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Delusional Drafters
and the Consequences for
Tyrannized Trustees:
Drafting Mistakes Trustees Commonly See

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I. Introduction

Imagine you're a trust officer with Giant Trust Company, and you've just been handed a trust document and been told to contact your new beneficiary to begin the administration of her brand-new trust. What goes through your mind as you start paging through it? Are you hoping to find familiar language you recognize from a hundred prior such documents – like a health, education, maintenance and support (HEMS) distribution standard? Something you can approach with confidence? What crosses your mind when you read the following: "Pay my daughter an annual amount equal to the wages reported on her prior year's W-2 but only if her salary has increased at least 5% from the prior year"? Does your heart just sink?

This paper gathers input from generous professional trustees and estate planning attorneys to provide real life examples of drafting mistakes and practical suggested solutions. It is long on fact situations and short on footnotes and scholarly notations.

II. Common Examples

A. Naming Trustees

1. ***Avoid judicial modification.*** When no named trustee is available to serve, a court can name a new trustee. Trusts almost always include this option as a last resort, and even if the document fails to provide for the court appointment of a trustee, the Texas Trust Code steps in. Texas Property Code § 113.083. Don't rely on this option. Avoid the expense and delay of a court proceeding with good planning.

2. ***Plan the trustees for each possible trust in your document.*** In our rush to meet our clients' deadlines, it's important to take the time to thoughtfully plan when naming trustees. Wills and trust documents often create a variety of different trusts if certain events occur or certain classes of people turn out to be beneficiaries. Most wills and trusts include a contingent trust for minors. Many estate planning attorneys include contingent special needs trusts, contingent life insurance trusts, contingent trusts in case a beneficiary is in bankruptcy, and maybe contingent retirement benefits trusts. Then, there are the trusts that are certain (well, almost certain) to be created. For example, when drafting a revocable trust for a couple, any trust that is created at the first death is almost guaranteed to spring into life (unless they die together). You may need to do some additional drafting, but take the time to compare the client's list of trusted people who may serve as trustee to the trusts that your document may create. Under what circumstances would each trust for which you've drafted actually spring into life? Have you named a trustee for that trust who is likely to be in a position to serve if those circumstances actually occur?

3. ***Include a corporate trustee in the line-up.*** Corporate fiduciaries charge fees based on the value of the trust, usually starting somewhere near 1.5% and tapering off as the value of the trust increases. Many clients fear the fees but have not considered whether they should fear instead the shortcomings of the individuals they may want to name. If the client prefers the individual trustee, then name a corporate fiduciary later in the list and give the beneficiaries the power to remove the poorly performing individual and replace with a corporate fiduciary. If the client prefers the corporate trustee but there's a likelihood the trust assets will not entice the corporate fiduciary to accept the trust when the time comes, then name the corporate trustee first and name individuals as alternates.

4. ***Allow the serving trustee to appoint a successor.*** This provision helps avoid a vacancy. Clarify whether a beneficiary's power to remove overrides the then-serving trustee's authority to appoint a successor, if the trust includes such a power. Generally, promote the choices of a corporate trustee. In other words, the corporate trustee who must resign because the trust has become too small may appoint an individual successor, and that choice may be worthy of protecting.

5. ***Include a Trustee Appointer.*** Give an individual the power to appoint a trustee in the event of a vacancy. Ensure the trustee appointer is young enough to be around when likely to be called upon to act, or appoint successor trustee appointer if the client's chosen person is elderly. Consider providing that fiduciary duties do not attach to the position of trustee appointer.

6. ***For special needs trusts, allow the trustee to elect to direct the trust to a charitable pooled trust.*** It's a good idea to provide that The Arc of Texas Master Pooled Trust, or another non-profit pooled trust, can be appointed in the event the other named trustees of the SNT cannot serve. These trusts provide professional administration at reduced costs. Suggested language: *"With regard to a trust created under this Article only, the Trustee may direct the corpus of this trust, or whatever portion of the corpus of this trust as the Trustee deems appropriate, into a pooled trust managed by a non-profit organization as authorized by Texas Estates Code §1301.202 and Texas Property Code §142.020, should the Trustee, in the Trustee's sole discretion, believe that such arrangement is in the best interests of the SNT Beneficiary. In such case, the trustee may establish an account to benefit the SNT Beneficiary, funded or partially funded with part or all of the corpus of this trust, designating the same remainder beneficiaries as this trust. The Trustee is authorized but not required to select Trust III of the Arc of Texas Master Pooled Trust established December 2, 2000 for this purpose.."*¹

7. ***When naming trustees, avoid the following mistakes:***

- Impasse of co-fiduciaries. If there is a possibility of two co-trustees serving at the same time, include a mechanism for resolving disputes. If a beneficiary can elect to serve as co-trustee with a corporate trustee, understand that there's often an additional corporate trustee fee for that service which may lead to an interesting negotiation between the beneficiary and the trustee.
- Don't allow a beneficiary to replace a corporate trustee with an individual (what if the mother/beneficiary replaces Giant Bank with her adult son who promptly distributes the entire corpus to his mother?)
- Don't name a sibling to be trustee for another sibling (might be okay if the beneficiary is a special needs person)
- Don't name a child from a prior marriage to be trustee for his/her step-parent

¹ Thanks to Patty Sitchler, retired CELA and co-author of Thomson West, Texas Elder Law, Texas Practice Series, for the suggested language.

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