Suggestions for Modern Will Drafting

Dermod Ives
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PRELIMINARY PROCEDURE

Eight or ten years ago the procedure preliminary to the drawing of wills was called "taking instructions for wills." That procedure, however, has become obsolete, and the lawyer who approaches his job with that attitude only invites trouble for himself and his clients. The marital deduction¹ and other statutes² and decisions³ over the last fifteen years have made will drafting a far more complicated process than ever before. Wills drawn by lawyers who are still "taking instructions" are generally confused and incomplete since few clients are capable of seeing, let alone analyzing, the problems, for example, with respect to the naming of contingent legatees and remaindermen. Since the experienced practitioner is expected to deal with such problems, he must now view his position objectively as one which, for all practical purposes, will effectuate the testator's wishes by guaranteeing the probate of the testamentary plan embraced in the will. "Taking instructions" is not a sufficient basis upon which to construct a testamentary plan which will escape ruination by the vagaries of operation of the marital deduction statute or the widow's right of election.

Today, the first task to be met in drafting even the simplest will is ascertaining from the testator the nature and amount of his assets, whether they are testamentary or nontestamentary, and the nature and amount of his larger debts, obligations and tax liabilities.⁴ Here the lawyer may find it very helpful if he prepares a schedule showing the federal and state tax consequences of the use by the husband and/or wife of the marital deduction to the extent of 25, 50, or 100 per cent, computed with reference to whether the husband or wife dies first. Such a schedule is not difficult to prepare,⁵ yet it permits the client to see the tax consequences of and understand the reason for certain provisions in his will.

During this initial examination of the client, the lawyer should take

† See contributors' section, masthead p. 248, for biographical data.
1 See discussion in text at note 29, infra.
3 See, e.g., the cases decided under N.Y. Deced. Est. Law § 18.
4 A specimen checklist appears in Lasser, Estate Tax Techniques (1961). (Special Forms for Use in Estate Planning: Analysis and Worksheets.)
5 Detailed instructions for preparing such a schedule appear in Lasser, supra note 4, at 3-47.
down, in detail, the names, addresses, and relationship of the proposed distributees or, as they used to be called, the heirs-at-law and next-of-kin. He should also note those relatives excluded from the will and the reasons therefor, thus assuring himself that the client has in mind the natural objects of his bounty. Sometimes it will be advisable to include the following clause in a will:

I have in mind my brother, John Doe, and my sister, Mary Doe, but have made no provision for them in this, my will, not for any lack of affection for them, but because they have no need of any portion of my estate.

Further, two cases should usually be avoided first, the making of a bequest of a few hundred dollars to each of the testator's old faithful retainers who have been in his employ for upwards of twenty or thirty years and then spelling out that this munificence is in deep appreciation of their faithful services; and, second, the cutting off of a relative with a legacy of five dollars and stating in the will that slighting conduct on the relative's part caused the harsh treatment. The former case points up the injustice between the "haves" and the "have-nots" and is unfair to the loyal family retainers. The latter case is a childish exhibition of pique, having no place in a will, and may effectively prevent the closing of the estate.

Another problem may appear from the initial inquiry into the objects of the client's bounty. When the client is a man of substantial wealth he may be desirous of leaving large bequests to charity. Often, however, he may feel sure that he knows how to run the charities better than their own managements, in which event he will want to surround his bequests with minute instructions as to how his money is to be spent, the type of buildings to be erected or the type of clinics to be supported, and the services or treatments to be given by them. It is not unlikely that, by the time the will is probated, circumstances will have changed to such an extent that the building or clinic, if built, would be obsolete and the treatments or services outmoded. Faced by such a possibility the lawyer may be able to obviate the difficulties by suggesting that such details be left to the professional staff of the charity.

Next, the attorney should prepare a schedule of the client's cash requirements including all his larger obligations, such as notes, mortgages, estimated current household expenses, funeral expenses, estimated federal and state estate taxes (considering the extent to which the marital deduction is used), and estimated commissions and attorneys fees. In ascertaining persons who are to be excluded, the attorney will find it helpful to follow the pattern of intestate succession set forth in N.Y. Deced. Est. Law § 83.

Surpris-
ingly, probably not more than 5 out of every hundred people can guess within 50 per cent of what their estate's cash requirements will be. Using this schedule, the attorney can advise the client to purchase additional life insurance or government bonds, or to set aside cash reserves in a savings bank so that most, if not all, cash requirements will be provided for.

**Dispositive Provisions for Troublesome Items of Personalty and Realty**

In drafting a will, the client's attention should be directed first to a consideration of the disposition he wishes to make of certain specific items of property. Such personal property as jewelry, personal effects, household furnishings, works of art, heirlooms, antiques, books, and automobiles among other things should receive special treatment. Such real property as the family home and vacation lodge should be specifically devised.\(^8\)

**Personal Property**

Clients should be discouraged from attempting to pass personal effects, household items, and items used in everyday life from their children to their grandchildren. Such items may be lost or damaged through everyday use, may be difficult to identify at the end of the life estate, may result in the executors of the deceased life tenant having to account to the remaindermen for the life tenant's administration of, for example, the living room furniture, and may result in the requirement that the life tenant give a bond to protect the remaindermen. To avoid intra-family disputes over who is to get each particular item of personalty, it may be necessary to authorize the executor to distribute as nearly in accord with the testator's wishes as possible, and that, in any event, the executor's decision is to be final and binding.

