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**Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2987**

Date: 13-Oct-22

From: Steve Leimberg's Estate Planning Newsletter

Subject: [Linda Kotis on Lessons from a Trust-Maker: Have Faith in Creative Drafting](#)

*“Eli and Aimee-Leigh developed a successful family business that brought them riches ‘exceedingly abundantly more than they could ever ask or think.’<sup>10</sup> Their children, Jesse, Judy, and Kelvin, began working in the business at a young age, and have continued to do so after Aimee-Leigh went to be with the Lord a few years back. Because of their high net worth, this close-knit family established a number of trusts. Their story provides a backdrop for drafting more flexible trusts (i) that rely less on state trust code provisions which fill in defaults when a trust instrument is silent and (ii) which lend themselves to more effective trust administration.”*

**Linda Kotis** provides members with commentary on drafting flexible trusts, based on her experience over the years with drafting and reviewing thousands of estate planning documents for individuals and families. The author would like to thank her colleague, **Gina Lynn, Esq.** for her careful review of and comments on the initial draft of this newsletter.

**Linda Kotis** is Of Counsel in the Washington, DC office of **Ivins, Phillips & Barker**, a firm ranked by Chambers in its 2022 *High Net Worth Guide*. She is a member of the District of Columbia, California, Indiana, and Maryland Bars. Linda advises clients on forming and revising their estate plans and analyzes estate, income, generation-skipping transfer, and gift taxation matters for high-net-worth individuals and families. Linda’s significant experience includes modification of trusts through mergers, decanting, and nonjudicial settlement agreements, analysis of complex state trust administration and non-tax issues, the administration of high-net-worth estates, formation of private foundations, marital agreements, complex guardianships, post-mortem planning, probate matters and court pleadings regarding fiduciary administration issues. For **LISI**, Linda has written *Rotert v. Stiles and Dead Hand Control: Why Indiana Can’t Be “Trusted” to Prohibit Public Policy Violations* (April 13, 2022), *Mann Up! Accept that Your Gift of a Deconstructed House is Less than the Sum of its Parts* (March 24, 2021)

with co-author Ken Jefferson of Holland & Knight LLP, *Navigating the Waters of Maryland's New Elective Share Law: How Not to Be Up The Creek without A Paddle* (October 2, 2020) with co-authors Andrea Dykes and Carolyn Rogers of Howard Insurance, *Look, Up in the Sky. It's a Transfer Tax on Your Plane* (March 19, 2020) with co-author Ken Jefferson, *Modification Mania: Avoid Trust Code Trip-Ups and Draft Documents to Facilitate Change* (October 31, 2019), *Reset of the District of Columbia's Estate Tax Exemption* (January 9, 2019) with co-authors Andrea Dykes and Carolyn Rogers, *Minding the Gap: The Mismatch Between Maryland's 2019 Estate Tax Exemption and the New Federal Estate Tax Exemption* (June 25, 2018), and *Reform School: Lessons on Rescuing an Undesirable Tax Plan after Death* (April 27, 2017). She is a co-author with Andrea Dykes and Carolyn Rogers of *Maryland Enacts New Elective Share Law: Increased life insurance planning opportunities for states that have adopted the augmented estate concept*, *Wealth Management's Trusts & Estates* (August 11, 2020) and *The 2020 Election in Maryland: It's Not About Politics*, *Probate & Property* magazine (July/August 2020), and the author of *Nonjudicial Settlement Agreements: Your Irrevocable Trust is Not Set in Stone*, *Probate & Property* magazine (March/April 2017), and other articles in *Washington Lawyer*, *Bloomberg BNA Daily Tax Report*, and *Wealth Strategies Journal*. Linda's most recent presentations on estate planning were a 2021 webinar with co-presenter Ken Jefferson based on their LISI article about *Mann v. U.S.*, and at the 2020-2021 DC Bar Communities Guardianship and Probate Program Series with co-presenter Kasey A. Place of Ivins Phillips & Barker on *The Blessings and Burdens of Drafting for and Administering Estates with Charitable Beneficiaries* (February 25, 2021). Other presentations include: at the Greater Washington Society of CPAs' 2020 Nonprofit Symposium (December 14, 2020) on *Planning to SECURE Charitable Gifts: How the SECURE Act Supports Donations of Retirement Assets* with co-presenter Judith Barnhard of Councilor Buchanan & Mitchell; at the DC Bar Communities, Estates, Trusts, and Probate Lunch Series with co-presenter Kasey A. Place on *Lemons to Lemonade: Making Use of the Delaware Tax Trap* (November 13, 2018); at the *Women, Influence & Power in Law* conference (October 4, 2018) as a panelist with Robin Solomon of Ivins, Phillips & Barker; and at meetings of the American Bar Association, the District of Columbia Bar, and law firm briefings. Linda is an active member of the Estate Planning Council of Montgomery County, Maryland.

