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THE BOVE & LANGA REPORT: FLEXIBILITY

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2014 was an exciting year for Bove & Langa and we would like to take a moment to celebrate some highlights with you. In 2014, Alexander Bove was inducted into the Estate Planning Hall of Fame® and awarded the Accredited Estate Planner (Distinguished) designation by the National Association of Estate Planners & Councils (NAEPC). Ruth Mattson has become a principal and shareholder of the firm with Alexander and Melissa, and Dave Valente will be speaking at the American Bar Association's Estate Planning and Real Property Spring Symposia in Washington, D.C. Molly Soiffer has joined the firm as staff attorney while she completes her LL.M. studies at Boston University. Finally, in 2014, Melissa Langa was named Estate Planner of the Year by the Boston Estate Planning Council. Our outstanding clients and network of advisors make all of this possible, and we thank you.

No one predicted that both Boston and Buffalo would set new records this winter for receiving more than six feet of snow in a short period. While we always expect occasional storms, the effects of this snowfall have been unprecedented and we have adjusted our lives accordingly. As we slip and slide through this winter, the key to moving ahead is flexibility, and the same is true in estate planning. We cannot predict what the future may hold, how beneficiaries and their circumstances may change, or how the market will do. Instead, we can use all the tools available to us to draft flexible plans and to make changes in times of need.

THE NEW KID ON THE TRUST BLOCK

It has been said that the trust is one of the most flexible legal instruments ever devised, and most trust lawyers will agree. Trusts can be created to do anything except something that is illegal or against public policy. It is all a matter of drafting the provisions of the trust to do what the trust creator (our client) wants it to do. Unfortunately, what the creator might want to do is often based on circumstances that exist today or those we think will exist 10 or 20 or 30 years from now. Of course, these circumstances may change. Competent trust lawyers always try to anticipate, but it seems there is always something unforeseen – a posthumous child, for instance, or a family member's expatriation (relinquishment of US citizenship).

These situations generally arise after the trust becomes irrevocable or after the death of its creator, when it is typically irrevocable. In such cases, we sometimes, if not always, wish we

could go back and re-draft the trust to add provisions that would accommodate the unforeseen situation. A fairly recent development in trust practice has made that possible. In drafting trusts these days, most lawyers will include or at least consider including provisions for a trust "protector". A protector is a party who has powers over the trust but who is not a trustee. Typical protector powers include the power to remove and replace the trustee and the power to veto or order a trust distribution, but often the powers given to the protector are broad enough to accommodate virtually anything that comes up in the future that was not contemplated when drafting the trust.

For instance, one of the broadest of the protector's powers would be the power to amend the trust. From this, the protector could make changes to the trust that would accommodate any situation. By the same token, however, it is such a broad power that we would not want it in the wrong hands. Thus, selection of a protector must be done with care, and consideration should be given to naming a professional or other responsible party as opposed to a family member. This should "protect" the objectives of the trust.

LETTING THE TRUSTEE OFF THE HOOK

As we have mentioned in past Reports, the trustee of a trust has a big job. The trustee is responsible for carrying out the terms of the trust, communicating with beneficiaries, preparing trust accountings, filing trust tax returns, and of course, managing and investing trust assets. Failure to properly carry out any of these duties can result in personal liability to the trustee. This can be a concern, especially if a trustee has no expertise in one or more of the respective duties. Of course, a trustee can hire agents to carry out those functions, but if an agent makes a bad decision, liability could still rest with the trustee. For this reason, in recent years, the concept of "dividing" trustee responsibilities among more than one party (typically called a "trust advisor") has been readily accepted by trustees, beneficiaries, and trust creators as well, as it allows each trust advisor to focus on certain areas of expertise, particularly with respect to managing and investing trust assets.

In effect, the trustee, still the number one party responsible for the integrity and objectives of the trust, is "directed" to follow the instructions of the trust advisor with respect to the divided duties. Thus, the trust is called a "directed" trust. When this happens, the trustee is not responsible for any losses or damages resulting from the performance of the duties assigned to the trust advisor. So if the trust's terms direct the trustee to carry out investment instructions from the advisor (who presumably is qualified for the job), the trustee is not responsible for losses if the investments go sour unless an exception applies such as collusion, fraud, or bad faith by the trustee.

A directed trust may divide or separate not only investment responsibility, but also (among other things) decisions to make distributions to the beneficiaries. When would a trust creator want to do this? When a professional trustee is desired to carry out administrative duties such as accountings, reporting, maintenance of records and investments (if they are not divided), while the decision to make distributions to beneficiaries may be better carried out by a family trust advisor who is personally familiar with the beneficiaries and their individual needs.

Dividing trustee duties and responsibilities may work well in many cases but it must be remembered that each party who assumes responsibilities will and should be liable for failure to properly carry out those responsibilities, as that is what the trust arrangement is all about – that's why we call it a trust.

