

DRAFTING TO AVOID LITIGATION

Presented by

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I. EVOLUTION OF ESTATE PLANNING PRACTICE OVER FORTY YEARS

- A. More thoughtful, considered drafting can reduce the need for beneficiaries and fiduciaries to litigate contested proceedings, or to seek less adversarial but still expensive construction proceedings. Such drafting can also make the administration of the governing documents less uncertain and more efficient for fiduciaries.

“A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance”. (Emphasis supplied)¹.

- B. Not a presentation about negligence in the practice of estate planning. Rather, it is a call for greater thought in the drafting process. Read the document from the perspective of the fiduciary who is going to have to administer it. What questions or uncertainties will your drafting generate? Can you be more precise?

- C. Changes in drafting “philosophy” over 40 years.

1. Beginning: due to small estate tax exemption equivalents, great need to focus on preserving exemption equivalents for both spouses' estates. Use of bypass trust with surviving spouse having right to distribute principal based on ascertainable standards was prevalent. Need, for example, to maintain strict adherence to ascertainable (HEMS) language, to maintain effectiveness of bypass trust.
2. More recently: with increased estate tax exemption equivalents and portability, focus on estate tax minimization has been substantially reduced. This would be even more of a consideration if estate tax is repealed.

¹ F.S. §736.1009

3. Trend in earlier portion of cycle to “simplify” document language (except to the extent necessary to preserve estate tax benefits), remove as much of traditional, often repetitive language (ex: “I hereby devise, bequeath, transfer...”). Use more “modern” language, shorten length of documents to greatest extent possible.

D. Technological changes in the practice.

E. Growth in use of document assembly software.

F. Law firm profitability issues associated with estate planning fees:

“I once had a client, a NASA engineer, ask about my fees when all I was going to do was to push a button. I reminded him that when they launched Apollo XI, all they did was push a button. There is lot that goes into that button. He laughed and agreed to pay the fees.”²

G. Increase in use of long-term trusts (generation-skipping, increase perpetuities term):

“The advent of the current version of the generation-skipping transfer tax is at least partially responsible for the increased popularity of long-duration irrevocable trusts. Many states have modified their statutes to accommodate this trend either by eliminating the rule against perpetuities or by substantially increasing the period during which a party may hold property in trust. An increased desire to achieve asset protection⁴ through the use of trusts may also be responsible for the increased use of long-duration irrevocable trusts. **Yet drafting a long-term irrevocable trust is a challenging undertaking for the draftsman.**”³ (Emphasis supplied)

H. Enhanced focus on asset-protection considerations

I. Increase in trust and estate litigation (“growth industry”).

II. EXAMPLES OF SUBJECTS WHERE THOUGHTFUL DRAFTING IS IMPORTANT TO REDUCE POSSIBILITY OF LITIGATION

A. Fiduciary issues (particularly trustees)

1. Corporate trustee—power to remove and replace (who has power? How is it exercised? How does successor step in? What happens to power if power holder dies/incapacitated?)

² ACTEC Fellow, Mickey Davis, ACTEC Practice List Serve, November 19, 2015

³ (Zeydel, Diana S.C., “Changing the Unchangeable: Modifying Irrevocable Trusts”, 34th Annual Attorney/Trust Officer Liaison Conference, Real Property, Probate and Trust Law Section of The Florida Bar, 2015

2. In a revocable trust what triggers the designated trustee becoming the acting trustee?
 - a. How is incapacity of the settlor/original trustee defined?
 - b. Is a third party going to recognize the ascension of the nominated successor trustee without difficulty or, worse, a court order?
3. Identifying successor trustees—What does the following language mean:
 - a. “In the event of the death of each of the initial trustees, Dennis R. Dowdy and Betty L. Dowdy, the settlors nominate and appoint Settlor’s son and stepson to serve as co-trustees...” *Dowdy v. Dowdy*, 41 Fla. L. Weekly D85b (2d Circuit, January 6, 2016).
 - b. Does it mean that both of the initial trustees must be dead before the successors step in, or does it mean that the death of either initial trustee triggers the appointment of the successors? The case turned on who the trustee(s) were or should be in the quoted provision, and the trust provision had to be construed up to the appellate court level.
4. Drafting out of potential self-dealing. (F.S. §736.0802(3)-(6)). This is a **critical** consideration when a trustee will be administering and making decisions with respect to a trust asset in which the trustee also has an interest. The entire problem can be avoided by authorizing what would otherwise be acts of self-dealing: (F.S. §736.0802(2)).
5. Corporate Trustee qualification (minimum capital and surplus).
6. What happens if the named successors are no longer around or don’t wish to serve? While it is true that no trust will fail for lack of a trustee, if a court has to appoint that trustee, what happens to trust assets/obligations until the appointment is made?
7. Trustee authority to act.
8. Exculpation of personal representative (F.S. §733.620) and trustee (F.S. §736.1011)—potential chilling effect these provisions can have on would-be plaintiffs

