Denver Law Review

Volume 22 | Issue 6 Article 1

July 2021

Drafting Wills and Trust Instruments

Stanley H. Johnson

DICTA

Vol. XXII JUNE, 1945 No. 6

Drafting Wills and Trust Instruments†

BY STANLEY H. JOHNSON*

Errors, usually of omission, are all too frequent in the drafting of wills and trust instruments. Where a mistake has been made in a contract or a deed, it may ordinarily be corrected, but a tetstamentary instrument is put away in a secret place and seldom reviewed. Furthermore, it is apt to dispose of more property. It should therefore be prepared with considerable forethought and care, and with full consideration of all the contingencies and problems which may arise.

Unfortunately, the testator or settlor too often is in the greatest haste and the draftsman has not had sufficient experience in the problems of administration to turn out an air tight instrument under pressure. The following comments are offered in the hope that they may be of practical value, for they are drawn from actual instances which have occurred.

The simplest instrument is the will providing for outright distribution. Let us consider it first.

A few individuals, afflicted with a disease which might be termed willfulness, lie awake nights planning amendments to their wills. The only known cure is the application of a higher fee on each appearance of the symptom, a prescription which attorneys often find embarrassing. Most testators, however, have only a sketchy notion of what they want. It must be short and snappy and free from all that legal stuff.

There is no harm in a short will drafted in clear language provided it contains what is needed. One will, about two-thirds of a legal page in length, now being administered, disposed of a considerable amount of real estate. Though in other respects well done, it neglected to give the executor power of sale. For every parcel sold the tiresome statutory procedure must be followed. Whether the testator likes it or not, the attorney should make certain that everything needed is included.

It is desirable to have the testator state in the opening declaration the place of his domicile, since his intention will be of some purport in

†Summary of address before the Denver Bar Association on May 7, 1945.

*Of the Denver bar, formerly district judge, now Trust Officer, The International Trust Company.

settling taxes. The use of the word "testament" with "will" is probably tautological, but a statement that all former wills and codicils are revoked is important, since without it prior instruments are revoked only where inconsistent.[1]

A reference to the payment of debts and funeral expenses is unnecessary, though commonly included, but the direction to pay, as an expense of administration, all death taxes is important to assure the full amount of a gift to any beneficiary. Attorneys all too frequently omit this clause. It should be extended to include taxes against other transfers in contemplation of, or to take effect after death, which are not properly a part of the estate inventory; as for example, insurance not payable to the estate, savings bonds payable to alternate payees, and property held in joint tenancy.

The first gift should be of the testator's personal belongings. Let him provide a first and a contingent legatee, for the sale of personal belongings is an unprofitable nuisance. This paragraph is often wordy. "Chattels" is sufficiently comprehensive and avoids trivial constructions, such as whether the words "articles of personal adornment" includes a watch.

The specific legacies or devises follow. The beneficiary's address and degree of relationship, if any, should be given. If one gift is to be given preference over another, it should be clearly stated. If a spouse receives less than half, and elects to exercise the statutory option, the remaining gifts will be prorated.[2]

There is some difference of opinion in the matter of specific gifts whether the executor has any duty to pay property taxes. Some believe he is obliged to pay those which were a lien at the testator's death, and only these are deductible from death taxes. Certainly the executor is not authorized to pay subsequent taxes nor to take any steps to perfect title. If the testator wishes it, provision had better be made in the will. At least, the executor or his attorney should see that estate documents necessary to make title merchantable in the devisee are recorded, not overlooking the decree of final discharge. There are many estates still uncompleted in the Denver County Court, because the final discharge has never been obtained.

Real estate may have been turned into the residue. In this event it is important that the executor be given power of sale, since there may be a dozen devisees living in as many states, or, again, the personal property may be insufficient to pay expenses. The executor should be given more than this. If he is not to be trusted, he should not be named. If he is, he should receive full power at his discretion to hold, manage, improve, par-

[1]Whitney vs. Hanington, 36 Colo. 407.
[2]Buckley vs. Switzer, 69 Colo. 176.

tition, invest, reinvest, sell, exchange, convey, lease, mortgage, contract with respect to the property, both real and personal, free from the investment restrictions imposed by law, including the right to distribute to beneficiaries in cash or in kind at his own valuations, hold property in his own name or in the name of a nominee, make distribution to minors without the intervention of a guardian, or pay out on their account, and retain property not usually selected as a trust investment in spite of inadequate diversification. The same powers should be granted the trustee, if there is one.