THERE IS NOTHING EITHER GOOD OR BAD BUT THINKING MAKES IT SO

William Shakespeare might just as well have been thinking about trust beneficiaries and their relationship with the trustee when he wrote these words. Sometimes a trustee is neither good nor bad, but rather simply competently going about the business of administering the trust. But in the mind of the beneficiaries something bad is happening – maybe the trustee denied a distribution request, or maybe the stock market had taken a dip, and the trust assets along with it. In the past, if a trustee did not want to resign and the beneficiaries did not have the power to remove the trustee under the trust document, disgruntled trust beneficiaries had a court fight on their hands.

The Massachusetts Uniform Trust Code ("MUTC") now provides some relief in such a situation. If all "qualified" beneficiaries ask the court to remove a trustee, the court will do so – even if the trustee did nothing wrong – if the court finds removal to be in the best interest of the beneficiaries, removal is not inconsistent with a material purpose of the trust, and a suitable successor is available. Is this good or bad? It depends upon the thinking of the client. A client who establishes a trust which will hold business interests may want a special business trustee to run the show, without worry of removal. Or a client who establishes a trust for a troublesome child may select a trustee with special skills to handle the issues of that child, and that trustee may not want the axe of removal hanging over its head. In those cases, the trust might state that the selection of a specific trustee is a "material purpose", in which case the court will impose a higher standard for removal, requiring a beneficiary to establish a serious breach of trust.

Client-lawyer discussion of trustee removal and appointment powers have always been important in the design phase of an estate plan, and maybe even more so now that the existence or nonexistence of a material purpose in the trust may sway how a court interprets those provisions in the future when the beneficiaries desire a change.

CHANGING THE UNCHANGEABLE

As mentioned above, while lawyers are adept at many things, there's one skill they lack: the ability to foretell the future. Though lawyers go to great lengths to draft estate planning documents that accommodate changes of circumstances, such precision may tie the hands of a trustee or beneficiary in a way not contemplated when the documents were executed. With the relatively recent advent of the MUTC came a degree of flexibility not previously available to beneficiaries and trustees: the Non-Judicial Settlement Agreement ("NJSA").

In the past, if provisions to add flexibility were not included in an irrevocable trust, many attorneys argued that any modification to the trust would require costly and time-consuming court proceedings. Under the MUTC, there is now a statutory method for "interested parties" to enter into an agreement, out of court, to make certain kinds of modifications. Do the terms of a trust fail to provide who serves as a trustee when all the named trustees have ceased to serve?

Does the document prohibit the sale of certain unwanted real estate? Was the family vacation home bequeathed to one child, who would prefer to trade with a sibling? Has a beneficiary developed an addiction or mental illness, and the terms of the trust provide he will receive an inheritance sometime soon? Looking to change the principal place of administration of an irrevocable trust? Do the beneficiaries want to prohibit the trustee from taking a particular action, e.g. the selling of a business? Is the language of the trust vague? All of these scenarios invite the possibility of a NJSA as a resolution mechanism.

Of course, there are limitations of which to be mindful. A NJSA cannot violate a material purpose of the trust (if there is one), and must include terms and conditions that could be properly approved by the court under applicable law. Further, the statute requires that all interested persons, meaning those whose consent would be required were the settlement to be approved by the court, must unanimously agree. The NJSA can't solve all problems created by restrictive terms of an irrevocable trust, though it can solve many, and is a modern, helpful tool for clients and lawyers alike.

GETTING THE SEAL OF APPROVAL

Sometimes, even if all the beneficiaries and the trust creator and the trustee agree that a trust should be changed, they need court approval to make the change. The trust might not include enough flexibility provisions to allow the desired change, and the new laws permitting non-judicial trust modifications have their limits. Also, even if non-judicial changes are possible, the trustee may want the blessing of a court to protect against future liability. With the many opportunities available to modify trusts without court involvement, sometimes court approval is still wanted or needed.

Fortunately, the MUTC has provided more certainty for modifying a trust with court approval. As a first step, all of the beneficiaries of the trust must agree to the proposed change. The trustee, who would carry out the change, also must agree for the plan to be effective. If the creator of the trust is living, the creator may agree to extraordinary changes, such as changing an irrevocable trust in a way that is inconsistent with a material purpose of the trust. If a trust is charitable, or if any beneficiary is a minor or incapacitated and that beneficiary's interests are not adequately protected, modification may not be possible. Fortunately, the MUTC also includes provisions to allow a minor or incapacitated beneficiary to be represented in trust proceedings. These and other MUTC provisions coordinate to allow trusts to be modified more easily and more expansively than under past law, even when courts are involved.

