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Stanley H. Johnson

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STANLEY H. JOHNSON
of the Denver Bar

This article is intended to present in abbreviated form the substance of a lecture before Denver lawyers and others in a seminar concerning estate planning upon the subjects of living and testamentary trusts. It is intended to present briefly the various types of trusts, some of the advantages and disadvantages of each, some of the pitfalls to be avoided, and some desirable provisions that should be included.

By living trusts are meant those transactions where legal title to property, and usually possession, are transferred to a trustee during the lifetime of the creator of the trust, the creator being commonly called the settlor or grantor. Three forms of such trusts are presently in common usage: insurance trust agreements, intended to provide for the distribution by the trustee of the proceeds of life insurance after the settlor's death; declarations of trust, in which property in the hands of the settlor is formally set up in trust with the settlor and possibly others as trustee or trustees, sometimes with provisions concerning the trusteeship and disposition of the property after the settlor-trustee's death, and sometimes without; and the ordinary living or intervivos trust agreements, which usually have a testamentary disposition. They will be discussed in that order.

Such agreements are usually made as a part of an estate plan to provide ready cash to the executor for administration expenses and taxes by way of a loan from the trustee on terms within the trustee's discretion, that is, with very low interest rates or

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EDITOR'S NOTE: During the past several years, the subject of estate planning has gained the increasing attention not only of attorneys but also of trust officers, certified public accountants, and life underwriters. In an attempt to gain greater understanding of some of the difficult legal problems involved in estate planning as well as the role which could be played by representatives in each of these fields, the Fourth Annual Law Institute, jointly sponsored by the University of Denver College of Law and the Junior Bar Sections of the Colorado and Denver Bar Associations, was devoted to the general subject of estate planning and was presented in Denver during April and May of this year with the cooperation of the Rocky Mountain Chapter of the American Society of Chartered Life Underwriters. Both attorneys and life underwriters addressed the institute.

The articles contained in this issue of DICTA are adaptations of some of the lectures delivered at that institute. Unfortunately, space limitations make it impossible to publish here all the lectures there presented; consequently, several excellent addresses from that institute are being held for publication in subsequent issues of DICTA.

none at all, and with testamentary disposition as to the proceeds in trust for family usage. Provision may be made in such agreements for the additional transfer of other property from time to time, such as securities or real estate, which may be desirable to include in the trust. Except in unusual circumstances, such agreements are always made subject to amendment and revocation, and the settlor reserves all of his original rights under the policies until his death.

Some of the advantages are: the flexibility of use of income and principal by the trustee over and above the options provided in the policies, and under the present interest and dividend rates, a chance to earn more money (through sound investment by a bank as trustee) than can be earned in the ordinary policy recently issued; such portions of the principal of the trust as may be necessary for the executor's use in paying taxes and expenses is made readily available without losing the $75,000 exemption under Colorado Inheritance Tax Laws for insurance payable to beneficiaries; if the trustee's duty is merely to hold the policies until the settlor's death and then collect and distribute proceeds, no trustee's fee is ordinarily charged until the settlor is dead; of course, the availability of ready cash to the executor means that estate property need not be sold by him at an unfavorable time and that money may be available to carry on a business of the settlor until such time as it can be wound up under favorable conditions.

The current annual bank fees, of recent adoption, upon all forms of living or testamentary trusts of which the assets are made up of securities and cash, are about as follows:

	Fee
$5 per $1000 of principal value for the first $50,000	$250
$4 per $1000 for the next $50,000	$200
$3 per $1000 for the next $100,000	$300
$2.50 per $1000 for the remainder.	

A distribution fee for distributing principal is charged at the rate of 2% for the first $50,000 and 1% for the balance. This would be applicable to invasions of the principal for the benefit of a widow or children.

It would probably be better in drawing such an agreement not to refer expressly to loans by the trustee to the executor, because the Inheritance Tax Commissioner might claim that the agreement was a subterfuge to evade taxes, but a general provision for full discretion in making loans by the trustee is of course sufficient. One of the greatest advantages is the flexibility of the insurance trust agreement, which permits a trustee, for example, to distribute income or principal for the education of children in accordance with their needs of the moment instead of treating each equally, and also paying out for emergency and medical care, and the like.