If the widow is to receive less than half of the estate, the matter had better be discussed with her and a clause incorporated that, if she takes her half, she shall take nothing under the will and the balance be distributed as therein provided. It has been held, however, that her election does not invalidate the remainder of the will.[3]

After disposition of the residue, provision should be made to cover the contingency of all residuary beneficiaries predeceasing the testator; for example, to the testator's heirs at law under the statutes of descent and distribution in Colorado, or to a charity. Under a Colorado statute, and a declaration of trust of a number of banking houses on file in the office of the Secretary of State, gifts to general charitable uses in Denver may be made to The Denver Foundation merely by incorporating by reference the declaration of trust in the will.[4]

Sometimes the testator may wish his wife to act as co-executor, in order to retain some control. It is less troublesome to administration to provide that no sale or purchase of investments shall be made without her approval, without naming her co-executor. A successor executor should be provided, in case the first named cannot act.

If possible, the client with a small estate should be discouraged from splitting it into minute fragments, particularly where there is a wife or child dependent on him. In such cases it is better to bestow a life estate upon that individual in trust, distributing largesse from the remainder.

The attestation clause is unnecessary in a will, but helpful, nevertheless, in that it provides a guide to proper execution. It is also prima facie evidence of what it recites.[5] If separate date lines are incorporated above the testator's signature and in the attestation clause, care should be taken to make certain that they coincide. If a correction is made, it should be initialled by the testator and the witnesses, as should every page of the will except the signature page.

---

[3]Mitchell vs. Hughes, 3 CA 43.

[4]Books 245, p. 1; 294, p. 329; 267, p. 254; 403, p. 276.

[5]Butcher vs. Butcher, 21 CA 416, 423; H. B. 759, Session Laws of Colo., 1945, approved April 11, 1945.

It is well to advise the testator that his will is revoked by his remarriage, and pro tanto by the birth of a child, unless he has provided for his unborn children, and that lapsed legacies fall into the residue, unless a contingent legatee is named.

Testamentary Trusts

It is in wills containing testamentary trusts that trouble more commonly occurs. The draftsman must be very watchful, particularly where distributions are made to children at various ages.

It is usually more sensible to give the widow the income from a trust estate for life with the right in her trustee to invade principal for her benefit, than to leave her half the estate. She is often incompetent to make her own investments. Taxes will be saved against her estate. And if there are children she will have control of their income, though sometimes this may be embarrassing. If the remainder is to go to charity, however, a clause should be added stating that the trustee at his discretion may use principal only to the extent necessary to maintain her in the standard of living she has enjoyed in the testator's lifetime, or in some standard which may be measured. Otherwise, the entire principal will be taxed.[6]

Provision should be made for payment of her burial expenses and also for payments for her benefit in the event of her incapacity. Unless the estate is large, any specific gifts to others should be effective after her death, rather than before.

Usually, if there are children, the remainder distributes to them. The trustee, to avoid the expense of guardianship, should be empowered to pay to or for the benefit of minors, without a guardian. The testator should be discouraged from distributing to his children at too remote a period. If they are apt to be unreliable, they had better not receive principal at all, though the rule against perpetuities must be observed. The period of distribution in such cases may be sufficiently extended by taking as the lives in being a handful of babies, whether related to the testator or not, although this situation in due course will drive the trustee to despair.

If a child is to receive distribution of half of his portion at thirty years and half at forty years, be certain that three contingencies are covered. First, in the event the child dies before thirty with or without issue; second, in the event he dies after thirty and before forty with or without issue; and third, in the event he dies before the life tenant with or without issue. In two substantial estates now being administered, intestacy has resulted from a failure to observe these conditions.

---

[6]Merchants Bank vs. Commissioner, 320 U. S. 256, but see Com. vs. Robertson, 141 Fed. (2) 855.

Where income or a specified sum is payable monthly or quarterly to a beneficiary for life, any portion undistributed at the date of death should go to the next in line; otherwise, it is presumed payable to the life beneficiary's estate.[7] The rule, however, for no good reason, is otherwise with annuities.

If separate funds are to be set up for a number of children, the trustee should have the right to treat them as one fund until distribution. If the words "separate funds for each child of mine, and the descendants collectively of any deceased child" are used, the contingency of after-born children will be taken care of. The words "children" and "issue" or "descendants" are not the same. The first refers to one generation only; the latter two may refer to several generations, including adopted and illegitimate children. Testator's are apt to overlook a son's wife and, in the event of his death, to leave everything to his children. It might be mentioned that the testator's grandchildren will fare better if the mother is not compelled to earn her living.

