

Plain English in Wills and Trusts

By the Plain English Committee

This month we begin our review of the last of four categories of legal papers—wills and trusts. We separated this category into four sub-categories—wills, trusts, powers of attorney, and living wills. Ideally, we would have reviewed a sample survey of all the wills, trusts, powers of attorney, and living wills in Michigan. But the confidential nature of estate-planning documents precludes our review in most cases. Therefore, we have reviewed several primary reference sources used by Michigan lawyers to write estate-planning documents. See Figure 1.

Wills

When a person dies with assets (real property and personal property) in his or her name, a probate proceeding transfers title to the decedent's heirs. If there is no will (intestate), a probate hearing will establish the claims of relatives under the laws of inheritance (in Michigan this is the Revised Probate Code). If there is a will (testate), a probate proceeding will identify the beneficiaries under the will. Wills are often written from will-clause reference manuals, either in book form or on computer disk. We reviewed the following reference sources for will clauses in Michigan:

ICLE's *Michigan Will Drafting* with 1993 Supplement (88-003)

In 1979, the Probate Code was revised to make the probate process easier for those

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Figure 1

Type of Document	Primary Reference Source
wills	ICLE's <i>Michigan Will Drafting</i> with 1993 supplement (88-003) NBD Bank's <i>Will and Trust Forms</i> Nolo Press's "WillMaker" computer program Michigan Statutory Will (MCL 700.123c; MSA 27.5123(3))
trusts	ICLE's <i>Michigan Revocable Grantor Trusts</i> with 1994 supplement (91-001) NBD Bank's <i>Will and Trust Forms</i>
powers of attorney	ICLE's <i>Michigan Real Estate Sales Transactions</i> Form 15.1 (power of attorney for business transactions) ICLE's <i>Michigan Basic Practice</i> Form 2.3 (durable power of attorney for business transactions)
living wills	ICLE's <i>Michigan Business Formbook</i> Form 9.13 (Living Will) Designation of Patient Advocate Form (durable power of attorney for health care under MCL 700.496; MSA 27.5496)

who must use it. To this end, the system in the probate courts and the forms were redesigned. While ICLE's *Michigan Will Drafting* is an informative and user-friendly manual for attorneys who draft wills, the will forms themselves are designed for attorneys, and not necessarily for the clients and personal representatives who must understand and ultimately comply with the wills. The forms include some archaic formalisms and the doublets and triplets characteristic of legalese. Many of the sentences are longer than necessary, which impedes understanding. The expertise reflected in the manual itself should be directed at redesigning the forms.

NBD's *Will and Trust Forms*

Form I—Simple Will represents significant progress in eliminating legalese from estate-planning documents. The form contains no formalisms, few archaic words, few redundancies, and no Latin words. Furthermore, most of the verbs are strong, active-voice verbs. The form is straight and simple at the beginning and also at the end.

However, long sentence length is still a major problem in the form, and makes it almost unreadable. For example, the first two Articles contained sentences of 65, 101, and 229 words.

Will Computer Program

There is software currently available to create a very basic, no-frills will. We reviewed WillMaker 4.0, published by Nolo Press (and since upgraded to version 5.0). The program itself is simple to use with clear instructions suitable for most persons who are computer literate. The accompanying instruction book is also clear and reasonably concise. The body of the will created by the software program is, in general, written in an understandable style, although it does use some legal terms without definition, such as "collateral." The will contains no formalisms, no Latin words, relatively short sentences, strong verbs, no

Will
of

I, _____, of _____, Michigan, a citizen of the United States, declare this to be my will, and I revoke all prior wills and codicils that I have made.

(Articles I-VI)

I signed this will on _____, 1992.

_____ (name)

wordy phrases, and no unnecessarily long words. However, it does contain redundancies such as "free and voluntary" and "true and correct;" and archaic words such as "therein," "foregoing," and five "herebys." The paragraph numbering—"First" through "Sixteenth" paragraphs—is unduly cumbersome. The paragraphs declaring the testator's intent and containing the witnesses' signatures degenerate into full-blown legalese, with wording such as "this ___ day of ___." Overall, a good attempt that would benefit from some further effort to avoid paying homage to the gods of legalese.

Michigan Statutory Will

On July 1, 1986, the Legislature enacted 1986 PA 61, which provides a statutory will for Michigan. MCL 700.123c; MSA 27.5123(3). The law is aimed at making the will process simpler and less expensive for consumers. The form (also shown as Form 2.2 in ICLE's *Michigan Basic Practice*) is rel-

atively short and straightforward, and when filled out correctly, it creates a valid will. The will was developed and written by a committee of the Probate and Estate Planning Section of the State Bar of Michigan.¹ The will is written without legalese. It contains no formalisms, archaic words, redundancies, Latin words, long sentences, weak verbs with nominalizations, wordy phrases, unnecessarily long words, or other vices that legal-writing experts complain about. For example, the will begins "This is my will, and I revoke any prior wills and codicils. I live in ___ County, Michigan."

Trusts

A person may also transfer assets from his or her name to the name of a trustee. The trust describes how assets will be distributed both before and after the person dies. Using a trust avoids probate and can minimize federal estate taxes. We reviewed

the following reference sources for trust clauses in Michigan:

ICLE's *Michigan Revocable Grantor Trusts with 1994 Supplement* (91-001)

This publication is a user-friendly loose-leaf manual. For this article, we reviewed the Standard Revocable Trust Agreement printed in Chapter 9. The authors expressly designed the agreement as a Plain English document and have been partially successful. Following the style first suggested by Carl Felsenfeld and Alan Siegel in *Writing Contracts in Plain English* (West, 1981), the grantor is designated "I," and the trustee is designated "it." The authors also use headings and format to enhance readability. The sample provisions, however, are less successful in other respects. Many of the sentences are too long and contain too many embedded modifiers. And the passive voice is used unnecessarily. But the authors are on the right track, and we applaud their efforts in this difficult area.