The disadvantages of the insurance trust agreement are: first, the additional cost of a trustee's fee, now somewhat higher than formerly, which is not present in insurance options (of course it may be avoided by using individual trustees in the family which will not charge a fee, but investment judgment and permanency of the trustee may be lacking) ; and second, the loss of settlement options, since the more recent insurance policies provide that none of the options shall be available to a corporate trustee, but under the low earnings of most recent insurance policies, this disadvantage is offset by the greater earning of a diversified investment program.

Except that the trustee is dealing with insurance proceeds, the provisions of an insurance trust agreement concerning the powers of a trustee and distribution are similar to those in the ordinary living trust agreement and will be discussed under that heading.

DECLARATIONS OF TRUST

Lawyers generally seem not to be so familiar with declarations of trust, which may be utilized (1) to explain the uses under which property is held by the declarer of the trust, where the title is held by him as nominee without disclosing the trust, and also (2) for situations where property is held in joint tenancy and one or more of the joint tenants actually has no equitable interest in the property but is holding it for the purpose of management or distribution—actually as a trustee. It is also useful for making a gift enforceable. In other words, a promise to give property or money to another is unenforceable, but if set forth in a formal declaration of trust with a transfer by the owner to himself or another as trustee, the gift becomes complete, unless the declarer reserves the right to revoke it.

A declaration of trust is of course not ordinarily an agreement with any person but rather a recitation in an instrument which may be in form and effect a deed, stating the uses for which the property is held, providing for a successor trustee in the event of the death of the settlor-trustee, and making provision for final distribution. An individual commonly holds title to property—which he does not actually own, except for the record or obvious title—under constructive or resulting trusts, or under an oral trust agreement. If the party conveying the property under an oral agreement in trust is dead or has no capacity to execute a trust agreement, the person holding the title may publish to the world and to the executor of his estate the actual circumstances under which he holds the property, by an instrument in writing called a declaration or a deed of trust. It is rather common to find that a mother who has reached old age and may become senile has placed property in her own name and that of one of her children in joint tenancy, under an oral agreement that the child, upon the mother's death, shall dispose of the property for the child's own benefit and also for others. Where this situation exists, it may be desirable that the child establish by a declaration of trust exactly what the terms of the oral agreement were. This may even include provisions for disposition of the property upon the death of the child in accordance with the oral agreement, and for a successor trustee. Possibly such declaration might be subject to attack by an interested relative who is not included among the beneficiaries, but ordinarily the powers of the child to name a successor-trustee and to set forth the distributive provisions, following the child's death, would not be challenged.

The advantages of the declaration of trust are: the difficulty of proving the nature of the trust by the child's executor, in the event of the child's death, is avoided; also eliminated is the cost of appointing a new trustee in the district court; and the nature of the trust is defined in writing.

Some caution should be exercised in determining whether any gift taxes should be declared and paid, and this will involve knowlege of previous gifts of the original donor.

Living or Intervivos Trust Agreements

The provisions of such agreements are usually applicable also to insurance trust agreements and declarations of trust. Living trust agreements are sometimes made without testamentary disposition, any residue after the death of the settlor pouring into the settlor's estate, but this results in unnecessary administration expense and fees. Usually, however, provision is made for distribution of the property after the settlor's death, where the settlor has died without revoking the trust agreement. Such trust agreements should only be made irrevocable where the settlor is prepared to surrender all interest in the property, and this is usually done for the purpose of establishing a present gift. Even where the trust is made irrevocable as a gift to minors, if they do not get the present benefit of the income or principal, theirs is a future interest and not available for the annual gift tax exclusion, though qualifying for the gift tax exemption. The advantage of such a trust for minors is that it avoids the expense and nuisance of a guardianship, or, where one of the beneficiaries may become mentally or physically incompetent, of a conservator.

As in a will, real estate may be set up in trust for the benefit of many persons with provisions, in the case of a residence, for use by various members of the family, without having the title vest in a member of the family who already has a substantially taxable estate. It is also useful, where many persons, who would otherwise be co-owners, are buying real estate, to place the title in the hands of two persons as joint tenants who are actually co-trustees. If this device is used, a partnership or corporation with all of the accounting and tax problems, may be avoided, but nevertheless the trustees must of course report the distribution of income on the usual fiduciary tax form. Such agreements are also used occasionally for trusts to vote the stock of family corporations, but in drawing such agreements a reference should be made to the Colorado Statute on Voting Trusts, Vol. II, Colo. Stat. Ann., chap. 41, sec. 45. See also an article in Vol. XII, DICTA, No. 6, by Shippey.