Here is her commentary.

## EXECUTIVE SUMMARY:

Eli and Aimee-Leigh developed a successful family business that brought them riches “exceedingly abundantly more than they could ever ask or think.” Their children, Jesse, Judy, and Kelvin, began working in the business at a young age, and have continued to do so after Aimee-Leigh went to be with the Lord a few years back. Because of their high net worth, this close-knit family established a number of trusts. Their story provides a backdrop for drafting more flexible trusts (i) that rely less on state trust code provisions which fill in defaults when a trust instrument is silent and (ii) which lend themselves to more effective trust administration.

## COMMENT:

### 1. Change of Situs and Governing Law.

*Scenario:* Prior to her death, Aimee-Leigh created an irrevocable trust to benefit her son, Jesse, and his wife, Amber, and named them as Co-Trustees. Jesse and Amber are planning to relocate from the family compound to a new home in another state, and they will set up trust accounts with a bank in their new state and administer the trust there. This irrevocable trust is silent on changing situs and governing law.

*Issues and Solution:* Jesse and Amber are notoriously private about their family business and the trusts created to hold the wealth it has generated. They are concerned about who would need to be involved in changing the situs and governing law of the irrevocable trust created by Aimee-Leigh to their new home state, and certainly would not want to be subject to a court proceeding to accomplish the change. Fortunately, many state trust codes based upon the Uniform Trust Code (UTC) permit a change in the place of principal administration without having to petition for a court order. The change may be accomplished by providing certain notices to qualified beneficiaries and giving a 60-day time period for objection.<sup>2</sup> Some trust codes also allow the use of a nonjudicial settlement agreement (NJSA) to transfer situs and make other modifications to a trust.<sup>3</sup> An NJSA, however, is generally more time-consuming to draft and burdensome to execute than sending a notice to beneficiaries, because all interested persons must enter into the NJSA. Other trust codes are either silent on

nonjudicial transfers or require court approval when the trust agreement is silent.<sup>[4]</sup>

Therefore, trusts should contain provisions for changing situs and governing law and describe the notice to be provided to beneficiaries. The trust agreement could give the power to make these changes to an Independent Trustee or Trust Protector. This will help to avoid the possibility of undesirable consequences when beneficiaries are serving as Co-Trustees of their own trusts.<sup>[5]</sup>

## 2. Exercise of Limited Power of Appointment.

*Scenario:* Kelvin is the beneficiary of a separate trust created for his lifetime under his mother's revocable trust. Kelvin was Aimee-Leigh's youngest child and she believed he probably would not marry during her lifetime. Aimee-Leigh decided to give Kelvin a limited power of appointment (LPOA) over the property held in his trust at the time of his death, allowing him to change the default disposition to his descendants as remainder beneficiaries. Kelvin is able to appoint the property either outright or in trust to any of the following: (i) a descendant of Aimee-Leigh and Eli; (ii) a charity; or (iii) any person other than himself, his estate, a creditor, or a creditor of his estate. Kelvin may only exercise the LPOA through his Last Will and Testament.