Tangible items of personalty may be effectively distributed by an outright bequest to a named person with the expressed intention that such legatee distribute the property in accordance with a letter of instructions left with the will by the testator.\(^11\) If, as in New York County, any well determine whether a simple will with nothing but outright bequests and devises or a more complicated will with trust provisions is advisable.


\(^9\) For a definition of household furnishings see Dayton v. Tillyou, 24 N.Y. Super. Ct. 21, 28 (1863).

\(^10\) If the home is not given specifically, either outright or in trust, it may become part of the residuary estate and the title complicated by division into numerous shares among adults and children making it almost impossible to deal with.

letter of instruction incorporated by reference in the will is required to be filed for probate with the will, no reference to such letter should be made. This may be accomplished by simply including in the will a statement that the testator is satisfied that the articles will be distributed in accordance with his wishes as they may have been made known to the legatee.

The legal effect of such a provision is to vest the named legatee with title to the property and to obligate him morally to carry out the testator's wishes. Of course, if the legatee wishes, he may disregard the expressed intent of the testator. For this reason, only a trusted person should be named as the legatee. Further, if the language of the bequest is not made sufficiently explicit, the draftsman may fall into the trap of Matter of Campe's Estate, wherein a constructive trust was impressed upon the property received by the legatee for the benefit of the persons to whom the testator originally instructed the legatee to give the property. While this result is good, the necessity of resorting to a constructive trust should be avoided, if possible, because it needlessly burdens the estate with expensive litigation.

Works of art, stamp collections, ceramics, articles which are museum pieces, etc. should not be left to a museum without determining whether or not such a collection will be acceptable. In this day of high construction costs, museums which have had their incomes substantially reduced over the years cannot provide special facilities for the display in solido of a collection unless it is of outstanding importance. Therefore, provision for a gift-over should always be made in the event the bequest is renounced by the museum. Of importance in this connection is the New York rule that the legatee must pay the cost of transportation and storage of articles specifically bequeathed to him. If such cost will be substantial and the legatee is not affluent, the thoughtful testator will provide a special fund in the will for that purpose.

17 See People v. McGregor, 295 N.Y. 237, 66 N.E.2d 292 (1946), where a gift of the decedent's country estate to a municipality for use as a park was renounced. Of course, if a gift could have been considered a charitable gift, the doctrine of "cy pres" may be applicable to carry out the decedent's intention. Nevertheless, in every case, it is good practice to avoid such problems before they arise.
Real Property

The only real property involved in most estates is the family residence. Usually, the client will wish to have it pass to his wife so that she and the children may continue to live there as long as they desire. The general rule that it is best to have clients specifically devise their real property applies particularly to their residences. Sometimes it is advisable to provide a policy of insurance so that the proceeds may be used by the wife to pay off any mortgage on the home. Where, however, the client wishes to create a life estate in his residence and wishes to permit his wife to terminate it at her election when the children grow up, marry, and move away, or in case the neighborhood deteriorates, care must be used so that the conditions upon which the life estate will terminate are set forth clearly. If the conditions upon which a sale may be made are ambiguous, title companies may refuse to insure title on the theory that it cannot be determined from the will whether or not the life estate has been properly terminated. One method of handling this problem is to provide that termination shall be by the life tenant's written election filed with the then acting executor or trustee. It may be advisable, if possible, to have the wife and remaindermen join in the sale.

When a life estate in the client's home is given to his wife, the will should specify whether the widow or the estate is to be responsible for the payment of real estate taxes and assessments, mortgage interest and amortization, insurance premiums, and other similar expenses.

Powers of Appointment

Prior to 1942 only general powers of appointment were taxed in the estate of the donee of the power and then only if exercised. The Revenue Act of 1942 changed this to make all property subject to a power of appointment taxable in the estate of the donee of the power, whether or not exercised, with only minor exceptions. The taxability of powers of appointment was again changed by the "Powers of Appointment Act of 1951," which, among other things, provided that property subject to a general power of appointment, if limited by the creator so that it could not be appointed to the donee, his estate, or his creditors, would not be subject to tax even though exercised. The Powers of

\[A\] A devisee of real property takes subject to any mortgage existing unless otherwise provided in the will. N.Y. Real Prop. Law § 230. A direction in the will to pay all debts does not include the payment of a mortgage debt. Taylor v. Wendel, 4 Bradf. 324 (N.Y. Surr. Ct. 1857).

\[20\] Revenue Act of 1918, ch. 18, § 402(e), 40 Stat. 1057, 1097.


Appointment Act of 1951 has been carried over into the Internal Revenue Code of 1954 as section 2041.23

A power of appointment should not be exercised by a residuary clause. A separate paragraph of the will referring to each power of appointment, identifying it with the instrument under which it was created, and paraphrasing the provision by which the testator was given the power should be used. The appointment should be made, whether outright or in further trust, with particularity. If the appointment is outright, there is no problem. However, if the property is appointed in further trust, care must be taken that the lives used in measuring the new trust are of persons who were in being at the time of the death of the creator of the power if the power was created under a will, or on the date of creation of the power under an _inter vivos_ agreement.24

In New York the “two-lives” limitation25 has been changed to simply “lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a Last Will and Testament, for lives in being at the death of the testator and a term of not more than twenty-one years.”26 The change also provides that the measuring lives shall not be designated in such a fashion or made so numerous that proof of their end is unreasonably difficult.27 It is important to remember that the old “two-lives” limitation still applies to all _inter vivos_ transfers effective prior to September 1, 1958 and to the wills of all persons dying prior to September 1, 1958, and the new provisions only apply to _inter vivos_ transfers effective on or after September 1, 1958 and to wills of persons dying on or after that date.