Except in the East, where living trusts were formerly in rather common use even by business men during their lifetimes, the living trust agreement is ordinarily desirable for such persons as widows who have no investment judgment, or those who desire to provide for spouses, or minor children, during their lifetimes, for professional and other men who have substantial incomes but are not educated in investments, and for elderly people who may become senile and desire to protect themselves against incapacity. The living trust agreement has the advantage of not being so readily subject to attack as a will, because it is set up while the settlor is still living with many witnesses who may substantiate his competency. It is useful also with ante-nuptial agreements, or where a husband or wife have become estranged, in order to place the title and management of property in the hands of a trustee in accordance with the desires of the settlor.

There has never been a determination in Colorado as to the rights of the wife to elect to take half of an estate set up by a husband in trust against her interests, although an Illinois decision set aside such a trust, as an attempt to evade the wife's right to elect to take a portion of the husband's estate. The Colorado statute on election is restricted to wills and estates, and where a settlor, for example, is providing for his children by a previous marriage, it is quite possible that the court would not permit the wife to invade the trust created by the settlor for such a worthy purpose during his lifetime. This would be particularly true under an ante-nuptial agreement entered into between husband and wife permitting the husband to dispose of some or all of his property for the benefit of his children by a prior marriage. The chief advantage of the living trust is of course the avoidance of the waste of time, money, and trouble of probate or administration proceedings in court.

There are some drafting problems in connection with living trust agreements. Care should be exercised as to what portion of estate, inheritance, and income taxes are to be paid from the trust estate, and whether such payments should be made from income or principal, or both. The draftsman should decide whether the trust fund should pay for such taxes only against the trust estate or whether the trustee should be given discretion to pay such taxes against the estate of the settlor also. Disposition of chattels under such a trust agreement is difficult, because such property may not easily be transferred to a trustee during the settlor's lifetime. Banks are usually averse to accepting responsibility for personal property not within their control. If the settlor has an interest in a partnership, he should be advised whether or not it is desirable to authorize the trustee to leave assets in the partnership as a limited partner, at least for a time after the settlor's death. This will depend upon the earning power of the partnership and whether the settlor's interest therein may be readily disposed of. The living trust agreement is sometimes desirable for the transfer of stock in a closely held family corporation in order to prevent dispersal of its stock upon the settlor's death among a number of minor descendants or the spouses of descendants of the settlor.

Some pitfalls exist among the distributive provisions of a living trust agreement and of a testamentary trust. For example, in providing for the surviving spouse, in order to take advantage of the marital deduction, one-half of the adjusted net estate may be left subject to the surviving spouse's distribution by will, but the draftsman should remember that there should be deducted from such one-half interest the value of other property specifically given, or passing under operation of law, such as property held in joint tenancy, life insurance which qualifies, and other assets. This is only of importance, of course, where the surviving spouse already has substantial property subject to death taxes. The fund set up to take advantage of the marital deduction should be set up as a separate fund and all taxes and expenses of the trust paid out of the residue, so as to take full advantage of the marital deduction. The surviving spouse must receive all of the income from the marital deduction fund at least annually and must have the right of distribution at least upon death by will. It is better to make such power one of appointment by will, because then, if the surviving spouse does not exercise the power, the settlor's provisions as to how the property shall be distributed may become effective. Caution should be exercised to make certain that all life insurance policies and annuities which should qualify for the marital deduction and which are under option for the benefit of the surviving spouse also pour into the surviving spouse's estate any unused portions of the insurance funds.

The marital deduction fund will still qualify, even though provision is made for the divesting of the property from the surviving spouse and into the children, in the event that deaths of both spouses occur from a common accident, or the surviving spouse does not survive six months after the settlor's death. The draftsman should be careful however not to qualify that portion of the trust by terminating it upon the spouse's remarriage, or upon any other condition, since there can be no strings upon the surviving spouse's power of disposition by will, if the fund is to qualify for the marital deduction.