B. Disposition of tangible personal property

1. Who gets it?
2. What is the process for selecting where applicable?
3. Appraisal.

4. Advisability of describing how disputes are resolved? (Rock, paper, scissors?).
- C. Abatement of gifts in same class.
- D. Is a specific or general devise intended?
- E. Discretionary distributions of principal (see below).
- F. Priority among multiple beneficiaries.
1. Within a class of current beneficiaries.
 2. As between current beneficiaries and remaindermen.
- G. Distributions from trust to guardians of minor beneficiary of trust to pay for home improvements, other expenses incurred as a result of taking on responsibility of serving as guardian.

Sample: Distributions to Guardians. The trustee is specifically authorized in its sole discretion, to make distributions of income or corpus directly to the guardian of any beneficiary of this trust for expenses incurred by the guardian because of his or her care for such beneficiary. **Such expenses are to include, by way of illustration and not limitation**, the guardian's reasonable **travel expenses in visiting the beneficiary**, the reasonable cost of **additions or improvements to the guardian's home**, and the reasonable cost of **additional household help or appliances in the guardian's home**, providing such expenditures are necessary in the judgement of the trustee to enable the guardian to care for such beneficiary. It is my intention that such expenses be paid even though such payments may directly or indirectly benefit the guardian or the guardian's family. To the extent that such expenditures do not frustrate the primary purpose of this trust, **I direct the trustee to be generous in making such distributions to guardians**, and direct that whenever feasible, doubts should be resolved in favor of the guardian. Notwithstanding any provisions in this paragraph to the contrary, however, if a guardian is also serving as trustee of this trust, and there is no corporate or other disinterested co-trustee, then no payment for the benefit of the guardian may be made pursuant to this section.⁴(Emphasis supplied)

- H. Divorce (example: what if governing instrument provides for a gift over to or for the benefit of spouse's descendants if spouse is treated as having predeceased?—*See, Carroll v. Israelson, as Personal Representative, 40 Fla.L. Weekly D1522b, 17th DCA, July 1, 2015*).

⁴ Pruett, Benjamin H., "Tales from the Dark Side: Drafting Issues from the Fiduciary's Perspective", 35 ACTEC Journal, 331 (2010), 343.

I. Definitions

1. Spouse—although law is now clear about validity of same-sex marriages, what if client does not wish to have recognition of same-sex marriage? Would a prohibition be unenforceable as against public policy?
2. Descendants—adopted children treatment; what about artificially reproductive techniques?

J. Change of Situs or Governing Law—we live in an increasingly mobile society. What if fiduciaries reside in other jurisdictions than the beneficiaries? What if laws of another jurisdiction are more favorable in the asset protection or tax worlds?

K. Tax apportionment—retirement benefits are representing greater and greater percentage of estates. What if tax apportionment clause directs apportionment to residue solely?

What can go wrong? Estate of Tom Clancy—Two family trusts created, one for the benefit of his children of first marriage, one for benefit of surviving wife and daughter from second marriage. Issue was whether estate taxes were to be apportioned to this second family trust. Wife argued that taxes (\$11.8 million) should only be paid from first family trust. Court agreed. Portions of the will, when read in isolation, offered “some evidence” that Clancy intended for both family trusts to jointly shoulder the tax burden, the plain language of the will, as a whole, which the judge deemed the clearest and the predominant evidence of Clancy’s intent, didn’t require second family trust to pay taxes.