A word of warning is needed here. No power of appointment should be exercised in a will without a thorough examination of the instrument creating the power.28 This cannot be emphasized too much.

**DISPOSING OF THE RESIDUARY**

**Estate Tax Considerations**

When section 812(e) of the Internal Revenue Code was enacted in
Involving marital deduction, there were, of course, no opinions of Treasury counsel or decisions available to guide draftsmen of wills in determining how to take advantage of the section most effectively. This section applies only to estates of decedents dying after December 31, 1947.29

For the first few years draftsmen incorporated the language of the Code verbatim in the will. It was thought preferable to take advantage of the marital deduction, whether the gift was to be outright or in trust, separately from the residuary estate. Many old wills and, perhaps, some new wills contain provisions which provide that, conditional on the wife's surviving the testator, a "sum" equal to one-half of the net estate before estate taxes be set aside for the wife's benefit. However, after many years of drafting and redrafting marital deduction provisions, and with the lessons learned by banks and trust companies administering estates making use of the marital deduction, many attorneys adopted the view that the marital deduction can most clearly and effectively be used in that portion of the will disposing of the residuary. Now it is customary to divide the residuary estate into two parts as follows:

All the rest, residue and remainder of my estate, both real and personal and wheresoever situate, excluding all property over which I may have a power of disposition by will or otherwise, I direct the executors of this my will to divide into two (2) parts, the first of which when added to the value of all other property hereinabove specifically bequeathed to my said wife by Articles ...... and ...... hereof shall equal one-half (½) of my entire net estate, (before estate taxes, federal and state) meaning thereby property owned by me and passing under this my will after payment therefrom of debts, funeral and administration expenses, and the second of which shall be composed of the balance of my said residuary estate, and I give, devise and bequeath the same as follows:

Property subject to a power of appointment is specifically excluded from the residuary disposition for simplicity.30 A separate provision is then inserted at the end of the will by which the testator states flatly that he is not exercising any power of appointment. Of course, before this provision is included, the draftsman must ascertain that it conforms to the client's wishes. Usually, the testator wishes the property subject to the power of appointment to go according to the grantor's wishes as set forth in the original instrument granting him the power.

The Marital Deduction Share of the Residuary

The first part of the residuary is then disposed of, either as an out-

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30 The extent to which property subject to a power of appointment must be included in a decedent's gross estate is a complex matter covered by Int. Rev. Code of 1954, § 2041.
right gift to the wife or to trustees in trust for her benefit. Where the gift is made outright few problems arise. In the case of a gift in trust, while it is no longer necessary to create a separate trust for the wife, all of the income of a designated portion of a trust must be paid or applied to her use and she must have a power to appoint the entire portion of such trust. Most draftsmen, however, still use the method of creating a separate trust for the wife.

In creating a trust for the wife or in designating a portion of a trust for her benefit, all plans of distribution should be tested against the objective which the marital deduction seeks to accomplish. As enacted in 1948, its objective was to give the tax benefits, resulting to persons in community property states, from the system of community property, to persons in noncommunity property states. In community property states a surviving spouse's share of the community property passes to her outright and unconditionally, the law regarding this share as the surviving spouse's property and, therefore, not subject to disposition in the will of the deceased spouse. The purpose of the marital deduction is to allow persons in noncommunity property states to pass up to one-half of their property to their spouses temporarily free of estate taxes provided the surviving spouse is given the incidents of absolute ownership. The estate tax then becomes payable on the portion of such property left in the spouse’s estate on his or her death.

Usually, if the interest passing to the surviving spouse is similar to the interest of a surviving spouse in a community property state, it will qualify for the marital deduction, but if the interest may terminate because of a contingency or the lapse of a period of time, it is a terminable interest and may not qualify.

Use of the so-called “Death by Common Disaster” clause should be avoided, because of its possible adverse effect on the surviving spouse’s power to appoint the corpus of the trust. In New York distribution in the “common disaster” situation is regulated by statute. However, if tax computations show that it is extremely important that, despite the simultaneous death of a husband and wife, the marital deduction provisions contained in either the husband’s or wife’s will should be effectuated.

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31 Previously, it was necessary to create a separate trust for the wife with all income to be paid or applied to her use at least annually, with a general power to appoint her interest.
32 The will should provide for a gift over in case the wife fails to exercise her power of appointment.
33 The Internal Revenue Code of 1954 qualifies a legal life estate with a general power of appointment for the marital deduction.
34 2 Ti Hang, Real Property § 442 at 246 (3d ed. 1939).
36 N.Y. Deced. Est. Law § 89.
ated, an appropriate clause in both wills can be added. The clause in
the husband's will might be as follows:

In the event that my wife and I shall die under such circumstances that
there is not sufficient evidence that we died otherwise than simultaneously,
I direct that it shall be deemed that my wife survived me for all purposes
whatsoever under this my will.