The balance of the trust fund may be set up as a separate fund from which the income is payable to the surviving spouse for life without any death tax against the surviving spouse's estate, but if the trustee is to have power to invade the principal of the second fund, this power under the recent federal statute should limit the invasion to a fixed standard of living, or a fixed amount, or to $5000 or five per cent of the value of the principal of the trust fund, whichever is less, within any one year. See Internal Revenue Code, Title 26, Sec. 811, and the 1949 Amendments in the Pocket Supplement. So far as the power of appointment to the surviving spouse is concerned, it may be given also in connection with the second trust fund without an estate tax being imposed, providing it is a special power; that is, exerciseable only as to the descendants or spouses of descendants or in conjunction with a co-donee who has an adverse interest. See the 1949 Amendments to Sec. 811 f. 1, 2, 3 and 4. Special powers are not exempt under Colorado Inheritance Tax Law, Colo. Stat. Ann., chap. 85, sec. 12. But a release of the power may be made without liability for the tax, chap. 128A, secs. 1 to 9.

An advantage of the special power of appointment to the surviving spouse is that it gives the surviving spouse power to distribute at a period much later than the settlor's death in many cases, in accordance with the then needs of the descendants or others. But the same power may be granted to the trustee itself by broad powers of determining the distribution of assets among children. It is not at all necessary that the children should take the funds equally, but the trustee may be empowered, for example, to provide as much money as may be necessary from income or principal for each child until the youngest has attained a certain age or has completed his education, and then the funds may be distributed equally among the children.

Where each spouse has substantial income, it may be well to provide in the trust agreement that the income from the second fund in which the surviving spouse has only a life interest should only be paid to the surviving spouse upon his or her written request, and any income not actually utilized be paid to other beneficiaries, such as the children. This may avoid getting too much income into the hands of the surviving spouse and accomplish an income tax saving. Before the marital deduction is utilized, it is necessary to know what property the surviving spouse is likely to have at death besides that property provided in the trust and to calculate as nearly as possible the estate and inheritance taxes against the surviving spouse's total estate and the possibility of the surviving spouse getting rid of property during his or her lifetime by gifts or expenditures. Sometimes, however, particularly where there are no children, the spouses may not be interested in death tax savings, or the death taxes may be avoided upon the death of the survivor by charitable distributions.

Ordinarily, the American business man seems to have no interest in providing in his will or trust agreement for the spouse of his own child. If that spouse is a woman and mother, the attorney should emphasize to the settlor the lack of wisdom in making provision only for the settlor's grandchildren in the event of the death of the settlor's son, without any provision for the care of the mother of the children.

Where grandchildren become the beneficiaries of the trust, it is perhaps better, unless the trust fund is a very large one, to have the principal distributed to them outright, at least upon attaining majority, because of the expense of trustee's fees in perpetuating a small trust. Here it is all the more important to provide that the trustee may distribute to a parent or one acting in loco parentis to avoid the expense and nuisance of guardianship. Where grandchildren are involved and the trust is to continue, it would seem much better that the trustee be given power to discriminate among the grandchildren according to their educational needs, rather than to disperse the income and principal equally.

One common pitfall in trusts where distribution is to be made to children at different ages (as, for example, half of the principal to a child at age 25 and the remainder at age 30) is the failure to provide for distribution in the event that the child never lives to attain the age of final distribution. The attorney should ask himself at each step in drafting a trust agreement whether he has made provision for every contingency that might occur. The settlor or testator may tell him only that he wants half of his property to go to his present wife, and half to his children by a previous marriage, and that is as far as his mind takes him. The attorney must then drag out of him what provision he wishes made in case his children do not live to receive final distribution, or have no descendants, or any spouse surviving, as well as for the possibility that all of the beneficiaries whom the settlor names may be dead before the trust has terminated.

Practically, it is a good idea often to authorize the trustee to use principal in a certain amount or at the trustee's discretion for children who have passed majority, in order that they may buy a residence or establish themselves in a business, rather than receive all of the principal at fixed ages. The trust may well provide for the payment of the last illness and burial of the surviving spouse and leave to the trustee's discretion whether any of the debts of the surviving spouse may be paid. The spendthrift trust clause should always be inserted in a trust agreement, because it has been approved in Colorado and may save a prodigal beneficiary from disaster. Care should be taken to avoid a violation of the rule against perpetuities, particularly where unborn grandchildren are involved, by making the trust ultimately distributable not later than 21 years after the death of some persons then living.

Specific bequests and devises may be made in a trust agreement, but it is usually better to make such bequests after the death of the surviving spouse rather than before, in case the trust should not be more than enough to support the surviving spouse.