*Issues and Solution:* There are two problems in this scenario. First, a Will is a public document, so a trust created under a Will (a "testamentary trust") to receive appointed assets will be available for review by any person as part of the public record of the decedent's probate estate. In this case, Kelvin wants to appoint his interest in the trust to his close friend Keefe, whom he rescued from devil worship and who is a roommate in Kelvin's house in the family compound. Kelvin doesn't want his siblings Jesse and Judy, or anyone else for that matter, to know the object of his affection – and appointment. Second, some jurisdictions require continuing supervision of testamentary trusts, so Trustees of such trusts may be required to submit accountings for review by and approval of the probate court.<sup>[6]</sup> A trust created under a Will could waive the filing of accountings with a probate court. Still, in certain states, the Trustee may have other duties to provide information to beneficiaries and file such information with the probate court.<sup>[7]</sup>

Therefore, the trust should allow the beneficiary to exercise the LPOA either (i) by Will or (ii) in a separate instrument executed during lifetime, specifically referring to the power of appointment. A separate instrument, known as a Deed of Exercise, is preferable because it is a stand-alone document containing the trust provisions and may be modified or revoked at any time during Kelvin's lifetime. Using a Deed of Exercise would permit Kelvin to direct the remaining principal of his trust to create a new trust for Keefe's benefit without having the trust provisions included in his Will and filed with the probate court.

### 3. Mandatory Income Distributions.

*Scenario:* Each of Gideon and his younger brothers, Pontius and Abraham, is a beneficiary of a separate irrevocable trust created by their mother, Amber. Their uncle Kelvin is the Trustee of the trusts. Now that Gideon has reached age 21, he is entitled to mandatory distributions of 100% of net income. Distributions of principal may be made to him or for his benefit for health, education, maintenance and support (HEMS), regardless of his age. The same terms apply to the separate trusts for Pontius and Abraham. There is a spendthrift clause in each trust, which prohibits assignment of a beneficiary's interest in the trust and protects the interest from creditors and spousal claims.

*Issues and Solution:* Shortly before turning age 20, Gideon became resentful towards his father and concerned about ethical lapses in family business dealings. As part of his rebellion, Gideon started hanging out with some rough characters and found himself participating with his ne'er do well "friends" in damaging some commercial property. The wealth of Gideon's family makes it a convenient "deep pocket" in potential lawsuits. Even if a trust has a spendthrift clause, some jurisdictions allow a creditor to reach a mandatory distribution of income or principal to beneficiaries.<sup>88</sup> In addition, some states permit spouses to reach assets of a trust that are otherwise immune to creditors' claims. This is the result in Delaware, where the Supreme Court of Delaware recently allowed a current spouse to reach the assets of a third-party spendthrift trust. The court reasoned that a wife seeking separate maintenance from her husband who had deserted her was not a creditor to whom a debt was owed and therefore not subject to statutory limitations on claims against a spendthrift trust.<sup>89</sup> Rather, it was an attempt on the wife's part to compel

the husband's performance of the duty imposed by law to support his wife and dependents.<sup>[10]</sup>

To avoid these potential pitfalls and better protect trust assets from the reach of creditors, the trust should not mandate the distribution of income or principal. Instead, here are a few options: (i) give the Trustee discretion to make distributions of income subject to HEMS and make principal distributions wholly discretionary; (ii) state that the Trustee has discretion to make distributions of income and/or principal subject to HEMS; or (iii) make all distributions wholly discretionary.

#### 4. Power to Make Unlimited Distributions.

*Scenario:* When Jesse, Judy, and Kelvin were young, Eli and Aimee-Leigh created a single irrevocable trust (a pot trust) for their benefit and funded it with marketable securities. They appointed Junior, a longtime friend from Eli's childhood and the son of Glendon, to serve as the Independent Trustee. Each of the siblings became a Co-Trustee upon reaching age 21. The Trustees have discretion to distribute net income and/or principal for health, education, maintenance, and support (HEMS) to or for the benefit of a beneficiary. An Independent Trustee has discretion to distribute unlimited principal to or for the benefit of a primary beneficiary of the trust, including to other trust instruments. Because the trust agreement also contains guidance to the Trustees to treat the beneficiaries as equally as practicable, all three siblings have either received similar distributions in a given year or no distributions at all.