It may be desirable to allow the testator's spouse to make distribution to the children after his death by a power of appointment, by will or otherwise. Such a power, if confined to distribution among a class consisting of the spouse of the decedent, or his or the spouse's descendants, including adoptive children, is not taxable a second time against the donee's estate. Beyond this class it is, and the second tax cannot be avoided by making the spouse co-trustee with some disinterested person, if she retains discretionary power over principal.[8] Recipients of this power who have not exercised it have until July, 1945, to release it without tax, under the Federal Estate Tax laws, and by a new act in Colorado have an indefinite period to release from Colorado tax. The power to control distributions of principal is not taxable against a disinterested trustee, but it is a difficult one to exercise.

A spendthrift clause, providing that the trustee may pay only into the beneficiaries' hands, and that the trust fund or its income shall not be subject to attachment or other court order is sometimes desirable, but its legal effect has apparently not been determined in Colorado.

Pains should be taken over the clause granting the trustee his powers. He has no implied power of sale of real or personal property unless expressly given him. The trust will continue subject to the jurisdiction of the probate court unless the instrument states otherwise. This rule is often overlooked. Court jurisdiction is only useful where there may be trouble requiring court determination, in which event, it is cheaper to remain under the wing of the court.

---

[7] II Scott on Trusts #238 et seq.
[8] C. C. H. Ed. of I. R. Code amended to 10/1/44, Sec. 811 F.

Difficulties arise over the allocation of income. If the testator wishes his wife to enjoy all the income from a 3% bond, bought by the trustee at a premium, he had better say so. Otherwise the trustee will be required to amortize the premium from income over the life of the bond to its call date. In that case the wife's income may be cut in half. Similarly, if he desires his wife to have all the income from the estate, he had better not leave her only the income from the residue, which is something less. The rule of equitable apportionment probably is the law in Colorado, and that portion of income earned by the excess of the estate over the residue during administration under this rule is distributable into principal.

If there is a possibility that the testator will leave a mortgage upon real property, the executor or trustee should have power to amortize it from principal first, if any, and, if not, from income. Otherwise, he may be forced to collect from the remainderman, and if the remainderman has no money the property will be lost.

Trust Agreements

There may be a situation in which a trust agreement effective during the settlor's life is preferable to a will, even though the probate fees may be lost for all time. The doctor who is too busy, or has inadequate investment knowledge to take care of his estate; the wealthy individual who wishes to save taxes by a present irrevocable gift; and more particularly the older person who faces the possibility of incompetency—these may effect a saving and an advantage by incorporating a testamentary disposition in a declaration of trust.

With two exceptions, an instrument of this nature does not vary greatly in its problems from the testamentary trust contained in a will. First, the settlor must be provided for. The draftsman should see to it that his trustee may care for him during incapacity, may pay his funeral expenses and his creditors upon his death. Secondly, it must be remembered that a trust instrument is irrevocable unless it states to the contrary.[9] The settlor should retain full power of amendment, as well as revocation, and since there have been decisions that power of amendment, once exercised, is lost, he should be expressly permitted to amend as often as he pleases. Needless to say, if the trust is to be irrevocable, the draftsman must exercise great caution. Irrevocable trusts should be discouraged.

Occasionally an estate may include an interest in a partnership or family corporation. In the former, the executor, or trustee if there is one, should have power to reinvest the decedent's share in the business as a limited partner, for purposes of liquidation. In the latter, he should be

[9]III Scott on Trusts #329 et seq.

empowered to vote the stock, qualify as an officer or director, or if it may seem preferable, these rights may be bestowed upon some other person, perhaps a member of the family more familiar with the business.

In connection with wills and trusts, a word might be said about the policies of the Denver banks conducting trust departments. It is their practice, when consulted concerning a will or trust instrument, to assist in drafting only through the client's own attorney. When the instrument is executed, the original or a copy is deposited in a sealed envelope in the bank's vault with the name of the attorney upon the envelope. In all instances the attorney is accepted as the attorney for the estate, unless the testator has had a later will or codicil drawn by a new attorney, or has left written directions that another attorney should be employed. This rule is strictly adhered to. It should be observed by attorneys who may be called in by the beneficiaries.

Sometimes the banks are named without their knowledge. It is preferable to submit a preliminary copy of the instrument to a trust officer of the bank, if possible, and to provide him with a final copy to deposit in the bank vault.

In summary, it may be said that the drafting of wills and trust instruments requires in the first instance a knowledge of possible contingencies and problems, and in the second, care in the use of language and its application to the contingencies and problems. It is well to build up and revise from time to time a form. Wherever possible, the first draft should be set aside—not like Macauley's History for a year or more, but for two or three days at least. When it is read again, before the final draft, it should be scanned with a critical eye for mistakes, and not with a mind to engage in self-congratulatory exploration.