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## Robert D. Kaplow in Laches: To Be or Not To Be (A Trustee) That Is The Question

**Robert D. Kaplow's** article *To Be or Not To Be (A Trustee) That Is The Question* was recently printed in the April 2015 issue of Laches magazine, published by the Oakland County Bar Association

In it, Mr. Kaplow provides an overview of trustee duties, powers, liabilities and ways to protect against liability so that you can make an informed decision before agreeing to become a trustee.

Read the full article below:

*"Whether tis nobler in the mind to suffer as trustee the slings and arrows of outrageous beneficiaries or to take arms against a sea of troubles and oppose the beneficiaries."*

**Allegedly, a first draft of Hamlet by William Shakespeare.**

### THE SCENARIO

You are meeting with one of your long time clients and discussing preparation of an estate plan for the client. The client has a spouse from his second marriage, two children from a first marriage, and a child from the second marriage. Unfortunately, the children from the first marriage do not get along with the second spouse. The client has paid you substantial sums over the years in connection with representing his business. The client does not have anyone that can act as trustee for the client's estate plan, so he suggests that you be the trustee.

Your initial reaction is one of pride that the client appreciates you sufficiently to ask you to take on the job as trustee of the client's trust. It shows that the client has confidence in you and your judgment. It is certainly an honor to be asked. In addition, you have been able to charge the client substantial fees previously, and serving as Trustee will be a way for you to continue to charge good fees after the client's death. Furthermore, the client has said that if you cannot be the trustee,

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then the client may have to look for another attorney to handle the client's business matters.

On the other hand, you realize that the family will be a challenge, and you have heard that acting as trustee is more of an aggravation than an honor. Furthermore, you never really liked the client's children or spouse. In addition, you have not acted as trustee for other trusts enough time to continue to build your lucrative law practice.

What should you do?

## **TRUSTEE DUTIES AND FIDUCIARY OBLIGATION**

As the trustee, your obligation is to administer the trust. The trust administration is based on the terms of the trust, the Michigan statutes and common law. You should review the trust prior to agreeing to be the trustee to make sure that you do not have any problems with any of the dispositive provisions. Furthermore, the trust may provide for the law of another state to be applicable to the trust, and you have to be comfortable with the laws of that state.

The Michigan Trust Code (MCL §700.7101, et seq.), which was effective April 1, 2010, clarified many issues regarding trust administration in Michigan. In general, the Michigan Trust Code is based on the Uniform Trust Code. MCL §700.7801 provides "The trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with [the Michigan Trust Code]."

Thus, in administering the trust, you must act in the best interest of the beneficiaries.

As trustee, your duties include the following:

1. Duty of care and performance.
2. Duty of loyalty. This means that you must administer the trust in an impartial manner and not for the benefit of any particular beneficiary.
3. Duty to keep records and furnish accounts. Generally, beneficiaries are entitled to receive an annual accounting of trust activities. It is highly recommended that accountings be provided to the beneficiaries, as sending out accountings starts the statute of limitations under MCL

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§700.7905 and §700.7814(3). A beneficiary raising a claim against the trustee would have adequately disclosed the existence of a potential claim for breach of trust.

4. Duty to take control of trust property. This means that you must take reasonable steps to protect and preserve trust property.
5. Duty to enforce claims on behalf of the trust and defend claims against the trust.
6. Duty to pay expenses and taxes of the trust.
7. Duty to keep trust property separate from the trustee's property.
8. Duty to make trust property productive. This would apply unless the trust specifically provides otherwise. For example, if the client owns a closely held business, you need to make sure that the trust allows the trustee to continue to hold that closely held stock.
9. Duty to follow trust terms regarding distributions to beneficiaries. You must make sure that you understand the trust provisions for distributions and the circumstances that allow for distributions or allow the withholding of distributions.
10. Duty to furnish information. Within 63 days of accepting the trusteeship, information must be provided to each beneficiary that includes a copy of the terms of the trust that describe or affect the beneficiary's interest. MCL §700.7814(2b). Some other states require furnishing the full trust to each beneficiary.
11. Duty to exercise reasonable care and skill as trustee. This generally is the skill and care of a person of ordinary prudence (prudent man or woman rule).

## **TRUSTEE POWERS**

When agreeing to be the trustee, it is imperative that the trustee have all of the powers that are necessary to administer the trust, not just for the present time, but in the future. Many trust documents list a number of specific powers of the trustee. In addition, the Michigan Trust Code lists 40 specific powers. See MCL §700.7817. See also MCL §§700.7816, 700.7818 and 700.7819 for additional trustee powers.

The trustee has the duty to invest the trust assets in a prudent manner. However, the Uniform Principal and Income Act and the Uniform Prudent Investor Act do give the trustee some protection in making sure that the assets are invested in a manner to generate income and growth. The overall portfolio must be looked at as

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a whole to make sure that it is prudent. Individual investments can be risky as long as the overall portfolio is prudent. There is no categorical disallowance of an investment.

## **TRUSTEE LIABILITY**

When acting as trustee, it is imperative to follow the trust provisions. Most cases of liability against the trustee involve a breach of fiduciary duty by the trustee. This can include self-dealing, favoring one beneficiary over another, or failure to follow trust terms. In addition, taking excess compensation as trustee can result in actions by the beneficiaries. One especially troublesome area involves environmental issues. If there is real estate involved in the trust, the trustee must make sure that there are no environmental problems with the property prior to accepting the property into the trust. The trustee must also be wary of conflict of interest situations.

## **PROTECTION AGAINST LIABILITY**

There are a number of ways to protect against liability as the trustee. Of course, it is imperative to have a good trustee liability insurance policy and also to have a personal umbrella policy that would cover your actions as trustee. It is important to have strong language in the negligence on the part of the trustee.

The most important way to protect against liability is to have a good relationship with the beneficiaries and communicate with them frequently. This is especially true when dealing with the next generation family members of the client as they may not have had contact with you as the attorney. They may be more litigious than the family members that you have worked with closely over the years.

You should also avoid trusts where the beneficiaries are litigious or hate each other. In addition, trusts that have beneficiaries who are “trust babies” just waiting for distributions can also become problems. You should not take on a trust which requires substantial active management of a business unless you can devote sufficient time to the business and have knowledge of operating that business.

**Of course, the best protection against liability is to not accept the position of trustee.**

## **CONCLUSION**

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So, in thinking over whether to take on the position of a trustee you must balance the pros and cons. In most cases, you are probably best served by thanking the client and declining to be trustee. If the client is really pushing for you to be the trustee, then a good compromise can be to have a bank as co-trustee with you. The bank is experienced in being a trustee and can take charge of the basic administration of the trust and provide expertise in administering the trust. As the co-trustee, you can have input as to distributions and investments.

Again, if you do decide to become a trustee, make sure that the trust does have substantial indemnity provisions and that you do have substantial trustee liability insurance.

What is your decision?