*Issues and Solution:* Jesse has been married to Amber for many years now and they have three sons. A short while back, Judy met the love of her life in Benjamin Jason, affectionately known as "BJ", and they were wed during a trip to Disneyworld. Therefore, as married adults, Jesse and Judy would each like to have their trust interests disentangled from one another and from Kelvin's interests as well. One solution is to decant the trust into three new and separate instruments, creating one trust each for Jesse, Judy, and Kelvin. This is possible because the trust agreement gives an Independent Trustee the power to distribute unlimited principal to or for the benefit of a primary beneficiary of the trust, including to other trust instruments. Junior is thus able to decant the trust. The decanting would occur either based upon the provisions in the trust, or pursuant to statutory authority in

states which have adopted a version of the Uniform Trust Decanting Act. By including decanting provisions as part of the trust agreement, the Trustee does not have to rely solely upon state trust code provisions which may or may not permit decanting.

5. Residence of Co-Trustees.

*Scenario:* Eli's business received an influx of cash from Glendon, a hometown friend and former boss. Eli decided to use it to fund an irrevocable trust for his daughter Judy, and her husband BJ, who is named as the Trustee. The trust allows BJ to appoint an Independent Co-Trustee, which is desirable in case Judy and BJ need a large distribution to pay for that second summer house they have been coveting. Because Eli wanted to keep control of the trust in the family, the trust agreement requires BJ to appoint Jesse (Judy's brother), and Uncle Baby Billy (Judy's and Jesse's uncle), as Independent Co-Trustees, if Jesse and Uncle Baby Billy are living and willing to serve as Trustees. If neither is living or willing to serve, BJ may then select another person as an Independent Co-Trustee.

*Issues and Solution:* Uncle Baby Billy has a wandering heart; he has frequently talked of moving from his family homestead in Freeman's Gap with his new young wife, Tiffany, to seek fame and fortune in California. Some jurisdictions, such as California, impose income tax on a trust when it has a California fiduciary. This is the case even when the other Co-Trustees are not California residents and the beneficiaries are located elsewhere.<sup>111</sup> California's income tax rate is currently 13.30%. To address undesirable possibility subjecting the trust to California income tax, the trust agreement could include a provision about Uncle Baby Billy moving away. It could state that if Uncle Baby Billy becomes a California resident at any time, BJ and Uncle Baby Billy will determine the tax consequences of having a California fiduciary prior to Uncle Baby Billy's decision as to whether he will accept or decline the office of Trustee. The trust agreement could then provide for an alternate Independent Trustee to be appointed, if Uncle Baby Billy declines to serve as Trustee.

6. Removal and Replacement of Trustees.

*Scenario:* Kelvin has finally set up his own revocable trust, naming himself as Trustee. He has been rather indecisive about his choice of successor fiduciaries. After many gentle reminders from his estate planning attorney to finalize the trust and have it executed, Kelvin hurriedly decided to name Aunt Tiffany, the wife of Uncle Baby Billy, to serve as successor Trustee when Kelvin dies, resigns, or becomes disabled.

*Issues and Solution:* Kelvin is having second thoughts now about his choice of successor Trustee. This is due to Tiffany's age and her inexperience with complex financial matters. Yet, he doesn't want to have to amend his trust agreement to name a new successor Trustee. And Kelvin's estate planning attorney is not eager to give Kelvin a chance to reconsider changing other provisions of the trust as well. Amending the trust to change Trustees will not be necessary here, however. The trust agreement allows Kelvin as the Grantor to remove and replace Trustees during his lifetime. This is accomplished by Kelvin's execution of a separate written instrument delivered to existing Trustees, the Trustee being appointed, and the adult beneficiaries and parents, guardians or appointed representatives of minor beneficiaries.