L. Substance abuse.

M. Scope of trust protector authority.

N. Digital assets.

O. Business valuation--Example: valuable closely-held business is principal asset of husband/wife’s estates. One of three children is active in the business and is logical choice to receive shares as part of her distribution. Other children not likely to have a problem with that, and parents want the equivalent value to go to other children. Is the question of how the business is to be valued when the time comes to be left to the successor trustees? What if child receiving business shares is one of successor trustees? Sole successor trustee?

P. Durable powers of attorney—an agent is a fiduciary. Notwithstanding the provisions in the power of attorney, an agent who has accepted appointment must act only within the scope of authority in the power of attorney:

“Except as provided in this section or other applicable law, an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent.” (F.S. §709.2201(1), emphasis supplied).

Q. Coordination among various estate planning documents:

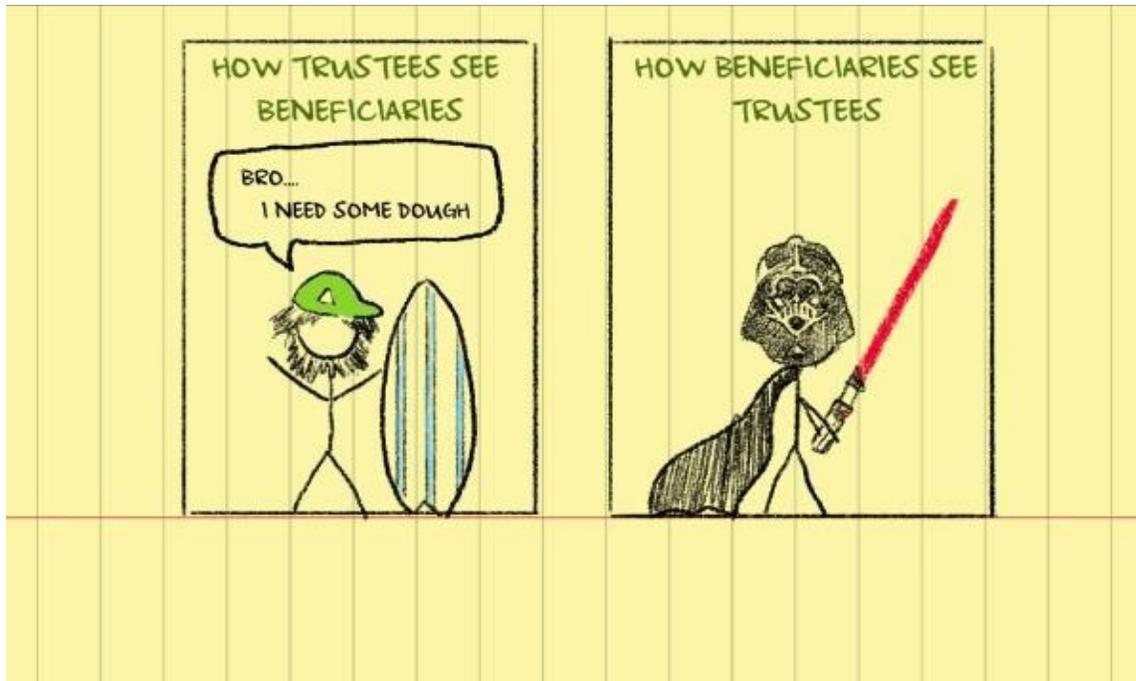
1. It can be easy to overlook a subtle lack of coordination between or among the various estate planning documents. For example, the revocable trust may permit amendments by an agent under a power of attorney by express reference to the particular trust. Conversely, the power of attorney may permit the agent to amend a revocable trust, and the revocable trust may prohibit amendments by a guardian, legal representative or an agent acting under a power of attorney.

The revocable trust may authorize unlimited gifting by the agent, but the form of power of attorney may limit gifting to amounts not in excess of the annual exclusion, or the converse.⁵

2. These are typically not “stand alone” documents. Need to coordinate provisions of durable power of attorney granting extraordinary powers to agent (such as power to amend revocable trust) with terms of revocable trust, which typically prohibit anyone other than the settlor to amend. Unless the trust specifically provides that an agent under a durable power of attorney has the authority to amend, third parties may not recognize authority of agent.

⁵ George, James R. and Zeydel, Diana S.C., “*Effective Estate Planning for Diminished Capacity—Can You Really Avoid a Guardianship*”? 50th Annual Heckerling Institute on Estate Planning, University of Miami School of Law, 2016.

