

***Coming in as a Successor Trustee  
Releases and Best Practices***

Boston Bar Association  
Trust Administration Section  
November 2, 2018

Gerald Baker  
Executive Managing Director & Chief Fiduciary Officer  
Boston Private  
gbaker@bostonprivate.com

Stacy K. Mullaney  
Chief Fiduciary Officer  
Fiduciary Trust Company  
smullaney@fiduciary-trust.com

1. Duties of the Successor Trustee to Review Acts of Prior Trustee
  - “Knows or should know” Standard
    - Restatement of Trusts
    - *O’Connor vs. Redstone*, 452 Mass. 537
    - Massachusetts Uniform Trust Code Section 812 – *Collecting Trust Property*
2. Mitigating Successor Trustee Liability for Prior Fiduciary Breach
  - Exculpatory Clauses
  - Consent, Release & Ratification
  - Trustee Appointment
    - Separate Agreement
    - NJSA
    - Building indemnification language into Appointment and Acceptance documentation
    - *Hastings v. PNC Bank*, 54 A.3d 714 (Md. 2012)
3. Due Diligence Process
  - Investments
    - Prudent Investing and Diversification
    - Specialty Assets (real estate, insurance, closely held stock, tangible personal property, oil & gas interests, etc.)
  - Tax Reporting
    - State and federal income tax reporting
    - Generation-skipping transfer tax status
  - Account Statements

- Distribution History
  - Family Dynamics
  - Identifying needs of interested parties (grantors, beneficiaries, etc.)
  - Understanding the chain of predecessor trustees
4. Practical Considerations
  5. Questions

**SAMPLE SUCCESSOR TRUSTEE INDEMNIFICATION**

In consideration of GREEN NATIONAL BANK, N.A.'s acceptance of its nomination as Successor Corporate Trustee and the duties as Corporate Trustee of the T. Colin Campbell Trust for the benefit of Karen Campbell, under Agreement dated December 30, 1968 (the "Trust") and other good and valuable consideration, the receipt, adequacy and sufficiency of which are hereby expressly acknowledged, the undersigned, as beneficiary of the Trust, on behalf of herself and her heirs, executors, administrators, successor and assigns, does hereby agree to indemnify and to hold GREEN NATIONAL BANK, N.A. as Successor Corporate Trustee to NORTHEASTERN TRUST BANK, FSB, harmless from and against any and all claims, whether at law or in equity, which might be asserted against GREEN NATIONAL BANK, N.A., its affiliates, successors or assigns by reason of any act or omission, cause or thing whatsoever by NORTHEASTERN TRUST BANK, N.A., or by any other corporate or individual trustee that preceded GREEN NATIONAL BANK, N.A., as trustee of the above-referenced Trust. The undersigned understands that GREEN NATIONAL BANK, N.A. shall become responsible as Corporate Trustee only at such time as its appointment as Successor Corporate Trustee has become effective and it has received the assets of the trust.

\_\_\_\_\_  
Karen Campbell

DATED: \_\_\_\_\_

---

**JOHN DOE IRREVOCABLE TRUST FBO JANE DOE**

**REMOVAL OF CORPORATE TRUSTEE**

**and**

**APPOINTMENT OF SUCCESSOR CORPORATE TRUSTEE**

---

**WHEREAS**, under Article FIRST of the trust instrument dated January 1, 2010, JOHN DOE established a trust for the benefit of JANE DOE (the “Trust”);

**WHEREAS**, the current Trustees of the Trust are JANE DOE as individual Trustee and GOLIATH TRUST as corporate Trustee;

**WHEREAS**, Article TWELFTH of the Trust gives the individual trustee the absolute right to remove the corporate trustee by written instrument signed by such individual trustee, as all more specifically stated in the Trust;

**WHEREAS**, Article TWELFTH of the Trust further gives the individual trustee the absolute right to appoint a successor corporate trustee by written instrument signed by such individual trustee and provided that the such corporation has trust powers, as all more specifically stated in the Trust;

**WHEREAS**, JANE DOE, as individual trustee, desires to remove GOLIATH TRUST as corporate trustee; and

**WHEREAS**, JANE DOE, as individual trustee, further desires to appoint LOCAL TRUST as successor corporate trustee.

**NOW, THEREFORE**, JANE DOE hereby removes GOLIATH TRUST as corporate trustee of the trust effective immediately and hereby appoints LOCAL TRUST as successor corporate trustee.