## 7. Appointment of Co-Trustees.

*Scenario:* Judy has decided to create an irrevocable trust for her brother Kelvin. She and BJ don't plan to have children, and she has always harbored maternal feelings for Kelvin, since as the youngest, he had fewer years with their mother before her untimely passing. Plus, she wants to provide Kelvin with another source of income, as she is worried about how much he is investing in God Squad LLC; he formed the entity to manage the team of followers who live and work on his property in the family compound. Judy has decided to name Kevin as Trustee of his own trust. She would also like to anticipate the possibility of having Co-Trustees. She is unsure, however, of how the agreement should address appointment of additional Trustees.

*Issues and Solution:* Judy is concerned about Kelvin's ability to name appropriate persons as Co-Trustees, especially given his initial decision to name their incredibly young Aunt Tiffany as successor Trustee for his own revocable trust. She feels, however, that making no provision for Co-Trustees is unwise. Trust codes typically do not



give a sole Trustee the power to name a Co-Trustee. In some jurisdictions, a new Co-Trustee may be appointed through a nonjudicial settlement agreement.<sup>121</sup> This could be a cumbersome process, however, because an NJSA requires the execution of an agreement by all interested persons, and of course there is the possibility of a necessary person withholding consent. A court may always be petitioned to add a Trustee.<sup>131</sup> This, however, could be a costly and time-consuming mechanism due to compliance with procedural requirements for filing a petition, giving notice to interested persons, and waiting periods that may apply.

Therefore, Judy could provide for the future appointment of a Co-Trustee without giving Kelvin, the initial Trustee, the authority to add a Co-Trustee. The trust agreement could instead authorize another trusted family member (non-beneficiary) or an independent third-party to name Co-Trustees by a written instrument with a copy given to the other Trustees and beneficiaries. To give the appointer guidance on selection of the Independent Trustee, the trust agreement could contain specific qualifications, such as requiring the person to have attained a certain age, not reside in certain states, or not be a related or subordinate person.

## 8. Methods of Modifying Trusts.

*Scenario:* Jesse decided to create a Spousal Lifetime Access Trust (SLAT) for the benefit of Amber during her lifetime to remove assets from his estate. Amber was named as Trustee and has been making distributions to herself under the HEMS standard to buy clothing and beauty essentials. She also pays for her medical care, gym membership, and insurance on her Range Rover. An Independent Trustee may make distributions to Amber for any reason. These distributions to Amber all benefit Jesse indirectly; even though he no longer has direct access to the assets funding the SLAT, the payments reduce the amount of their income he would otherwise pay for such expenses. Amber is becoming weary of making investment decisions for the SLAT, however; it is taking time away from the marriage support group which she and Jesse co-lead. Still, Amber does not want to name a corporate Trustee to handle the investment strategy, as she wants to keep her financial matters as confidential as possible.

*Issues and Solution:* The initial draft of the trust agreement appointed an Investment Advisor and specified powers the advisor could exercise and the relationship to the Trustee's powers. Jesse decided not to proceed with those provisions in the final version of the trust that was executed. Now he and Amber are regretting this decision. They are wondering whether the trust could be amended to add those provisions and name Harmon, their nephew and first-born son of Uncle Baby Billy, as the initial Investment Advisor, with power to appoint his successor. The trust agreement, however, contains a common boilerplate provision that forecloses an amendment:

This Agreement shall be irrevocable. Notwithstanding any provision contained in this document or any statute or common law, the Grantor shall have no right, either alone or in conjunction with any other person(s) to revoke, amend or modify this Agreement or any trust created by it.

This is unfortunate, since in several jurisdictions with trust codes based on the UTC, an irrevocable trust may be amended by the settlor and beneficiaries without seeking court approval.<sup>[14]</sup> While the "no amendment" provision may have been included to forestall the possibility of Jesse being viewed as having a retained interest causing the assets to be added back into Jesse's estate, a trust amendment to add a fiduciary who is not a beneficiary should not create a risk of estate inclusion. It should still be possible to modify the trust through a decanting, because the agreement gives an Independent Trustee the power to distribute unlimited amounts of principal (see Item 4 of this Newsletter).