III. DISCRETIONARY TRUST ISSUES



- A. “One of the most difficult tasks trustees face is how to exercise broad (and generic) discretion in the administration of trusts, whether the trust is fully discretionary, with no standards whatsoever, or discretionary subject to an ascertainable standard. **To the extent that the settlor’s intent is expressed in the trust, it is much easier for the trustee to carry out that intent.**”⁶ (Emphasis supplied)
- B. “Enforcement and Construction of Discretionary Interests”, Restatement Third, Trusts §50⁷ (hereafter, “Restatement Trusts §50 or “Section 50”).
1. What is the purpose of Restatement Trusts §50? Why is it there in the first place?
 2. Why is Section 50, at 60 pages in length, the longest (by far) of the 111 sections of the Restatement?
 3. What do the following general comments in Section 50 say about the subject of this presentation?

⁶ Pruet, Benjamin H., *id.*, 341

⁷ The American Law Institute, 2003

a. As to subsection (1):

“A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.

“The commentary that follows is concerned not only with the trustee’s duties but also with the ability of beneficiaries of these discretionary interests to enforce their rights...

“A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an unreasonable interpretation of the terms of the trust...On the other hand, a court will not permit abuse of discretion by the trustee. **What constitutes an abuse depends on the terms of the trust**, as well as on basic fiduciary duties and principles.

“Court intervention may be obtained to rectify abuses resulting from bad faith or improper motive, and to correct errors resulting from mistakes of interpretation.” (Emphasis supplied).

b. As to subsection (2):

“The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, **depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor’s purposes in granting the discretionary power and in creating the trust.**

This Comment is concerned with the construction of expressions frequently used in the terms of discretionary powers, and particularly with the types of benefits likely to be encompassed by typical standards. Presumed meanings yield to findings of actual contrary intention and also may be affected by context and the more general purpose(s) of the trust and the estate plan of which it is a part.” (Emphasis supplied).

What does “construction” mean in this context?

“The process, or the art, of determining the sense, real meaning, or proper explanation of **obscure or ambiguous terms or provisions in a statute, written instrument**, or oral agreement, or the application of such subject to the case in question, by reasoning in the light derived from extraneous connected circumstances or laws or writings bearing upon the same

or a connected matter, or by seeking and applying the probable aim and purpose of the provision. It is to be noted that this term is properly distinguished from interpretation, although the two are often used synonymously. In strictness, interpretation is limited to exploring the written text, while construction goes beyond and may call in the aid of extrinsic considerations, as above indicated. (Emphasis supplied).”⁸

4. The scope of the issues associated with construing discretionary interests in trusts is reflected in the table of contents of the subjects discussed in subsection (2) of Section 50:

a. Meaning of frequently used standards

(i) Health:

Emergency medical treatment?
Psychiatric treatment?
Psychological treatment?
Routine health care examinations?
Dental care?
Eye care?
Eye glasses, contact lenses?
Elective cosmetic surgery?
Cosmetic dental work?
Lasik surgery?
Health insurance?
Dental insurance?
Vision insurance?
Unconventional medical treatment?
Home-health care, such as round the clock nurses?
Gym memberships?
Gold club memberships?
A day at the spa?
Extended vacations to relieve tension and stress?
A certain type of automobile with more comfortable seats to relieve back pain?⁹

(ii) Education:

Grammar, secondary and high-school tuition, fees, activity fee?
Post-graduate school?
Medical school, law school, and other professional school expenses?
Support of the beneficiary during the school year?

⁸ Black’s Law Dictionary (online version)

⁹ Kiziah, Trent S., “Practical Issues Arising During Trust Administration”, p. 14

Support of the beneficiary between semesters and between school years?

What if beneficiary decides to “take a break” from education?

Extended post-graduate studies for the student who makes a career out of learning?

Technical school training?

Career training such as cooking school?

A year of college in Europe as part of a university program?

Traveling the world as part of studying world culture?¹⁰

5. At what **moment in time** is the standard to be applied?
 - a. When the will or trust was signed?
 - b. On the testator’s/grantor’s date of death?
 - c. When the trust becomes irrevocable?
 - d. Currently, *i.e.*, at the time the distribution is being considered?¹¹

6. Significance of beneficiary’s other resources.
 - a. Underlying fiduciary duties: ascertaining needs and resources; informing beneficiaries.