In appointing LOCAL TRUST, JANE DUE, in her capacity as individual trustee and current beneficiary of the Trust, relieves LOCAL TRUST of liability for the acts or omissions of all predecessor trustees or co-trustees. LOCAL TRUST shall not be required to audit or investigate the acts or administration of any former trustee or co-trustee, shall not have any duty to take action or obtain redress for any breach of trust by any former trustee, or co-trustee (or conservator acting on behalf of trustor), and limit the accountability and responsibility of LOCAL TRUST to those trust assets actually delivered into its possession.

---

Date

---

JANE DOE

# *Coming in as a Successor Trustee Releases and Best Practices*

Gerald Baker

Executive Managing Director & Chief Fiduciary Officer

Boston Private

[gbaker@bostonprivate.com](mailto:gbaker@bostonprivate.com)

Stacy K. Mullaney

Chief Fiduciary Officer

Fiduciary Trust Company

[smullaney@fiduciary-trust.com](mailto:smullaney@fiduciary-trust.com)

# Restatement 2d of Trusts §223

1. A trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee.
2. A trustee is liable to the beneficiary for breach of trust, if [the trustee]
  - (a) Knows or should know of a situation constituting a breach of trust committed by [the] predecessor and [the trustee] improperly permits it to continue; or
  - (b) Neglects to take proper steps to compel the predecessor to deliver the trust property to him; or
  - (c) Neglects to take proper steps to redress a breach of trust committed by the predecessor.

# MUTC Section 812: Collecting Trust Property

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee.

# MUTC Section 104(a): Knowledge

(a) Subject to subsection (b), a person shall have knowledge of a fact if the person:

- (1) has actual knowledge of it;
- (2) has received a notice or notification of it; or
- (3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

# Sample Exculpatory Provisions

- *Each trustee hereunder shall be liable for his/her/its own receipts, payments and willful defaults and for nothing else, and one shall not be liable for another, nor for errors of judgment, nor for failure to chare or to attempt to chare any co-trustee or preceding trustee hereunder.*
- *No trustee acting under this instrument shall be accountable for any act or default of, or have any responsibility for the accounts of, any other trustee, and no individual trustee shall be liable for any loss or damage except as may be caused by such trustee's bad faith or gross negligence.*

# MUTC Section 1008: Exculpation of Trustee

- (a) A term of a trust relieving a trustee of liability for breach of trust shall be unenforceable to the extent that it:
  - (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
  - (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
- (b) An exculpatory term drafted or caused to be drafted by the trustee may be invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that its existence and contents were adequately communicated to the settlor.

# MUTC Section 111.

## Non-Judicial Settlement Agreements

- (a) For purposes of this section, "interested persons" shall mean persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
- (b) Except as otherwise provided in subsection (c), interested persons may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust.
- (c) A non-judicial settlement agreement shall be valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.
- (d) Matters that may be resolved by a non-judicial settlement agreement shall include:
  - (1) the interpretation or construction of the terms of a trust;
  - (2) the approval of a trustee's report or accounting;
  - (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
  - (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
  - (5) transfer of a trust's principal place of administration; and
  - (6) liability of a trustee for an action relating to the trust.**
- (e) Any interested person may request that the court approve a non-judicial settlement agreement to determine whether the representation, as provided in article 3, was adequate and to determine whether the agreement contains terms and conditions the court could have properly approved.

# Successor Trustee - Due Diligence Process

- Investments
  - Prudent Investing and Diversification
  - Specialty Assets (real estate, insurance, closely held stock, tangible personal property, oil & gas interests, etc.)
- Tax Reporting
  - State and federal income tax reporting
  - Generation-skipping transfer tax status
- Account Statements
- Distribution History
- Family Dynamics
- Identifying needs of interested parties (grantors, beneficiaries, etc.)
- Understanding the chain of predecessor trustees