## 9. Merger of Trusts.

*Scenario:* In a fit of generosity (and perhaps a little competition to win favor from their grandchildren), Eli and Aimee-Leigh each set up two separate trusts for each of Gideon, Pontius, and Abraham, who are the sons of Jesse and Amber and the nephews of Judy and Kelvin. The twelve trusts have similar terms, continuing for the lifetime of each grandson. Each trust provides for distributions for health, education, maintenance, and support to or for the benefit of each grandson who is the primary beneficiary of his own trust. The trust agreement also allows discretionary distributions of principal by an Independent Trustee. Judy is the Trustee of the six trusts created for her nephews by Aimee-Leigh, her mother. Kelvin is the Trustee of the six trusts

created for his nephews by Eli, his father. Each trust owns interests in various limited liability companies (LLCs), cash, marketable securities, and adjacent parcels of vacant real property suitable for constructing a vacation home for the grandson to use, upon the earlier of reaching age 35 or his marriage.

*Issues and Solution:* Judy and Kelvin are becoming weary of handling so many separate trust accounts for each nephew's trusts and reviewing all the various monthly statements. They must write separate checks to pay the real property taxes for each parcel of real property, deal separately with the LLCs owned by each trust, file separate tax returns, and establish separate EINs and separate bank accounts. They would like to consolidate the trusts somehow. Less time spent on trust administration would allow Kelvin to dedicate himself to more effective management of his own business, God Squad LLC, and give Judy more time to rehearse a new song and dance routine she wants to unveil during the next family business event. In some jurisdictions, the trust code permits a trustee to combine two or more trusts into a single trust after giving notice to the qualified beneficiaries,<sup>[15]</sup> based upon UTC Section 417. Alternatively, a trust instrument may address the combination of trusts. A common boilerplate provision, however, permits a merger of a trust with another trust only when each trust has the same beneficiaries and also the same Trustees. In this case, if this is the provision that Kelvin and Judy were to rely on, Judy could merge the two trusts for each nephew of which she is Trustee and Kelvin could do same. This series of combinations, however, would still leave separate two trusts for each beneficiary.

A better solution is to draft the trust agreement so as to allow merger of one or more trusts with another trust created for the same beneficiaries, regardless of whether both trusts have the same Trustee. This would allow Judy and Kelvin to accomplish their desired goals to merge the trusts, so the result is one trust for Gideon, one trust for Pontius, and one trust for Abraham. Judy and Kelvin could then decide whether both of them wish to serve as Co-Trustees of each trust, or only have one of them continue to serve as a Trustee.

#### 10. Designated Representatives and Virtual Representation.

*Scenario:* Kelvin has decided to use some royalties from the videos of his God Squad performing mighty feats of strength to fund a trust for

Pontius, his favorite nephew and middle child of his brother Jesse and sister-in-law Amber. The trust accumulates income until Pontius reaches age 30. At that point, the Trustee may distribute net income and/or principal to or for the benefit of Pontius' health, education, maintenance and support. At age 40, Pontius will receive all income and the Trustee may make unlimited distributions of principal to or for the benefit of Pontius. Kelvin asked his close friend and house mate, Keefe, to serve as Trustee of the trust. Pontius recently celebrated his 16<sup>th</sup> birthday, and so the Trustee will not be making any distributions to him or for his benefit for another 14 years.

*Issues and Solution:* Kelvin is concerned about his nephew Pontius learning about the trust's existence and "lording" it over his brothers Gideon and Abraham. As the youngest child of Eli and Aimee-Leigh and the only unmarried son, Kelvin knows only too well what it feels like to be treated differently from one's siblings. Therefore, Kelvin wants to withhold information about the existence and terms of the trust until Pontius reaches age 30 so that Gordon and Abraham don't hear about the newly created trust now from Pontius and feel left out. In several jurisdictions with trust codes based on the UTC, a trust agreement may authorize a Trustee to withhold information concerning the existence, value or assets of the trust and the terms of the trust agreement from any beneficiary who has not reached a certain age. This is the case, for example, for trusts created under District of Columbia or Maryland law when a trust beneficiary is under age 25.<sup>[16]</sup> A person may be appointed to receive notices on behalf of such a beneficiary.<sup>[17]</sup>