 - b. What other resources are to be considered, if any?

“No trust involving dispositive discretion in the trustee should be drafted without providing at least a basic answer to this inevitable question”.¹²

 - c. Whether the trustee **must consider** the beneficiary’s other means of support and if so:
 - (i) Is the trustee only to consider the beneficiary’s income producing assets?
 - (ii) Should the trustee consider the beneficiary’s marketable securities that could easily be sold or converted into assets producing more income?
 - (iii) Should the beneficiary be required to sell assets before the trust is invaded?
 - (iv) Should the trustee consider that the beneficiary is employable but simply refusing to work?
 - (v) Should the trustee consider the beneficiary’s spouse’s financial resources or the beneficiary’s parent’s legal obligation of support?
 - (vi) What documentation can the trustee rely upon from the beneficiary and what information must be gathered?

¹⁰ *Id.*, page 16

¹¹ *Id.*, page 35

¹² Halbach, Jr., Edward C., 61 Colum.L.Rev.1425 at 1442 (1961)

Income tax returns?

Financial statements? (Sworn, unsworn)

Budget?

- (vii) Is “income” to be defined in terms of the Internal Revenue Code, Principal and Income Act, or mere receipts?
- (viii) If the beneficiary’s other resources **may be considered**, then under what circumstances should they be considered?¹³ (emphasis supplied)

- d. Sample clause: “The trustee may pay to or for the benefit of each descendant of mine who is the primary beneficiary of a trust created hereunder, and such primary beneficiary’s descendants from time to time living (i) such amounts from the income and principal of that trust as the trustee may deem appropriate for the support of those persons in their accustomed manner of living and for their health and education, taking into consideration any other resources available to them to the knowledge of the trustee, and (ii) such additional amounts and proportions among them, as the trustee in its sole discretion deems best.

“In determining the advisability and amount of any payment, the trustee may, but need not, rely on a statement of any beneficiary’s or distributee’s assets, signed by such beneficiary or distributee, or any parent, guardian, or similar fiduciary of such beneficiary or distributee. Within the scope of the trustee’s discretion, the trustee’s judgment as to the advisability, amount and receipt of any such payment shall be final and conclusive upon all parties interested or who may become interested in the trust; and upon making any such distribution, the trustee shall be fully released and discharged from all further liability therefor.”¹⁴

- e. “If the beneficiary’s other resources **are not to be considered**, then is the trustee to consider how the beneficiary is using distributions the trust has already made to the beneficiary? For example, if the trust mandates income be distributed to the beneficiary, permits invasion of principal for the beneficiary’s health, education, maintenance and support, and specifically provides the beneficiary’s other resources are not to be considered, then is the trustee required to consider whether the mandatory income is sufficient to maintain the beneficiary’s standard of living?”¹⁵ (emphasis supplied)
- f. Others’ duties of support.
- g. Availability of public benefits.
- h. Other and related matters (beneficiary’s earning capacity).

¹³ Kiziah, *supra*, at p.33

¹⁴ Pruett, *supra*, at 346

¹⁵ Kiziah, *supra*, at p.33-34

i. After completion of education; liabilities of beneficiary; tax considerations)

7. Consider use of **statement of intent** when broad grant of discretion is given:

“It is the Settlor’s intent that this trust be used to enhance the beneficiaries quality of life, including (without limitation) travel, purchase of a home, cultural appreciation and enjoyment (music, arts, etc.), and education. In addition, the Settlor would like this trust to provide a source of funds in the event that a beneficiary, through accident or misfortune, does not have sufficient sources of income to provide for his or her own support. The Settlor expects his [her] descendants to support themselves independently and to be productive members of their communities and not to become dependent upon distributions from the trusts to the extent that they lose their ambition or incentive. Where a beneficiary is able to be gainfully employed and is not actively engaged in raising his or her children, income and principal of a trust established hereunder should not be used to replace the beneficiary’s own effort to work and accumulate financial security. However, it is not the Settlor’s intent to force a parent to work outside the home when he or she has determined that it is important to stay at home to raise a family. In addition, the Settlor does not intend that the trustee place undue emphasis on the amount a beneficiary earns if he or she is actively engaged in a worthwhile pursuit including working as an unpaid volunteer for charitable purposes.”¹⁶

8. How should the general duty of impartiality¹⁷ influence trustee consideration of discretionary distributions to current beneficiaries, at the cost of remaindermen? How should the same duty of impartiality come into play in making decisions to make distributions to some, but not all of a group of current beneficiaries? For example:

“Where there are multiple beneficiaries of the trust, meaning either concurrent beneficiaries or successive beneficiaries (current and remainder) a trustee **needs guidance** as to how to exercise that discretion with respect to the various competing interests, given the trustee’s duty of impartiality among trust beneficiaries.

