Plain English in Wills and Trusts

By the Plain English Committee

This month we begin our review of the last 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 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
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 relatively 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. 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.
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). 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 13.1 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."