The clause previously suggested to be used in procuring the benefits
of the marital deduction assumes that approximately one-half of the
testator's insurance or other property, not subject to administration
under his will, will pass to the wife in such a way that it will qualify
for the marital deduction. Generally, the type of insurance proceeds
which will qualify for the marital deduction include payments under
optional settlements, of which there are commonly four, provided, how-
ever, that the proceeds are held by the insurer under an agreement to
pay the proceeds in annual installments or the interest thereon annually
to the surviving spouse-beneficiary during her life. The optional settle-
ment must give power to the surviving spouse alone, exercisable in favor
of herself or her estate, to appoint all amounts held by the insurer, and
the power must be exercisable in all events.

Subject to the foregoing, there is no doubt that provisions for the
payment of interest only, as distinguished from installments including
both principal and interest, will qualify. Further, if the surviving spouse-
beneficiary is given power to take down all of the proceeds of the insur-
ance, the insurance will still qualify, regardless of who may take the
balance, if any, at the death of the spouse-beneficiary. And, if the
balance remaining after the death of the surviving spouse-beneficiary
is payable to his or her estate, the insurance also will qualify.

Prior to enactment of the 1954 Internal Revenue Code, insurance
proceeds which qualified for the marital deduction also resulted in income
tax savings if they were payable (a) in installments for a fixed period
of time to the wife, or (b) in installments for the wife's life. This was
ture, even though there was a further annuity after the wife's death,
as long as she had the absolute right to direct the disposition of all
payments. Although the installments paid aggregated more than the
amount that would have been paid in a lump sum on the death of the

37 See Thore, "Life Insurance and the Marital Deduction," 87 Trusts & Estates 199
(1948).
38 To qualify, insurance must meet the 5 conditions set forth in Treas. Reg.
§ 20.2056(b)-5(a) (1961).
39 Int. Rev. Code of 1954, § 2056(b) (c). See also N.Y. Tax Law § 249-s(3)(g).
Dallman, 209 F.2d 321 (7th Cir. 1954).
insured, such excess payments, representing interest, were not subject to income tax.

These rules have now been changed. Under section 101(d) of the 1954 Internal Revenue Code the lump sum payable on death or the present value of the future payments actuarially computed (if no lump sum payable on death) is prorated over the annuity period, and that prorated amount is excluded from the payments received in each year. The balance is taxable as interest except in the case of a surviving spouse who receives an additional annual exclusion of $1,000. This rule applies to amounts received by reason of the death of an insured only if occurring after August 16, 1954.

Life insurance so often forms a substantial portion of an estate that an attorney must be familiar with not only the number and amount of the policies, but also with the beneficiaries who have been named, whether or not the insured has irrevocably elected that the proceeds be paid under certain of the settlement options. If it is impossible to examine the insurance policies or to find out how they are payable, a provision may be incorporated in the previously suggested marital deduction clause so that the value of the testator's insurance payable to his wife, in such manner that it qualifies for the marital deduction, can be taken into consideration thereby reducing proportionately the amount set up in the marital deduction trust for the wife's benefit.

It must also be remembered that an insured may now unconditionally assign policies of insurance and if he "cuts all strings," the insurance will not be taxable in his estate even though he continues to pay the premiums after the effective date of the assignment. Furthermore, if he lives three years after such date the Treasury Department cannot attempt to include the proceeds as a transfer made in contemplation of death.

The Balance Remaining After the Marital Deduction Share

In the disposition of the second part of the residuary estate, it is appropriate to provide for the payment of any money legacies which previously would have been provided for before the disposition of the residuary estate as general legacies. Care should be taken to specify whether or not the legacies are to lapse if the proposed legatees predecease

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43 Ibid.
the testator; if necessary, contingent legatees should be named.\(^47\) In enumerating the legatees the draftsman should ascertain their correct names and whether they are corporations, associations, or organizations and, if unincorporated, their right to take under the law of the state of their residence. For example, in *Matter of Rathbone*,\(^48\) it was held that five of the general and residuary legatees being unincorporated could not take their legacies and as a result, several hundred thousand dollars of the estate passed by intestacy to the testator's grandchild. The disposition of the balance of the second part may be either outright or in trust. It is not advisable to incorporate rigid trust provisions in a will whereby the income beneficiary cannot receive any portion of the principal. Such provisions are inequitable to the beneficiaries. Although in the past some fiduciaries hesitated to assume the responsibility of invading principal, now they accept it as part of their job. However, the conditions under which the discretion is to be exercised should be clearly set forth in the will.

It is recommended that the power of invasion in the marital deduction trust be made unlimited in scope. This enables the wife to take down principal and by careful planning to pass it on to members of the family in such a way that no gift tax is payable, or if her lifetime exemption has been used up, only a relatively small gift tax is payable. Of course, if the husband or the wife is easily swayed or subject to undue influence, an unlimited right to invade should not be advised.

Since the "Powers of Appointment Act of 1951"\(^49\) a power to invade principal may be granted for the wife's benefit in the trust covering the balance of the residuary estate without burdensome tax consequences as long as it is limited as set forth in sections 2041(b)(1)(A) and (b)(2) of the Code. The limitations on such power of invasion are that it must be exercisable by reference to an ascertainable standard relating to the health, support, or maintenance of the beneficiary and that the value of the corpus segment reachable in any one year not exceed, at the time of any failure to exercise the power, the greater of $5,000 or 5 per cent of the aggregate value of the trust assets subject to appointment.

