

**University of Texas School of Law
2020 Stanley M. Johanson Estate Planning Workshop**

**From Here to Eternity:
Designing Trusts for the Long Haul**

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A financial advisor recently contacted me about a potential new client, asking how much it would cost to prepare “disclaimer trusts” and otherwise generally update their wills and revocable trusts. My response was that I would first need to determine whether disclaimer trusts are the appropriate structure for the client, and the rest would depend on the terms, design and structure of the trusts based on the clients’ objectives and assets. I probably won’t get the client based on the fact that my response included the snarky line, “That’s like removing someone’s tooth without personally assessing the condition of the tooth and determining the best course of action.”

To me, this correspondence was indicative of the way many commoditize trusts, thinking them as generic entities that all generally do the same things. If so, we would all be sales reps for LegalZoom which allow people to assemble their own wills and trusts online.

However, that trust, and the trusts that may stem from it, could last for several decades, or possibly several generations. The trust agreement is the rule book that will govern the assets for a long time, and such a document must be flexible enough to address the thousands of unforeseeable events that *will* occur with respect to the assets, the beneficiaries, and the world at large. My hope is that these materials help you draft better trusts, raising issues and points you may not have previously considered.

This session will focus on trust design, peppered with sample clauses. My breakout panel tomorrow will delve more heavily into suggested and best clauses and provisions.

I. Trustee Appointment and Removal

- A. Critical to have flexibility to change who will be trustee, can appoint trustees, remove trustees and under what conditions.
- B. Don’t limit the trustees to fixed trustee list.
- C. Empower client, spouse, beneficiaries and others to appoint and remove trustees, and to change who can appoint/remove trustees in the future.
- D. Give power to specify terms and conditions in which person becomes a trustee, or must cease.
- E. Give power to specify roles and powers of trustees.
- F. Sample language:

Plan of Trustees. Any of the following persons who are not Incapacitated may establish a plan of trustees for any trust hereunder except as otherwise indicated:

¹ Sample language is provided throughout this outline. The language is subject to applicable state law and you may wish to tailor the language accordingly.

- (i) me;
- (ii) Jane;
- (iii) the primary beneficiary of a Descendant Trust who has attained thirty-five (35) years of age, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (iv) my descendant who is the parent of the primary beneficiary of a Descendant Trust, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (v) a majority of the Senior Descendants of the primary beneficiary of a Descendant Trust who have attained thirty-five (35) years of age and are not Incapacitated, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (vi) a majority of the siblings of the primary beneficiary of a Descendant Trust who have attained thirty-five (35) years of age and are not Incapacitated, but only with respect to that Descendant Trust and any trust created (or to be created) therefrom;
- (vii) a majority of my Senior Descendants who have attained thirty-five (35) years of age and are not Incapacitated; and
- (viii) a majority of the non-corporate trustees of the trust.

To the extent of any inconsistency in plans of trustees, (i) the plan established by a person in a superior position (even after the death of such person in a superior position) on the foregoing list (solely for purposes of this Article except as otherwise expressly provided in this Agreement, the “Hierarchy List”) shall take precedence over the plan established by a person in an inferior position, (ii) the plan established by the primary beneficiary of a Descendant Trust with respect to any trust created (or to be created) therefrom shall take precedence over a plan established by the primary beneficiary of a trust so created, and (iii) the later plan established by a person shall take precedence over such person’s earlier plan. The trusts hereunder need not have the same trustee or trustees, and the failure of a trustee to act as trustee of one trust shall not in itself prevent such trustee from serving as trustee of any other trust.

A plan of trustees may designate initial or successor trustees to begin serving immediately or to serve upon or until the occurrence of a specified event or contingency, may designate an initial or successor trustee for limited or general purposes and accord specific responsibilities and powers (within the mandate of rights and powers given to the trustee in this Agreement), may impose qualifications or requirements, may specify compensation of such trustees, may designate single or successive trustees, and may provide for the imposition of limitations or conditions generally or on the designation of successor trustees, additional trustees or on the removal of trustees serving hereunder, all as provided in the plan. A plan of trustees may empower any person to establish plans of trustees subject to any limitations or conditions and specify such person’s place on the Hierarchy List; provided, however, that such person’s place on the Hierarchy List may not be higher than those above the person granting the power. A plan of trustees may eliminate any person’s power to establish plans of trustees subject to any limitations or conditions and remove such person from the Hierarchy List, but only with respect to a person in an inferior position on the Hierarchy List. Except as otherwise provided in this Article, a plan may leave a vacancy in the trusteeship unfilled. Notwithstanding the foregoing, a plan of trustees may not affect the responsibilities, powers, qualifications, requirements, compensation or impose limitations or conditions generally on the serving trustees. Any references in this Agreement to “the person(s) listed or described” in specific numbers on the Hierarchy List shall continue to refer to the same person(s) notwithstanding changes to the number after which they are listed in the Hierarchy List pursuant to a plan of trustees unless such person is removed from the Hierarchy List with respect to the particular trust.

II. Directed Trusts vs. Multiple Trustees

Control over trusts can be sliced and diced in many ways. There can be different types of trustees each with different powers, such as “distribution trustees,” “investment trustees” and “administrative trustees.” Distribution trustees can be broken down further to HEMS distribution trustees” and “discretionary distribution trustees.” There

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