In other jurisdictions, the Trustee's duty to provide certain notices, information and accountings to qualified beneficiaries is part of the mandatory rules under the trust code that cannot be drafted away, regardless of the beneficiary's age. Nonetheless, the rules may allow the nomination of a person in the trust agreement to represent and bind a beneficiary and receive any notice, information, accounting, or report that would otherwise be given to the beneficiary.<sup>[18]</sup>

Here, the law governing the trust agreement for Pontius' trust permitted withholding of information about the trust until age 25. Therefore, Kelvin's trust for Pontius was drafted to name a representative to receive notices on Pontius' behalf until age 25. Kelvin believes that by the time Pontius reaches age 25, he will be less competitive with his

brothers and possess a more mature viewpoint about his financial standing. Kelvin has chosen his sister Judy to serve as the representative. Judy is very fond of all of her nephews and as the middle child of Eli and Aimee-Leigh, she has always wanted to promote family harmony among her siblings and their children as well.

### **Concluding Observation**

Many jurisdictions have adopted a version of the Uniform Trust Code. Much of the UTC codifies the common law of trusts, and the UTC also contains a number of innovative provisions.<sup>191</sup> Still, even state trust codes based on the UTC vary in their level of precise and comprehensive guidance for trust administration and interpretation. Therefore, leaving a trust silent on certain matters with the intention of relying on state law to fill in the gaps may lead to undesirable results. On the other hand, blind reliance on trust templates created by software providers may result in including boilerplate language which, at best, is inapplicable, and at worst, detrimental to the client's intent and the beneficiary's interest. Thus, knowing how to draft for flexibility helps create trusts that more closely fit a client's particular situation.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Linda Kotis*

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## **CITATIONS:**

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<sup>[1]</sup> See Ephesians 3:20 (KJV).

<sup>[2]</sup> See, e.g., Md. Estates and Trusts Code Ann. § 14.5-108 (c)(d); Fla. Stat. § 736.0108(5)(6).

<sup>[3]</sup> See, e.g., 760 ILCS 3/111 (b)(8),(11); Fla. Stat. § 736.0111(4)(e). According to Fla. Stat. § 736.0111(2), all interested persons must participate in an NJSA. Fla. Stat. § 736.0111(1) states that “for purposes of this section, the term ‘interested persons’ means persons whose interest would be affected by a settlement agreement.”

According to Fla. Stat. § 731.201 General definitions [from the Florida Probate Code].

Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736 [The Florida Trust Code], 738, 739, and 744, the term:

(23) “Interested person” means any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved. In any proceeding affecting the estate or the rights of a beneficiary in the estate, the personal representative of the estate shall be deemed to be an interested person. In any proceeding affecting the expenses of the administration and obligations of a decedent’s estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor’s estate. The term does not include a beneficiary who has received complete distribution. The meaning, as it relates to particular persons, may vary from time to time and must be

determined according to the particular purpose of, and matter involved in, any proceedings.

<sup>[4]</sup> See, e.g. Alaska Stat. § 13.36.090; Cal Prob Code §§ 15001, 17400, and 17401, though in the case of an irrevocable trust with a living settlor, the settlor and all beneficiaries of the trust could agree to the change of situs as part of a trust modification, pursuant to Cal Prob Code § 15404 (a).

<sup>[5]</sup> For example, a change of governing law may result in the application of state law provisions more favorable to current income beneficiaries than remainder beneficiaries about what constitutes income versus principal. Allowing Trustees who are current beneficiaries to make this choice could result in a violation of the Trustee's fiduciary duty to remainder beneficiaries.

<sup>[6]</sup> See Va. Code Ann. § 64.2-1306.

<sup>[7]</sup> See Va. Code Ann. § 64.2-1307(B):

B. If (i) the will of a decedent probated on or after July 1, 1993, contains a waiver of the obligations of the testamentary trustee nominated therein to account or (ii) the sole beneficiary of the trust also is a trustee, the trustee will not be required to file accounts with the commissioner of accounts.

