

## Use of Plain English in Drafting Wills and Trusts

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### Purpose

The use of plain English as a writing style for legal documents has two stated goals — readability and accuracy [see Alterman, *Plain and Accurate Style in Lawsuit Papers*, MBL 964 (November, 1983)]. Considering that a client's will and trust agreement are the primary (if not the exclusive) documents determining the time and manner of disposition of his wealth, it is vital that their wording provide as much clarity as possible — not just to other professionals (i.e., attorneys, bank and trust officers, court officials, tax authorities, life insurance representatives, stockbrokers, etc.) but also to the client and his family.

Unfortunately, many of the words and phrases in the probate and trust area are highly technical, thanks to the substantial body of interpretive case law going back to England (e.g., residue, intestate, incorporation by reference, etc.), the Revised Probate Code (e.g., personal representatives, devise, issue, etc.), and the Internal Revenue Code (e.g., marital deduction, alternate valuation, qualified disclaimers, etc.). Thus, caution should be exercised since extensive elimination of perceived legalese may prove disastrous later on when the imprecise or ambiguous provisions of the will or trust must be referred to in the light of a specific factual situation.

### General Suggestions

Before considering specific examples, I would suggest that certain

generalized drafting techniques be employed in preparing wills and trusts.

The first is the use of the present tense whenever possible. Instead of stating:

"The term 'beneficiary' shall be construed to mean . . ."

provide simply that:

"The term 'beneficiary' means . . ."

Another drafting technique is to devote a section to certain defined terms to avoid unnecessary repetition throughout the document. For example, instead of repeating:

"including (without limitation) and by way of illustration"

"individuals, partnerships, trusts, estates, charitable organizations, governmental agencies, and other entities"

"leave, give, devise, and bequeath"

each time, provide for a single, all purpose definition at the beginning or end of the will or trust agreement as follows:

"As used throughout this document—

- (1) The term 'including' means 'including (without limitation) and by way of illustration'.
- (2) The term 'person' means 'individuals, corporations, partnerships, trusts, estates, charitable organizations, governmental agencies, and other entities of any kind, both singular and plural'.
- (3) The phrase 'to leave' means 'to leave, give, devise, and bequeath'."

Readability and clarity are also enhanced by using numbered and lettered subparagraphs for listing and categorization purposes. Thus, the following trust provision:

"The right to remove any then acting family trustee is given to the settlor (as to the original trust) or, if he is then deceased or incapacitated, the settlor's wife (as to each and every trust) or, if she is then deceased or incapacitated, those of settlor's children (as to each and every trust) who are then living and not incapacitated, acting by majority if three or more thereof, acting unanimously if two thereof, acting alone if one thereof, or, if none, the eldest lineal descendant of settlor who has attained at least 21 years of age."

is much easier to understand and construe if it is broken down into parts like this:

"The right to remove any then acting family trustee is given to the first in order of the following listed persons who is not then deceased or incapacitated:

- (1) Settlor, as to the original trust,
- (2) Settlor's wife, as to each and every trust,
- (3) As to each and every trust, settlor's children:
  - (A) If three — acting by a majority,
  - (B) If two — acting unanimously,
  - (C) If one — acting alone, or
  - (D) If none — settlor's eldest lineal descendant, provided he or she has then attained at least 21 years of age."

Other drafting techniques to be utilized are (i) avoiding negative sentence structure and (ii) reducing the number of prepositional phrases by using possessive nouns. Instead of drafting this way:

"Each beneficiary who is not under the age of 30 shall be permitted without restriction to withdraw all of the assets of the trust."

try this:

"After reaching age 30, each beneficiary may fully withdraw all of the trust's assets."

