the midst of a divorce, or incarcerated, or self destructive? In many cases, either the badly-timed distribution must be made and perhaps lost, or expensive Court action must be taken in an attempt to “reform” the trust, with no guarantee of success. These and many other problems can be readily solved through the appointment of a *trust protector*.

A trust protector is an individual (though it could be more than one person, or even an entity), who would have specified powers over the trust but who is not a trustee. For instance, a person could create a trust for the benefit of his children and grandchildren, naming a trusted friend or advisor as trust protector (successors may be named if those first appointed ceased to serve). The trust protector could be given the power to remove and replace trustees, change the “situs” (location) of the trust, delay or accelerate trust distributions, review the trust accounts, and even amend the trust as necessary. The limitation or extent of the powers is a matter to discuss with your attorney, but it should be evident that the position introduces great flexibility in a document that is otherwise relatively fixed, without the expense and publicity of Court involvement, but with, for example, the authority to fire the “CEO” without giving him a golden parachute.

## **SUMMARY**

In addition to helping our clients craft and implement estate plans with the best fiduciary selections possible, the attorneys at Bove & Langa also serve as fiduciaries at the request of a client, and provide legal representation of fiduciaries in the performance of their duties, whether it be the executor administering an estate, the attorney-in-fact managing the assets of an incompetent person, or the trustee making complex decisions regarding discretionary distributions in the best interest of the trust beneficiaries.

So, why did the fiduciary cross the road? Because it was prudent to do so!

This report has been specially prepared by the attorneys at Bove & Langa. The material provided herein is for educational and informational purposes only and should not be construed as legal advice. Always consult your attorney – hopefully at Bove & Langa.