Technically, a power of invasion may be absolute in the income beneficiary or discretionary with the trustee. It may be limited to a specific purpose, or be unlimited. However, it is usually deemed psychologically advisable to limit the annual amount by which the principal can be

\(^{47}\) N.Y. Deced. Est. Law § 29, provides that a legacy to a descendant, brother or sister of the testator who has predeceased shall not lapse but shall vest in the descendants of such legatee.


\(^{49}\) Supra note 22.
invaded, except in the marital deduction trust as mentioned above. Also, it should be made clear that the right of invasion is not to be cumulative. The attorney must understand that a power of invasion of principal in the beneficiary may result in a substantial greater tax liability than the discretionary power of invasion in an independent trustee.

So that there will be no question of the testator’s intention, a clause in each will should state that, where the benefit of the marital deduction is desired, the provisions under the will in favor of the spouse are intended to secure for the estate such benefits. Care must be taken not to defeat the marital deduction by the inclusion of too broad administrative powers.

In considering whether the balance of the second part of the residuary estate should be disposed of outright or in trust, the attorney will find the facts in the preliminary examination of the client with respect to the amount and value of the assets, the amount of the debts and liabilities as well as the personalities, needs, and business experience of members of the family and others will often be determinative. If outright and testator’s children are named, with their issue as contingent legatees, it is customary to specify whether the gift-over is to be per stirpes or per capita. Nine times out of ten this brings an inquiry from the client as to the difference between these phrases. If words of one syllable and a diagram are used, the difference is easily demonstrated.

In connection with the decision of the way to dispose of the second part of the residuary, the attorney is often called upon to explain to a client some of the more important advantages of a trust: (1) It protects a beneficiary from possible extravagances; (2) it places the investment of the fund in experienced hands; (3) it can be flexible so as to provide principal funds for special purposes; (4) it allows the client to choose the ultimate recipient of the property; (5) it eliminates a second estate tax; and furthermore (6) it can split the taxation of the client’s property between his and his wife’s estate by use of a marital deduction trust, which will result in a lower tax than if only the second tax is eliminated and the property is all taxed in the first estate. Trusts are most advantageous if they are kept as simple as possible in both plan and language.

In a great number of instances the client, after setting up the first part of the residuary estate in a marital deduction trust for his wife, will wish to further protect his wife and will name her as income beneficiary of the trust of the balance of the second part of the residuary estate. Upon termination of that trust it may be divided into as many parts as the testator has children then surviving and children not then surviving but leaving issue then surviving. One of such parts
can be continued in trust for each of such children, distributable to them at varying ages, or part of it continued until their respective deaths and then the remainder distributed outright to their issue.

After the death of the life beneficiary the duration of a trust cannot be measured by the life of a grandchild of the testator who was not in being at the time of the testator’s death. Therefore, the trust should be divided into several portions, one portion for each grandchild living at the date of testator’s death, being continued in trust, and the remaining portions being given outright, one to each grandchild born subsequent to the testator’s death. In this way an equitable division can be arranged with as much protection for the grandchildren as is possible. If the trust remainder is to be distributed outright upon the beneficiary’s attaining a specified age, gifts-over should be provided in the event the beneficiary dies before attaining such age.

Some clients may desire to create a charitable trust. The general charitable purposes must be outlined with sufficient definiteness to exclude the possibility that any portion of the income or principal may be used for other than charitable purposes. Where possible the specific charities should be named in the will. But even if the naming of the specific charities, however, is left to the executors or trustees, the full charitable deduction can be secured for estate tax purposes. Such procedure although sometimes necessary is not recommended. The trust may give a power to the trustees to incorporate a foundation or institution for educational, charitable, or philanthropic purposes with the right after incorporation, to pay over the principal and any unexpended income of the charitable trust fund, and thereupon to terminate the trust.

In New York more than one-half of the estate should not be given to

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61 It is also possible to give the trustee discretion to withhold or to pay income among a number of designated beneficiaries in accordance with their income requirements, such trusts being known as “spraying” trusts.

62 Attorneys formerly were often tripped up by providing for an accumulation beyond the minority of an infant. N.Y. Pers. Prop. Law § 16; Kalish v. Kalish, 166 N.Y. 368, 59 N.E. 917 (1901).

63 Since charitable gifts may be deductible for estate tax purposes, it is wise to use the estate tax laws as a guide to framing the language of the trust. See Int. Rev. Code of 1954, §§ 2055, 2106; N.Y. Tax Law, § 249; Estate of Gray, 2 T.C. 97 (1943).

64 Matter of Durbrow, 245 N.Y. 469, 157 N.E. 747 (1927) (gifts to such charitable uses as executor shall choose); Fairchild v. Edson, 154 N.Y. 199, 48 N.E. 541 (1897) (gifts to such charitable uses as a designated person shall choose); Matter of Hall, 156 Misc. 841, 282 N.Y.S. 856 (Surr. Ct. N.Y. County 1935), aff’d, 247 App. Div. 719, 287 N.Y.S. 324 (1st Dep’t 1936), aff’d, 272 N.Y. 428, 3 N.E.2d 854 (1936).