“Is the trust primarily for the benefit of current beneficiaries, with remainder beneficiaries being entitled only to that amount, if any, that is left over after the current beneficiary’s death, **or is the intent** to preserve assets for later generations?

¹⁶ Pruett, *supra*, at 343

¹⁷ If a trust has two or more beneficiaries, the trustee shall act impartially in administering the trust property, giving due regard to the beneficiaries’ respective interests. (F.S. §736.0803)

“As to current beneficiaries, should the trustee give priority to the interests of one beneficiary over another?”¹⁸(Emphasis supplied)

9. Sample provision:

“The trustee may distribute to or for the benefit of the beneficiary and/or the beneficiary’s descendants, so much or all of the net income and principal of this trust as the trustee deems desirable to provide for the health, support, education and welfare of the beneficiary and/or such descendants. Making a distribution to one beneficiary under this subparagraph does not require making a distribution to any other beneficiary. Any beneficiary of this trust who is then serving as trustee may not participate in a decision to make a distribution for such beneficiary’s welfare. The trustee shall annually add any undistributed income to principal.

“Distributions for a beneficiary’s (or his or her descendants’) welfare may include, but are not limited to, distributions to enable the person to (i) make a down payment on the purchase of a home consistent with such beneficiary’s standard of living; (ii) invest a reasonable amount in business enterprises in which the beneficiary would be an active participant, including the purchase by the trustee of such enterprises as investments of the trust; and (iii) pay for a wedding and honeymoon, or other special trip at any time. I may provide the trustee with additional guidance by letter or memorandum to assist the trustee in ascertaining my intent, but any such writing would be non-binding.”¹⁹

IV. TECHNIQUES TO ADDRESS LESS THAN ADEQUATE DRAFTING, OR CHANGES IN CIRCUMSTANCES

A. Will reformation to correct mistakes—F.S. §732.615:

...the court may reform the terms of a will, even if unambiguous, to **conform the terms to the settlor’s intent...In determining the settlor’s original intent, the court may consider evidence relevant to the settlor’s intent even though the evidence contradicts an apparent plain meaning of the will.** (Emphasis supplied)

B. Modification of will to achieve testator’s tax objections-- F.S. §732.616

C. Private contracts among interested persons-- F.S. §733.815:

...interested persons may agree among themselves to **alter the interests, shares, or amounts to which they are entitled...** (Emphasis supplied)

¹⁸ Pruett, *supra*, at page 342

¹⁹ *Id.*

D. Judicial modification of irrevocable trust when modification is not inconsistent with settlor's purpose-- F.S. §736.04113:

1. From subsection (1): ...a court at any time may modify the terms of a trust, if...
2. From subsection (1)(a): The purposes of the trust have been fulfilled or have become illegal, impossible, wasteful, or impracticable to fulfill;
3. From subsection (1) (b): **Because of circumstances not anticipated by the settlor**, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; (emphasis supplied)
4. From subsection (1) (c): A material purpose of the trust no longer exists.
5. From subsection (3) (a): The court shall consider the **terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence** relevant to the proposed modification. (emphasis supplied)

E. Limited judicial construction of irrevocable trust with federal tax provisions-- F.S. §736.04114:

1. From subsection (1): ...a court at any time may **construe the terms of a trust...to define** the respective shares or **determine beneficiaries, in accordance with the intention of the settlor...** (emphasis supplied)
2. From subsection (3): **In construing a trust, the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust and the settlor's probable intent.** (emphasis supplied)

F. Judicial modification of irrevocable trust when modification is in best interests of beneficiaries-- F.S. §736.04115:

1. From subsection (1): ...if compliance with the terms of a trust is not in the best interests of the beneficiaries...a court may at any time modify a trust...
2. From subsection (2) (a): The court shall exercise discretion in a manner that **conforms to the extent possible with the intent of the settlor...** (emphasis supplied)
3. From subsection (2) (b): **The court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification.** (emphasis supplied)

4. From subsection (3) (b)2: This section shall not apply to...any trust created after December 31, 2000 if...**the terms of the trust expressly prohibit judicial modification.** (emphasis supplied)
5. How many of us discuss with client in the planning process that the client's stated and often strong feeling for the terms of an irrevocable trust could be modified unless we draft that the trust may not be modified?