Where the waiver is contained in the decedent's will, the trustee shall within 90 days after qualification notify in writing all beneficiaries of the trust, other than the trustee, who are adults, whose addresses are known to the trustee, and to whom income or principal of the trust could be currently distributed; provide each such beneficiary with a copy of the applicable provisions of the will; advise each such beneficiary of his right to require an annual accounting; and provide each such beneficiary with a copy of this section and annually thereafter provide each such beneficiary an accounting upon request. The trustee shall send to the commissioner of accounts a copy of the notice given to each beneficiary or, in the alternative, file a writing with the commissioner of accounts stating that the requirements of this section have been met. For receiving and filing such notice or writing, the commissioner of accounts shall be allowed a fee not to exceed \$25.

<sup>[8]</sup> For example, under DC Code § 19-1305.06. Overdue distribution, when a trustee has not made the distribution to the beneficiary within a reasonable time after its designated distribution date.

<sup>[9]</sup> Under 12 Del. C. § 3536(a)(2), a creditor of a beneficiary of a third-party trust cannot compel a distribution and has only such rights against the beneficiary's interest as are expressly granted to the creditor by the provisions of the trust instrument or otherwise under Delaware law.

<sup>[10]</sup> See *Garretson v. Garretson*, 306 A.2d 737 (Del. 1973).

<sup>[11]</sup> Cal. Rev. & Tax. Code § 17742.

<sup>[12]</sup> See 760 ILCS 3/111(b)(6); Fla. Stat. § 736.0111(4)(d).

<sup>[13]</sup> See 20 Pa.C.S. § 7764(e) which states as follows: "Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary if the court considers the appointment desirable for the administration of the trust."

<sup>[14]</sup> For example, see DC Code § 19-1304.11(a) which allows an irrevocable trust to be amended by the settlor and beneficiaries without seeking court approval as follows:

A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by:

(1) An agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust;

(2) The settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or

(3) The settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

<sup>[15]</sup> See e.g., Va. Code Ann. § 64.2-735. This is the case so long as "the result does not materially impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust."

<sup>[16]</sup> See DC Code §§ 19-1301.05(b)(8) and 19-1308.13(b). Md. Code Ann., Est. & Trusts § 14.5-105 states as follows:

The terms of a trust prevail over a provision of this title [14.5, Maryland Trust Act], except:



. . . .

(11) The duty under § 14.5-813(a) and (b) of this title to:

(i) Notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, the identity of the trustee, and their right to request trustee's reports and a copy of the trust; and

(ii) Respond to the request of a qualified beneficiary of an irrevocable trust for reports by the trustee and other information reasonably related to the administration of the trust;

<sup>[17]</sup> Md. Code Ann., Est. & Trusts § 14.5-301(a) states that:

Except as required by the applicable rules of civil procedure in a judicial proceeding, notice to a person that is authorized to represent and bind another person under this subtitle has the same effect as if notice were given directly to the other person unless the person represented objects to the representation by notifying the trustee and the representative before the notice would otherwise have become effective.

<sup>[18]</sup> Fla. Stat. § 736.0306, Designated Representative states as follows:

(1) If specifically nominated in the trust instrument, one or more persons may be designated to represent and bind a beneficiary and receive any notice, information, accounting, or report. The trust instrument may also authorize any person or persons, other than a trustee of the trust, to designate one or more persons to represent and bind a beneficiary and receive any notice, information, accounting, or report.

(2) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind a beneficiary while that person is serving as trustee.

(3) Except as otherwise provided in this code, a person designated, as provided in subsection (1) may not represent and bind another beneficiary if the person designated also is a beneficiary, unless:

(a) That person was named by the settlor; or

(b) That person is the beneficiary's spouse or a grandparent or descendant of a grandparent of the beneficiary or the beneficiary's spouse.

(4) No person designated, as provided in subsection (1), is liable to the beneficiary whose interests are represented, or to anyone claiming through that beneficiary, for any actions or omissions to act made in good faith.

<sup>[19]</sup> Uniform Trust Code (last revised or amended 2010), Prefatory Note, page 1.