65 It should be noted, that in some financial circumstances, it may be advisable to create a charitable foundation or trust during the client’s lifetime. Int. Rev. Code of 1954, § 170, permits the giving of 20% of net income (under certain conditions 30%) to charity each year free of income taxes.
charity if the testator has a husband, wife or child, descendant or parent surviving.\(^{56}\)

If there is any question that the net estate may be too small to warrant its being held in trust,\(^{57}\) it is appropriate to provide that the trustees shall have the power to terminate the trust if the principal is less than a certain specified amount.\(^{58}\)

**Administrative Provisions**

Equally important with the dispositive provisions of the will are the administrative provisions. In appointing executors and trustees, the client will probably wish to name his bank.\(^{59}\) Also he may wish to name an individual as co-executor or co-trustee. Generally, the individual co-executor or co-trustee will be chosen from the following:\(^{60}\)

1. The client's spouse, if she has had any business experience and is not the worrisome type; or
2. A close relative or friend with business experience and some independence of judgment; or
3. The client's attorney who is familiar with the family problems and finances.

A survey made by one of the New York banks a few years ago showed that in the early 1900's sole discretion as to investments was granted to the bank 95 per cent of the time. Only in 5 per cent of its trusts was the bank named a co-trustee. These percentages gradually shifted so that in the last ten or fifteen years sole discretion as to investments has been granted to the bank approximately 56 per cent of the time and has been granted to it and a co-trustee 44 per cent of the time. The survey also disclosed that relatives of the testator are appointed co-trustee approximately 63 per cent of the time, the client's attorney approximately 17 per cent of the time, and others approximately 20 per cent of the time.

Practically all wills drawn in the last fifteen years have dispensed

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\(^{56}\) N.Y. Deced. Est. Law § 17.

\(^{57}\) The following cases involved the application of the doctrine of "cy pres" to charitable trusts which were too small to fulfill the purposes for which they were created. Matter of Lewis, 308 N.Y. 795, 125 N.E.2d 598 (1955) (trust to establish old ladies' home); Matter of Heckscher, 131 N.Y.S.2d 191 (Sup. Ct. Suffolk County 1954) (involving a trust for the creation of a public park).

\(^{58}\) Of course, such provision may be made in any trust, and may be advantageously used in family trusts where the client's estate is relatively small.

\(^{59}\) Only corporations authorized by statute to act as fiduciaries may be named. N.Y. Banking Law §§ 100, 100a. Special provisions are made for foreign corporate fiduciaries. N.Y. Banking Law § 131-3; Matter of Schwan, 5 Misc. 2d 56, 159 N.Y.S.2d 883 (Surv. Ct. Kings County 1957).

\(^{60}\) In determining persons to be named as fiduciaries the attorney should advise the client of the substance of N.Y. Surv. Ct. Act §§ 94, 95, which determine who may not act as fiduciaries.
with the necessity of the fiduciary giving a bond. Where a trusted relative or friend is named as executor or trustee, dispensing with the necessity for a fiduciary's bond may save time, trouble, and expense in the administration of the estate. In New York, a bond will be required unless the will provides to the contrary.61

The most important powers to grant to executors and/or trustees are:

To sell and lease real property without court order;62

To retain investments in kind;63

To distribute in kind (a) to satisfy general legacies, (b) to set up trusts and, (c) to distribute such trusts;

To hold and administer trust funds in solido;64

To sell or exchange property, without court order;65

To invest and reinvest;

To exchange securities or property for other securities or property, and enter into merger or consolidation agreements and retain securities received therefrom, whether or not they are legal;66 and

To allocate those assets which qualify for the marital deduction to that portion of the estate set aside, either outright or in trust for the wife.

The attorney should consider carefully these powers because their exercise or existence may cause a rough and litigious administration if they are poorly drafted.

In setting up the standard of the care required of a trustee in making investments, New York has adopted a modified Massachusetts prudent-man rule which provides a method by which trustees of trusts restricted to "legals" may give some relief to beneficiaries from the squeeze between decreasing yields on "legals" and increasing living expenses.67 Up to 35 per cent of the value of a trust fund restricted to legals now may be invested in securities, including common and preferred stocks, not otherwise made eligible by the statute.68 In computing this percentage, a


62 Even though N.Y. Deced. Est. Law § 13, confers this power upon fiduciaries without need for express provision in the will, there are advantages to be gained by including it specifically in the will. N.Y. Deced. Est. Law § 110 (allowing the fiduciary to sell on the most advantageous terms); Denton v. Sanford, 103 N.Y. 607, 9 N.E. 490 (1885) (requiring a sale under such a statute to be made for cash).

63 Trustees may not retain investments ineligible under New York Statutes, unless otherwise directed by the testator. Villard v. Villard, 219 N.Y. 482, 114 N.E. 789 (1916).

64 Schermerhorn v. Cottting, 131 N.Y. 48, 29 N.E. 980 (1892).


68 Ibid.
trustee must exclude the value of any investment in a legal common
fund made pursuant to the banking law.\textsuperscript{69}Where a small trust fund has been invested in a common trust fund
many banks have been getting unusually good results as to yield and
stability from the diversification provided by such investment. Bankers
realize the opportunities in this area and now will not refuse a trust
because of size alone. Therefore, when drafting a will it may be advis-
able to specifically authorize investments in common trust funds.

Normally, it is provided that stock dividends shall be treated as
principal and that cash dividends, including extraordinary cash divi-
dends, dividends on mining stocks and other wasting investments, as
well as liquidating dividends shall be treated as income.\textsuperscript{71} The executor
or trustee, however, must determine for himself whether a distribution,
declared by a corporation or its counsel to be a stock dividend, is truly
such. Usually the corporation will transfer earned surplus to the common
stock capital account upon the occasion of a distribution. New York
law requires the allocation of stock dividends to principal unless the
instrument provides otherwise.\textsuperscript{72} Nevertheless, the executor or trustee
must still determine that the distribution is a true stock dividend.

