

THE TRUSTWORTHY ADVISOR

Many lawyers hold themselves out as providing trust and estate legal services, with the thought that anyone can write a Last Will, draft a trust, administer an estate, or serve as a trustee. New lawyers especially have been forced by recent economic times to hang out their shingle as a sole practitioner, and accept the business that walks in the door. By this column we hope to illuminate in relatively simple terms the various hidden issues that might arise in serving private clients in the field of trusts and estates.

TRUSTEES HAVE DISCRETION – AND RISK

You are the trustee of an irrevocable trust established by a client who is now deceased. The trust is for the benefit of the client's three children, and you have "absolute" discretion to make (or not make) distributions of income and principal to them for their "health, maintenance, education, and support" and not necessarily in equal shares. Other than those four words, however, there is nothing else to guide you – no written expressions of wishes from the client and no special notes in your file. There is about \$900,000 in the trust, held in a balanced portfolio of securities, yielding about 4 percent annually. The trust provides for distribution to the children in equal shares of whatever is left of the funds when the youngest child reaches age 40.

The children are all healthy, ages 18, 23, and 28. The 18 year old has just been accepted at the US Naval Academy. The 23 year old has graduated from college but has been unable to find a job; and the 28 year old is married and gainfully employed, but his wife recently gave birth to a child who was born with severe birth defects and will require extensive care for at least the next ten years. Their medical insurance will only cover a portion of the care.

The 18 year old appears financially set for the next few years, as he has some savings, and the Academy does not charge tuition or room and board. The 23 year old, however, has asked you to send her \$1,000 per week until she finds a job, and the 28 year old has asked that you help fund the care of his daughter in the amount of \$10,000 per month.

Since you have authority to do so, should you make these payments? Doesn't it seem that \$14,000 distributions per month is disproportionate for a trust that is only earning \$36,000 per year? Obviously, to pay that amount would eat up the principal in maybe 10 years or so. And can you make payments to or for the grandchild when she is not even a beneficiary? Does the fact that the unemployed child's request clearly qualifies for "support", require you to pay it? And since the 18 year old may end up receiving little or nothing, can he sue you personally for his "lost" share? What if you exercise your discretion to refuse both requests outright? Or what if you just divide the pot into three shares, pay a share to each child and terminate the trust? Will that protect you from a lawsuit?

Accepting a trusteeship is serious business and entails a direct acceptance of the responsibility of managing the trust according to its terms. "Bailing out" to escape fiduciary duty or avoid exposure to breach of that duty after you have accepted the position will not, by itself, get you off the hook. This does not necessarily mean that a distribution of all the funds and subsequent "early" termination of the trust would be out of the question. The Massachusetts Uniform Trust Act ("MUTC" Chapter 203E), which applies (with certain exceptions) to all trusts created before or after the act, does allow such a termination by court consent if all beneficiaries agree and the proposed termination does not violate a "material purpose" of the Trust, and in this situation that might be the case. Take a look at Section 411 of Chapter 203E.

Furthermore, although the term "absolute discretion" gives you a great deal of leeway, if you refuse to grant a request that appeared reasonable and within the terms of the Trust, you must

have a good reason. MUTC Section 814 states “Notwithstanding the broad discretion granted to a trustee in the terms of the trust, including the use of such terms as “absolute”, “sole”, or uncontrolled”, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”

One might be, for example, that the request is disproportionate to the size and income of the trust and to the intended purposes of the settlor in establishing the trust, the latter being the most essential guideline in answering all dispositive questions. As to whether payments may be made to or for the child of a beneficiary who herself is not named as a beneficiary, there is considerable law supporting this type of distribution if the individual is a dependent of the named beneficiary. Despite that, the requested payments in this case do seem disproportionate to the size of the trust and the settlor’s wishes, and it may well invite a claim by the other beneficiaries.

Trustees who are on the horns of a dilemma, as might be the case here, are well-advised to consider a basic and very important solution to this sort of problem. That is, to seek “instructions” from the court as to the resolution of the problem, and the fees to seek this instruction may typically be paid from the trust corpus. This is a very common mechanism and protects the trustee from personal liability. In this case, then, either the termination and distribution with the consent (and releases) of all beneficiaries or the petition for instructions could resolve the Trustee’s dilemma.