ONE PLUS ONE EQUALS ONE: THE NEW MATH OF VIRTUAL REPRESENTATION

Many a child has argued against a parent's edict by proclaiming "It's a free country, isn't it?" only to hear in response "Democracy stops at our front door!" A parent's authority may be supreme at home, but when a parent steps outside the front door, sometimes the parent's authority to speak for minor children is limited by law. For example, in the recent past, changes to a trust which impacted a minor child could not always be implemented with just a parent's consent. The minor child would have a "guardian ad litem" (sometimes called a "GAL") appointed by the court to represent the minor child's interest. The GAL is often a lawyer familiar with trust law, who takes the time to learn about the proposed action, interview the relevant

parties, and come to a conclusion whether the proposed action is in the minor child's best interest. All this takes time, and can be a costly expense which depletes the trust's funds.

Enter the concept of "virtual representation". Codified in both the MUTC and the Massachusetts Uniform Probate Code (the "MUPC"), clients can now ask a probate court judge to recognize that there are times when a parent may represent the rights of the parent's minor child. This can be successful if the parent and child have substantially identical interests, and no conflict of interest overrides that commonality of interest. Most trusts drafted today spell out in some detail the parameters of virtual representation. Sometimes the trusts limit virtual representation, such as permitting parental representation only if the parent is the descendant of the creator of the trust (in-laws need not apply!). Sometimes trusts expand virtual representation, such as permitting virtual representation powers to be held by a trust protector. The sky is virtually the limit.

A SUPER VICTORY FOR TRUSTS

Upon the Patriots' recent victory in Super Bowl XLIX with Tom Brady at the helm, the team became entrenched as the greatest in NFL history, at least in the minds of many New Englanders. Meanwhile, Robert Kraft, owner of the Patriots, and his family recently became key players in the trust field when they achieved a significant victory in a Massachusetts Supreme Judicial Court ("SJC") case.

The Kraft Family Irrevocable Trust, which had been created by the Patriots' owner in 1982 for his sons who were then minors, was protective. Even though each son received a separate share of the trust, all distribution decisions were made by a "disinterested" trustee, meaning one sufficiently removed from the beneficiaries under the requirements of the Internal Revenue Code. Moving the clock ahead, by 2012 the Kraft sons did not need the protections put in place while they were minors, and they wished to control distributions from their respective shares. Doing so, however, was not directly allowed under the terms of the existing trust. To achieve the same result, the trustees called an audible and elected to "decant" the trust by distributing each son's share into a new trust with the desired terms. For tax and other reasons, the trustees sought approval for this action in the courts. After a brief timeout, the SJC found that the 1982 trust did give the trustee the power to distribute the trust property to four new trusts, based upon the facts and circumstances. However, the SJC advised that any future Massachusetts trust should clearly state whether or not decanting is permitted under its terms.

Creators of newly formed trusts can, for the most part, dispense with uncertainty by explicitly allowing (or forbidding) decanting, which in many ways is equivalent to the power to amend an irrevocable trust. Like Vince Wilfork pulling a woman from a flipped jeep after the big win, the power to decant constitutes an unmet degree of strength for a trustee, but one requiring a significant degree of care, given attendant tax consequences and potential for abuse.

THE END IS IN SIGHT

Until recently, it was extremely difficult to terminate an irrevocable trust in Massachusetts. Absent court approval, such a trust could only be terminated if: (1) the trust assets were worth less than $50,000, or (2) all of the beneficiaries and the trust creator consented,

which was often impossible due to various reasons including the beneficiaries being minors. After the creator's death, termination was even more laborious, timely, and costly, requiring the assistance of the Court. Often the Court would make a determination as to whether the trust had fulfilled its material purposes, which were intimately linked to the intent of the trust creator. If those purposes had not been achieved, the trust could not have been terminated.

The MUTC simplified termination of trusts in Massachusetts by expanding the acceptable methods to effectuate dissolution. Most notably, trustees now have the power to terminate trusts that are valued at less than $200,000, rather than $50,000 (the limitation in the prior statute), without court approval. This provision gives trustees more power to distribute assets to beneficiaries instead of allowing the costs of administration to use them up. Expanding upon prior law, a trust also may be terminated if all beneficiaries consent to the termination and the Court concludes that the trust is no longer necessary to achieve its material purpose. Lastly, the Court may terminate a trust of any value if it finds that the administrative expenses are cost-prohibitive in light of the trust's purpose. The MUTC changed the law relating to trusts in many ways, including the expansion of the provisions regarding trust termination. These changes could have far-reaching effects, allowing a more streamlined process for intertwining the intent of the creator, desires of the beneficiaries, and the costs of administration.

TAKEAWAYS

Trusts are not all the same. A trust can be structured to do almost anything that is not illegal or against public policy. The amount of flexibility provided in a trust will vary according to the wishes of the trust creator and the experience and ability of the drafting attorney. Selecting and drafting the best provisions to carry out a trust creator's wishes require thought, care, and expertise.

The little reed, bending to the force of the wind, soon stood upright again when the storm had passed over.

-Aesop