A final suggestion is to cut out, or at least cut back on, these standard legalese terms:

Avoid	Suggested Alternatives
Hereat	"At this time"
Hereby	"By this," "by means of this", or "as a result of this"
Herein	Eliminate
Heretofore	"Previously"
Herewith	Eliminate
Said	"The", "that", or "those"
Such	"The", "that", or "those"
Whereas	"Since"
Wherein	"In which" or "of which"
Witnesseth	Eliminate

### Specific Provisions

Over the years, introductory clauses in both wills and trust agreements have been fertile ground for legalese overkill. For example, much of the language in this clause could be removed:

"I, John J. Doe, Jr., a resident of the city of Detroit, county of Wayne, and state of Michigan, being of sound mind and disposing memory, not acting under duress, menace, fraud, or undue influence of any person whomsoever, aware of the uncertainty of life and the certainty of death, and being desirous of making a proper and an equitable distribution of my property at my decease, do hereby revoke all other wills and codicils to wills by me at any time heretofore made and do hereby make, ordain, publish, establish, and declare this to be my last will and testament in manner and form following, that is to say . . ."

Instead, simply say:

"I, John J. Doe, Jr., a resident of Wayne County, Michigan, revoke all my prior wills and codicils and declare this to be my will."

Elimination of "the city of Detroit" will not affect the determination of venue or provide much help in identifying the testator. The removal of "county of" and "state of" simply saves space and makes reading easier. The testator's statement of "being of sound mind and disposing memory . . . and being desirous of making a proper and equitable distribution . . ." will not help or hurt the outcome of a will contest. The testator being "aware of the uncertainty of life and the certainty of death" adds nothing but fluff to the instrument.

Likewise, an effective disposition of the residue can be accomplished without cumbersome repetition and run-on sentences. For example, the following traditional residuary clause offers a challenge for most everyone:

"All the rest, residue, and remainder of my property and estate, whether personal, real, or mixed, of whatsoever nature and wheresoever situate, of which I may die seized or possessed, or to, or in, which I may have any right, title, or interest at my death, but not any property as to which I have any power of appointment under any will or other instrument, which I have not otherwise effectively disposed of in my will, I give, devise, and bequeath to my wife, Helen B. Doe; or, if she does not survive me, to those of our two children who survive me, share and share alike, and to the then living issue of any such child who does not survive me, such issue to receive equally, by right of representation, the share which their parent would have taken if then living; or, if none of the foregoing survive me, all of the aforesaid rest, residue, and remainder of my property and estate I give, devise, and bequeath to . . ."

While much of the technical wording in this residuary clause cannot be eliminated, the seemingly endless sentence and redundancy can be avoided by redrafting the provision as a series of short sentences accompanied by a definition of the term "residue" as follows:

"I leave the residue of my estate to my wife, Helen B. Doe, if she survives me. If she does not survive me, I leave the residue of my estate to those of our two children who sur-

vive me, share and share alike, and to the then living issue of any such child who does not survive me, such issue to receive, equally by right of representation, the share which their parent would have taken if then living. If neither Helen nor any of our children or their issue survives me, I instead leave the residue of my estate to . . .

As used in my will, the term 'residue of my estate' means all of the rest, residue, and remainder of my estate [including all properties (and interests in properties) which I may own or to which my personal representatives may be entitled at the time of my death or which my personal representatives may receive after my death, whether real, personal, or mixed, of whatsoever nature and wheresoever situated]. It includes all assets which I have not otherwise effectively disposed of in my will, either because an intended beneficiary failed to survive or for any other reason. Since I do not intend to exercise any power of appointment by this residuary disposition, that term does not include any asset over which I have or may have a power of appointment."

Appointment of guardians, personal representatives, and trustees in a will should be a straightforward proposition. Thus, using the phrase "nominate, constitute, and appoint" for this purpose is repetitive overkill. All that needs to be said is:

"My wife, Helen B. Doe, shall be the personal representative of my estate."

or

"If my wife does not survive me, my brother, Frank H. Doe, shall be the guardian of my minor children."

### Conclusion

Drafting probate and trust documents in a readable and accurate manner with a view to restricting "canned" legalese will remove many obstacles to comprehension. This will allow the scrivener, the client, and others to focus more on a document's substantive meaning, thereby increasing the likelihood of its provisions being consistent with the intended results. ■