Rights of subscription to stock or bonds and the proceeds of sale of
such rights should be treated as principal. For several reasons premiums
paid on securities should not be amortized, the most important reason
being that the income beneficiary is usually the primary object of the
testator's bounty and should receive all the income.

By appointing a donee of a power in trust the appointment of a
guardian will be obviated and the expense and paper work necessary in
connection with annual accounts, maintenance orders, and surety bonds
will be saved. Normally, the then acting executor or trustee is appointed.
Of course, the donee of the power in trust may be a parent of the child
or any responsible third party the client desires. Title to the securities
or funds to which the child is entitled is vested in the child.\textsuperscript{73} The ad-
visability of appointing the parent as donee, however, must be considered
in the light of section 678(c) of the Internal Revenue Code, which, in
essence, provides that where a parent acting as a fiduciary has the power

\textsuperscript{69} N.Y. Banking Law §§ 100c, 157.
\textsuperscript{70} N.Y. Pers. Prop. Law § 21.
\textsuperscript{71} It is best to include such a provision because the law in this area is quite unsettled
although much litigation has revolved around this point. N.Y. Pers. Prop. Law § 17-a,
does not completely solve the problem. See also, Chase Nat'l Bank v. Chicago Title and
Trust Co., 246 App. Div. 201, 284 N.Y.S. 472 (1st Dep't 1935), aff'd, 271 N.Y. 602,
3 N.E.2d 205 (1936).
\textsuperscript{72} N.Y. Pers. Prop. Law § 17-a.
\textsuperscript{73} Matter of Carroll, 274 N.Y. 288, 8 N.E.2d 864 (1937); Matter of Kellogg, 187 N.Y.
355, 80 N.E. 207 (1907).
to apply the child's income in payment of his legal obligations to support
the child, and so applies it, then such income will be taxable to the parent.

While there has been no recent change in the Government's attitude
toward the taxation of a minor's income to his parent under section
678(c), the so-called "grandfather regulation" provides, in effect,

that any amount, pursuant to the terms of the will or trust instrument,
used to pay all or part of the "legal obligations" of any person to a minor
must be included in the gross income of such person as though directly
distributed to him as a beneficiary.

There are two exceptions which relate (1) to alimony and (2) to trust
income in case of divorce. "Legal obligation," however, includes a legal
obligation to support another person only if the obligation is not effected
by the adequacy of the dependent's own resources. A parent has a legal
obligation, within the meaning of the regulation, to support his minor
child if, under local law, property or income from property owned by
the child cannot be used for his support as long as the parent is able
to provide for him. Of course, the opposite is true if, under local law,
a parent may use the child's resources for the child's support in lieu of
the parent's support. In this case no obligation to support exists
within the meaning of the regulation. Further, the amount includible in
the gross income of one legally obligated to support another is limited by
the extent of his obligation under local law.

In some counties in New York the donee is not even required to
qualify in court. He may be given broad powers of investment and may
be authorized to spend income and principal if necessary for the sup-
port, maintenance, and education of the infant. Upon the infant attaining
majority, the donee, of course, must account. A simple receipt and
release will discharge him, and the infant's property will have been
administered, probably for many years, at an amazingly low cost. A
direction that the donee of the power in trust should receive compensa-
tion similar to that received by the guardian of property of an infant
will insure the donee compensation unless there has been negligence
in the administration of the property. The courts of many countries,
however, will allow the donee no compensation unless it is provided in
the will.

**Provisions With Respect to Payment of Inheritance
And Estate Taxes**

Careless draftsmanship in what is usually the last paragraph in a will,
the inheritance tax clause, may lead to great injustice. Rates of estate

tax are exceedingly high. Many persons today set up *inter vivos* trusts and joint accounts and have provided life insurance payable to named beneficiaries, all of which interests pass outside the terms of the will. Unless there is a specific provision that estate taxes on property owned by the testator and passing under his will only, are to be paid out of his residuary estate, the residuary estate will be burdened with the estate taxes attributable to interests which pass outside the will if the state in which the decedent died domiciled had no tax apportionment either by statute or by case law. As a result the natural objects of the testator's bounty normally provided for in the residuary may receive practically nothing, and third parties, sometimes strangers to the family, may receive windfalls free of tax. Attorneys should be careful in using the following formerly standard clause:

I direct that all estate and transfer taxes assessed upon my estate or any transfer under this, my will, shall be paid out of my residuary estate.

For an ordinary will not containing a marital deduction provision in the residuary, the following more specific language is preferable in most cases:

I direct that all estate and inheritance taxes (State and Federal) imposed upon the value of any property owned by me at the time of my death and passing under the terms and provisions of this, my will, or any codicil thereto shall be paid out of my residuary estate.

If, however, the residuary is used to take advantage of the marital deduction, it is necessary to protect the share passing to the wife by inclusion of a clause that all estate taxes "shall be paid out of that portion of my residuary estate disposed of in Article ....... Paragraph .........," indicating therein the portion of the residuary other than that set aside for the marital deduction.

