

THE FIDUCIARY PROFESSIONS

## Let There Be Light

It's about time that trust documents were written in plain English

**S**cottish castles built in the 17th century had few windows. The reason was not defense, but taxes. A luxury tax of the day was measured by the size of the windows in a taxpayer's home. A windowless castle represented good tax planning—but brought darkness to its inhabitants.

Today lawyers are drafting trusts that resemble windowless castles. They minimize potential wealth taxes—but leave families and administrators in the dark. The language of many modern trusts has become so convoluted as to be barely intelligible by other professionals and virtually incomprehensible to those for whom they were written. A recently encountered “hanging power” ran on for nearly five pages.

Why is trust jargon on the rise; clarity and simplicity on the decline? The possible culprits: an ever-more-complex Internal Revenue Code, proliferating legal malpractice claims and a belief held by too many lawyers that their value must be measured in monetary terms. Clients are willing to put up with gobbledygook to pay less in estate taxes in the hopes of achieving the American Dream of leaving the next generation better off. But for the hunger to save taxes, I doubt consumers would put up with the endless legalese.

The irony is, the jargon is not only unnecessary, it often fails to serve clients' long-range goals. Trusts can last many generations in the United States. Yet, while most modern trusts painstakingly minimize current wealth taxes, many do not arm beneficiaries and trustees with sufficient tools for tomorrow's challenges. The result: beneficiaries living out their years in windowless trusts festooned with capitalized terms and logarithmic formulas.

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What will it take to spark a revolt? Perhaps the Web will help. In the Internet age, it seems unlikely that trusts and estates lawyers will long remain immune from the public demand for simpler, clearer and more concise writing. Nor should they. Statutory mandates for plain English drafting now exist in consumer banking and securities law. In time, hopefully, they will spread to trust drafters. There is no magic formula for simplifying and clarifying a modern trust agreement, which at the end of the day must deal with complex subjects unfamiliar to many readers. Nonetheless, deconstructing the design of a trust document is a good place to start.

A drafter intent on improving beneficiary comprehension and education might consider organizing trust topics in the following order:

- statements of grantor intent;<sup>1</sup>
- executive overview of key provisions;<sup>2</sup>
- details covering the payment of trust funds (who, how and under what circumstances);
- guidelines for exercise of discretion;
- rights to change trust beneficiaries;
- details of trust governance (fiduciary removal and replacement; fiduciary powers);
- dispute resolution rules (including virtual representation).<sup>3</sup>

Of course some complicated tax lingo cannot be jettisoned completely. This unfortunate necessity includes any terms not adequately defined by the dictionary (that's Webster's not Black's), together with dreaded administrative provisions (which most readers skim at best). Put technical terms at the end of the document whenever possible.

Once the basic design features are set, think about style protocols that help readers. For example, consider:

- minimizing cross-references;
- simplifying the numbering system (or better yet, dropping it entirely);
- using the first person rather than the third;

- personalizing the trust by using client names;
- employing easily understood section headings, such as "When I Need Help," "Ending Small Trusts" and "My Right to Change."

Most importantly, the core structure of trusts can be buttressed by greater attention to managing change. The guiding principle should be flexibility. Although the benefits of good governance and clear writing

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cannot easily be measured in taxes or expenses saved, their importance is hard to understate.

Good governance starts with a simple question for settlors: "Is there anyone you know well and trust implicitly who is ready, willing and able to serve as your trustee for a long time?" The question may be simple but the answer is hard; and as the value of trust assets increases and the trust term lengthens, the answer becomes more difficult. Trustee responsibilities have become more complex. Family members and friends are distracted by numerous commitments. Office staff and lawyers know their liability exposure as trustees and recognize their inherent conflicts of interest. Institutions are placing tighter limits on how they choose to serve as trustees. Fiduciary insurance is scarce and expensive.

Do the families you represent find

institutional trustees to be insensitive? bureaucratic? unresponsive? conflicted? ever-changing? understaffed? missing in action? Are their individual trustees too busy doing other things? uninterested in details? prejudiced by personal conflicts with family members? increasingly frail and forgetful? too eager to please in order to protect their day job at the family office?

Rarely does one trustee, whether individual or institutional, fulfill all needs; one size usually doesn't fit all.

Finding the right combination of family, friends and professionals to build a successful trust governance plan is difficult in all events—but almost impossible if the architecture of the trust is rigid or overly simplistic. Trusts that are constructed to last for decades, even centuries, must be better designed to allow for unforeseeable events. They must address a

family's need for human and intellectual capital as well as financial capital.

For example, long-term trusts should:

- permit division of core trustee functions among multiple fiduciaries, including investment responsibility;
- contemplate the use of a private trust company or a protector company;
- permit different trustees for multiple trusts under the same agreement;
- establish a workable system to inform and encourage the participation of beneficiaries in strategic discussions;
- call for mediation to resolve family or trustee disputes;
- provide checks and balances by mandating consent of protectors or advisors on extraordinarily important issues;
- allow beneficiaries, trustees or protectors (or a combination of

them) to remove trustees, appoint successor or additional trustees, move trusts to new jurisdictions and change (or keep) the applicable law, and amend trust documents (including restating them);<sup>4</sup>

- terminate trusts or create new ones;
- spell out voting protocols among trustees and committees (including using casting votes or other tie-breaker rules).

This is but a sampling of the issues drafters should consider when creating trust instruments. Lawyers are trained to look backward and revere precedent. Forward thinking often seems at odds with legal tradition. Yet serving a client effectively requires thoughtful consideration of the unanticipated ways society may change. It's time for lawyers to build more windows into their dynasty trusts and shed more light on change management. **I**

Endnotes:

1. *Sample text: Purpose of the Trust.* "My plan is to promote values I respect and to preserve and enhance the financial assets set aside for my husband and my family. I hope that trust distributions will provide opportunities beyond just addressing the most pressing needs and will foster satisfying and responsible lives, rather than retard ambitions, inhibit achievement or lower self-esteem."
2. *Sample text: Overview.* "During my life, there is only one trust. As long as I am able to handle my financial affairs, the trustees will pay out to me trust income and, as I direct, any other trust property. Otherwise, the trustees should use trust property to care for me and any person who is financially dependent on me. On my death, the trust splits into two trusts."
3. *Sample text: Mediation.* "To promote harmony and reduce costs, my plan specifies comprehensive procedures so that disputes may be mediated or otherwise resolved outside of court when-

ever possible."

4. *Sample text: Amendments by Trustees.* "The trustees may amend this document by a written document filed with the trust records in order to:
  - obtain or preserve favorable tax treatment;
  - prevent unfavorable tax treatment;
  - restate the terms of this document.
 They may do this after my death to:
  - eliminate language that has become obsolete or irrelevant due to the passage of time, the lapse or occurrence of contingencies, the separation or division of trusts, or changes in the law;
  - expressly provide for an additional fiduciary power or authority;
  - limit fiduciary powers or authority; or
  - make other administrative changes.
 No amendment by the trustees may be used to change beneficial interests or powers of appointment; nor can their amendments violate general fiduciary principles of good faith, fairness and reasonable care."