G. Nonjudicial modification of irrevocable trust-- F.S. §736.0412

H. Modification or termination of uneconomic trust-- F.S. §736.0414

I. Modification to achieve settlor's tax objectives-- F.S. §736.0416

J. Reformation to correct mistakes-- F.S. §736.0415:

...the court may reform the terms of a trust, even if unambiguous, to **conform the terms to the settlor's intent...In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument.** (Emphasis supplied)

K. Cy pres-- F.S. §736.0413

L. Decanting— F.S. §736.04117²⁰

M. Powers of appointment

N. Disclaimer

O. Chapter 86—Declaratory Judgments—actions by executors, administrators, trustees, etc.:

1. F.S. §86.021:

Power to construe: Any person claiming to be interested or **who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing** or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, **will,**

²⁰ But for the need to do the decanting strictly in accordance with statutory requirements, see *Harrell and Duke v. Badger, Trustee*, 40 Fla. L. Weekly D1391b (Fifth DCA, Florida, 2015). Trustee's effort to decant into a new trust that qualified as a "pooled fund" version of first-party special needs trust, which allows entity that manages fund to retain any remainder was invalid for having cut out the original trust's remainder beneficiaries and added the entity as a new beneficiary.

franchise, or other article, memorandum, or instrument in writing **may have determined any question of construction** or validity arising under such statute, regulation, municipal ordinance, contract, deed, **will**, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and **obtain a declaration of rights, status, or other equitable or legal relations thereunder.** (Emphasis supplied)

2. F.S. §86.041:

Actions by executors, administrators, trustees, etc.--**Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary**, creditor, devisee, legatee, heir, next of kin, or cestui que trust, **in the administration of a trust, a guardianship, or the estate of a decedent**, an infant, a mental incompetent, or insolvent may have a declaration of rights or equitable or legal relations to:

- (1) Ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
- (2) Direct the executor, administrator, or trustee to refrain from doing any particular act in his or her fiduciary capacity; or
- (3) **Determine any question relating to the administration of the guardianship, estate, or trust, including questions of construction of wills and other writings.** (Emphasis supplied)

V. CONCLUSION

A. Drafting to avoid every potential uncertainty or situation is, of course, impossible and not to be expected. However, more thought in the drafting process can reduce, if not eliminate, the likelihood of litigation. Consider these thoughts from Professor Halbach on the subject of language to be used in discretionary trusts and the consequences of inadequate drafting—the principles stated on this subject can be readily expanded to apply to the totality of the estate planning documentation:

“It may seem that whether a trustee has a simple or an extended discretion and whether or not other resources are to be considered by the trustee are but minor details in the drafting of a complete trust agreement. Nonetheless, such “details” may be and frequently are of major importance. After all, the trustee’s discretionary power over distributions is the substantive essence of a wholly discretionary trust and is a vital aspect in the flexibility of a trust in which all income is paid out, without the power relating only to principal. Such powers ought not be treated superficially in the trust instrument. The types of questions that have been considered are those that inevitably affect someone’s beneficial interest in the trust. Consequently, they are less likely to pass unnoticed than those relating to purely managerial decisions. This is demonstrated by the amount of litigation, most of it

fairly recent, that has already resulted under such trusts, the widespread use of which is relatively modern. Costly litigation produces only a guess as to what the settlor would have intended if the precise question in issue had been presented to him.

“As is often the case with constructional problems, recurring questions can readily be dealt with if not overlooked by the draftsman. The client can rarely afford to have every conceivable question answered, but neither can he afford to have the basic issues raised herein left wholly unanswered when a discretionary trust is used...”²¹ (Emphasis supplied)

²¹ Halbach, *supra*, at page 1456