MEDICAL MALPRACTICE

CASE EVALUATION • EXPERT TESTIMONY

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NBD's Will and Trust Forms

Form XII—Living Trust Agreement is written in about the same style as the will form that we reviewed earlier. Therefore, our comments on the will form also apply to the trust form.

Power of Attorney

In a power of attorney, A authorizes B to transact business and sign A's name. The power of attorney may be limited (authorize B to sign A's name on a sales agreement to buy a house) or general (authorize B to engage in virtually any business transaction for A). Two characteristics of a power of attorney are 1) it concerns business transactions, and 2) it terminates if A becomes either mentally incapacitated or dies. On the other hand, a durable power of attorney remains valid even if A is mentally incapacitated (or it may terminate by its terms—for example, ten years unless the principal is then incapacitated).² Michigan's Revised Probate Code contemplates two types of powers of attorney: the traditional (Sec. 497) and the durable (Sec. 495).

We reviewed a power of attorney, Form 15.1 from ICLE's *Michigan Real Estate Sales Transactions*, and found everything included in one long sentence. Furthermore, it contains the obligatory "hereby" and two "this ___ day of ___." We also reviewed a durable power of attorney, Form 2.3 from ICLE's *Michigan Basic Practice*, and found 84-, 70-, and 63-word sentences, and redundancies such as "terms and conditions," and "power and authority."

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a present,
when you can
give a piece
of the future.

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Living Wills

To this point, the wills, trusts, and powers of attorney have concerned assets or business affairs. Another type of estate-planning document concerns a person's health care. Under the Michigan Patient's Rights Act, 1990 PA 312, MCL 700.496; MSA 27.5496, a person can prepare a Living Will (instructions concerning a person's health care if the person becomes mentally incapacitated) and a Designation of Patient Advocate (durable power of attorney for health-care decision making).³ If the person becomes mentally incapacitated, the patient advocate, under authority of the Designation of Patient Advocate, makes health-care decisions according to the Living Will.

We reviewed a Living Will, Form 9.13 from ICLE's *Michigan Business Formbook* and which was excerpted from ICLE's *Michigan Will Drafting*. It seems well written except for two 90-word sentences. We also reviewed the Designation of Patient Advocate Form developed by the Health Care Committee of the State Bar of Michigan (also shown as Form 2.5 in ICLE's *Michigan Basic Practice*). This form contains no legalese and is a worthy example of user-friendly plain English. For example:

This document is to be treated as a Durable Power of Attorney for Health Care and shall survive[s] my disability or incapacity.

If I am unable to participate in making decisions for my care and there is no Patient Advocate or successor Patient Advocate able to act for me, I request that the instructions I have given in this document be followed and that this document be treated as conclusive evidence of my wishes.

It is also my intent that anyone participating in my medical treatment shall not be liable for following the directions of my Patient Advocate that are consistent with my instructions.

This document is signed in the State of Michigan. It is my intent that the laws of the State of Michigan govern all questions concerning its validity, the interpretation of its provisions and its enforceability. I also intend that it be applied to the fullest extent possible wherever I may be.

Photocopies of this document can be relied upon as though they were originals.

I am providing these instructions of my free will. I have not been required to give them in order to receive [care] or have care withheld or withdrawn. I am at least eighteen years old and of sound mind.

Clarity Awards

We give two Clarity Awards: one to Fredric Sytsma of the Probate and Estate Planning Section of the State Bar of Michigan for developing and writing the Michigan Statutory Will; and the other to Virginia Benner and John Cook of the Health Care Committee of the State Bar of Michigan for developing and writing the Designation of Patient Advocate Form.

We do not claim that these documents—or any of the documents we have recognized with a Clarity Award—are perfect. But they take a big step forward from legalese, and the lawyers who wrote them deserve credit.

Conclusion

Wills and trusts can be written in plain English. Robert Joslyn discussed this more than ten years ago in July 1984, in our second Plain Language column, "Use of Plain English in Drafting Wills and Trusts." However, most non-lawyers still complain about how badly written wills and trusts are. Probably no one will ever be able to survey the actual documents, which are usually confidential, to see to what extent the complaints are justified. Instead, we will have to review the reference sources and assume (or hope) that lawyers follow these sources in writing their actual documents. At present, we have found that only two out of ten reference sources are written clearly enough to merit a Clarity Award. But the nice thing about reference sources is that they are written by a single person or committee. You don't have to persuade 29,000 lawyers to eliminate legalese. All you have to do is persuade that one person or committee. ■

Footnotes

1. Lawrence and Sytsma, *Michigan Statutory Wills*, 64 Mich B J 677 (July 1985).
2. Bos, *The Durable Power of Attorney*, 64 Mich B J 691 (July 1985).
3. Lankfer, *Living Wills and Durable Powers Authorizing Medical Treatment Decisions*, 64 Mich B J 684 (July 1985); Bos, *Living Wills*, 70 Mich B J 444 (May 1991); Lankfer, *The New Michigan Patient's Rights Act*, 70 Mich B J 582 (June 1991); *Durable Power of Attorney for Health Care Form*, 70 Mich B J 696 (July 1991); Cook, *The Patient Advocate Act and the Law of the Right to Refuse or Consent to Medical Treatment*, 70 Mich B J 1306 (December 1991).