

BOVE&LANGA
LAW FIRM

Ten Tremont Street, Suite 600 | Boston, MA 02108
www.bovelanga.com | p 617.720.6040 | f 617.720.1919

MAY WE HAVE YOUR SOLE, ABSOLUTE, AND UNFETTERED ATTENTION?

MASS LAWYERS WEEKLY – TRUSTWORTHY ADVISOR
Alexander A. Bove, Jr. and Melissa Langa
November 2016

A trust came across our desk the other day which asked the trustee to consider principal distributions from the marital trust in its *sole* discretion as it *deemed advisable*; to consider any sort of distribution from the family trust in its *sole and absolute* discretion; to consider the exercise of certain administration powers in its *absolute unfettered discretion*; and to cause a termination of the trust in its *unlimited* discretion. Frankly we hoped the trust would end with a rousing direction to permit a change in situs in the trustee’s *sole, absolute, unlimited, and unfettered* discretion if *deemed advisable*, but we were disappointed there. Even that drafter had his limits.

If you begin with the construction proposition that every word in the trust should be construed as if it was legally meaningful, how would you advise the trustee of this trust? Are “sole” “absolute” “unfettered” “unlimited” and “deemed advisable” useful or harmful modifiers of the word “discretion”? A quick trip to the dictionary is instructive. Mr. Webster, if you please:

“Sole discretion” means the discretion may only be exercised by the person holding the discretion. Well, who else will exercise the discretion but the trustee directed to do so by the

terms of the trust? Absent a trust with multiple single purpose trustees where the drafter might wisely distinguish among the trustees which trustee holds what discretion, let's toss out "sole" as unilluminating in the typical trust.

"Absolute discretion" means complete and total discretion, not limited in any way. That sounds good, if what the settlor intends is to give the trustee the broadest possible authority to make or not make distributions. The term "absolute" makes clear the absence of any standard within the trust which must be applied by the trustee, such as a standard of support. "Absolute" stays.

"Unfettered discretion" means the exercise is not controlled in any way, it is unrestricted. But is it? Massachusetts case law requires the exercise of discretion to be prudent and reasonable, and while it may be possible to limit a trustee's liability to exercises which are in bad faith or are intentionally reckless and indifferent, the exercise is still, in a meaningful way, subject to the control of the courts, as enforced by the beneficiaries. And the Massachusetts Uniform Trust Code at section 814(a) codifies a "good faith" standard for the exercise of trustee discretion. Use of "unfettered" may be misleading, and somewhat redundant to "absolute," so let's put it aside.

"Unlimited" also means without restriction, similar to the meaning of "unfettered" and "uncontrolled" (a term somehow missed by our drafter). Was the drafter intentional in the use of the two terms? Are unlimited and unfettered separate and distinct markers for the trustee to follow, or has an ambiguity been created which the trustee and her advisor must struggle with in an attempt to understand the intent of the settlor? In the end, as argued, the trustee in

Massachusetts is not unfettered, unlimited, and uncontrolled in its exercise of discretion so the term unlimited is, again, misleading.

“Deems advisable” mandates a wise, sensible, and reasonable exercise of discretion. This guidance means little to a trustee who already has the fiduciary duty to use its best efforts, to exercise skill, care, and diligence in exercising all powers and discretions, always acting in the best interest of the beneficiaries. Since a trustee is unable to act in an inadvisable manner, these words don’t seem to add anything to the trust.

In the end, less is more. “Absolute discretion” in decision-making grants the trustee the widest possible discretion without lulling a trustee into the belief its actions are not reviewable. And given the rise of the non-professional trustee who might fail to seek legal advice as to the duties of its office the importance of clarity is paramount.

Giving a trustee broad discretion in a trust should be the rule rather than the exception, because the trustee should be empowered to adjust for the countless changes in requests and circumstances surrounding the beneficiaries as the years pass. But drafters should resist the tendency to add unnecessary modifiers, thinking that this gives more “teeth” to the scope of discretion. As we have seen on numerous occasions, such as the one noted at the outset, where different modifiers are mixed but not matched, trouble can result. In the worst case, it can invite litigation, and in the best case it can generate trustee anxiety and even suggest that the trustee should petition the court for instructions, causing unnecessary legal fees, paid by the trust.

The objective of every trust, of course, is to adequately reflect the settler's intentions. Different expressions of that intent in different parts of the trust can only serve to generate confusion and uncertainty as to what those intentions were. Thus, a careful drafter should search each trust for the use of the term "discretion" to ensure the modifier, if any, is consistent.

WORD COUNT: 820