**MISCELLANEOUS PROBLEMS**

**Codicils**

When changes in a will are contemplated, a codicil may be used if the changes are not of a dispositive nature, if the client is old and feeble, or if there is reason to believe that a question may be raised as to his competence. In all other cases the entire will should be rewritten

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75 New York has estate tax apportionment by statute. N.Y. Deced. Est. Law § 124.
76 In a state having no apportionment of estate taxes this situation may arise if a large amount of the decedent's assets pass outside his will. If an apportionment scheme different from that of the statute is desired, the provision must be drawn with great care. Matter of Mills' Will, 272 App. Div. 229, 70 N.Y.S.2d 746 (1st Dep't 1947), aff'd, 297 N.Y. 1012, 60 N.E.2d 535 (1945).
77 Atkinson, Wills 835 (2d ed. 1953).
78 Ibid.
because a codicil which reduces the interests of a beneficiary in the will requires that such a beneficiary, even though not an heir or next of kin, be cited on the probate.\textsuperscript{79} If such beneficiary is an infant, a probate which might have been concluded on the basis of waivers may be delayed and the expense of a special guardian's fee incurred.

On the subject of the destruction of prior wills, it is good procedure in the case of clients who are past middle age to retain prior wills so that in the event the last will is refused probate, the prior will will be available for probate.

\textit{In Terrorem Clauses}

Where the attorney has knowledge that the provisions for any of the distributees will not be enthusiastically received, it is wise to suggest the inclusion of an in-terrorem clause with a gift over to be effective if the distributee contests the probate.\textsuperscript{80}

\textit{Undivided Loyalty Rule}

The undivided loyalty rule which was the subject of the Court of Appeals decision in \textit{City Bank Farmers Trust Co. v. Cannon}\textsuperscript{81} is extremely important and should be familiar to attorneys. The most significant reaffirmation of this rule appears in \textit{Matter of People (Bond Mortgage Guar. Co.)}\textsuperscript{82} involving mortgage rehabilitation trustees.\textsuperscript{83}

\textit{Changes of Domicile}

Many times a will is drawn for a person who has recently moved into this state after spending all of his business life in another state. Sometimes, even though the client is living here, he prefers to consider his domicile to be with a son or daughter in some other state.\textsuperscript{84} The attorney should take time to explain that intentions are only part of the story in acquiring a domicile and are to no avail without a series of overt acts.\textsuperscript{85} The difficulties that may be encountered if two states attempt to levy inheritance taxes on a residence basis should be explained.

\textsuperscript{81} 291 N.Y. 125, 51 N.E.2d 674 (1943).
\textsuperscript{82} 303 N.Y. 423, 103 N.E.2d 721 (1952).
\textsuperscript{83} See also, Matter of Hubbell, 302 N.Y. 246, 97 N.E.2d 888 (1951); Niles, "Trust Accountability in the Absence of a Breach of Trust," 60 Colum. L. Rev. 141, 157 (1960).
\textsuperscript{84} A person may have many residences but only one domicile. Matter of Newcomb, 192 N.Y. 238, 84 N.E. 950 (1908). See also, N.Y. Tax Law § 243.
\textsuperscript{85} See Dupuy v. Wurtz, 53 N.Y. 556, 64 Bar. 156 (1873).
Closing Procedure

Just as the preliminaries should constitute a routine that never varies, so should the events after the will has been prepared. In this way the draftsman of the will, despite the fact that he may have no actual recollection of witnessing the will, may honestly testify that a regular routine is always followed in his office and for that reason he would not have signed as a witness unless the routine had been followed in the case in question. A copy of the proposed will should be sent to the client, and he should be asked to read it and suggest changes where he feels it does not strictly conform to his desires. If the client wishes, a copy of the proposed will can be sent to the bank named as a fiduciary therein for its comments. This is being done more and more each day, and many practical, helpful suggestions are received. When the will is as the client desires, an appointment is made to execute it, preferably in the attorney's office. Execution of the will in the attorney's office with his partners or associates as witnesses is desirable in that due execution of the will may be proved more easily than if laymen are witnesses. The attorneys' notes and diary entries will be available to aid their recollection while, if many years pass after the execution of the will before the witnesses' testimony is needed, the laymen may have no recollection whatever of the event.

After the will has been executed, a complete diary entry should be made by the attorney encompassing all events taking place at the time of the execution. If an officer of or an employee of the bank named as fiduciary acted as a witness, it is advisable for him to prepare his own diary entry for the bank's files.

The diary entry should show that in the attorney's presence the testator read the original will bound in final form and acknowledged before all the witnesses that (1) the instrument was his Last Will and Testament, (2) he had read it and found it satisfactory, (3) he asked the three others present to act as witnesses, (4) he signed it, and (5) the attorney read the attestation clause aloud, filled in the date, and the three witnesses signed, giving their residence addresses. It should also note where the original will was placed, the time taken for the entire ceremony, whether or not the person signing the will wore glasses, and the manner of his or her dress.

Copies of the will are then conformed and a conformed copy is given to the testator. The attorney's handwritten notes of the assets and liabilities, the dispositive instructions, and the family tree of the testator are bound under the office copy of the will which is preserved in the
office safe. Usually, the original will is sent to the client’s bank for safekeeping. The diary entry should be pasted in a special will diary, at the appropriate date, and carefully preserved in the office safe.

Perhaps the above discussion seems overburdened with details. Nevertheless, it is well to remember that these details which may seem so insignificant can be the source of much trouble and time consuming litigation. The successful estates lawyer must have unlimited patience to devote untiring attention to detail. He must also have an understanding of human nature and the tact and ability to draw from the client all the information necessary so he can produce a sound testamentary plan.