So far as trustees are concerned, it is cheaper to use members of the family or individuals, but in that event there should always be two, and always a provision for a bank to succeed as trustee upon the deaths of the individual trustees. The trust should expressly state that any successor has the same powers and discretion of the original trustees, and the power to appoint another successor. However, the permanent ability of banks to protect investments is usually paramount in a trust of this kind. If an individual and bank are named as co-trustees, the agreement should provide that the bank should have possession of the assets, because this is required under banking laws, but the matter of the expenditure of principal, where there is disagreement among the co-trustees, may be left to the individual trustee rather than to the bank, because it is probable his knowledge of the family needs is greater. The trust agreement should always provide that the trustee shall have power to sell real estate or personal property without order of court, where real estate is, or may become, a part of the assets.

Where distribution is to be made to children or grandchildren at certain ages, it is well to have their birth dates set forth in the trust agreement and made conclusive upon the trustee, in order to save the trustee the trouble of obtaining evidence of birth dates. If there is any possibility of the settlor having unborn children, provision should be made for their sharing in the trust also. The usual clauses governing the powers of the trustee may be obtained from any of the trust departments of the banks. The clause giving the trustee power to determine how disbursements shall be credited between income and principal is an important one, because there is more likely to be a contest between beneficiaries over this subject than perhaps any other in the trust agreement. The trustee may be given the right, in the event of dispute, to determine allocations and apportionments as between income and principal according to the Restatement of the Law of Trusts, which is pretty detailed in this connection, in order to avoid the expense of a court contest.

A settlor may wish during his lifetime to control the trustee in the sale or purchase of investments, or have his wife or someone else do so after his lifetime, and such a provision may, of course, be inserted. If the trust is to be subject to revocation there should be a clause expressly so providing, because without it the instrument is presumed to be an irrevocable trust. The provision should be for the right of revocation or amendment from time to time. The trustee should be required to report to the adult beneficiaries concerning assets and disbursements and there should be a reasonably definite clause concerning the trustee's fees.

Settlors at times desire to leave from the residue of the estate certain definite amounts to certain persons or institutions. This should be discouraged and the distribution should be made in percentages or shares because of the fluctuation in the value of the assets from time to time.

Testamentary Trusts

Most of the comments above are applicable to testamentary as well as living trusts, and no additional comments seem to be called for under this heading, except to stress the fact that, if the testator is dead, there can be no revocation or amendment, and therefore farsightedness and accuracy are of the greatest importance.

Some mention, perhaps, should be made of foreign real estate in connection with the selection of a trustee and with charitable devises or bequests.

Where real or personal property is owned by the testator in a foreign state, ancillary administration is usually necessary and the will should provide for an ancillary, as well as domiciliary, executor. Whether an ancillary trustee should also be selected will depend upon the laws of the foreign state. Some states, as California and Kansas, do not permit foreign banks to qualify as trustee, or hold title to real estate. Some do not even permit a non-resident individual to qualify as executor. Furthermore, there are laws in some states limiting the amount of the estate or trust estate which may be left to charity. Where only personal property is situated in the foreign state, the problem is not so great, as in the case of real estate. Before the will is drawn these laws should be carefully examined. In some instances it may be better for the testator to dispose of his foreign holdings during his lifetime, or it may be possible to have the proceeds of foreign land, intended for charity, distributable to an individual, who in turn by separate trust agreement, agrees to distribute the proceeds upon receipt to the charity involved.

Canadian stocks and bonds are a nuisance because of the necessity in an estate of returning succession duty returns both to the province of incorporation and to Canada, and paying a tax.

It is the author's hope that some of these suggestions may be helpful to those lawyers who have not had much experience in the drafting of trusts. They are not intended, of course, to cover all of the problems which may arise.

SUPPORT AMENDMENT NO. 1

Constitutional Amendment No. 1 will be on the ballot in the November general election. The provisions of this amendment are non-controversial and its passage will cure three ills now afflicting our judicial department. The measure has the support of both political parties, is endorsed by the District Judges Association and County Judges Association and is a small but vitally important part of the judicial reform program of the Colorado Bar Association. We know of no opposition to this measure but energetic support must be given by every lawyer and lover of good government to secure an affirmative vote on the amendment and to overcome the strong tendency of electors to vote against all constituional changes. Take time to explain the purposes of this amendment to every voter whenever and wherever an opportunity presents itself. The text of Constitutional Amendment No. 1 and an explanation of its provisions may be found at page 338 of the September, 1952, issue of *Dicta*.