



Estate Planning from the Eyes of a Corporate Trustee

December 18, 2024

Jackie Davis, Fiduciary Counsel

This Presentation is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients. This Presentation is based upon information obtained from various sources that Bessemer believes to be reliable, but Bessemer makes no representation or warranty with respect to the accuracy or completeness of such information and disclaims any liability in connection with the use of this information. Views expressed here in are current only as of the date indicated and are subject to change without notice.

Sample Provisions are included through out this Presentation. Please note that all sample provisions are taken from articles or larger estate planning documents and may reference defined terms and/or other sections that are not included in this Presentation. Practitioner should always consider current, applicable state and federal law and tailor such provisions accordingly.

Estate Planning from the Eyes of a Corporate Trustee

- **Planning Considerations with Boilerplate Provisions**
 - Distribution Provisions
 - Incapacity Provisions
 - Definitions & Administrative Provisions
- **Beyond the Drafting**
 - Funding
 - Gift Tax
 - Charitable Intent
 - Grantor Trusts

Planning Considerations with Boilerplate Provisions

Double Check those Distribution Provisions:

- Use of Shall or May
- Incentive Provisions
- Requirement to Consider Other Resources
- Pot Trust Problems
 - Equality
 - Priority
 - Division

Sample Language: Incentive Provision

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 and 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 efforts 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, include working as an unpaid volunteer for charitable purposes.

Sample Language: Automatic Division of a Pot Trust

The Pot Trust shall terminate on the first to occur of (i) the twenty-fifth birthday of my youngest then living child, or, (ii) the death of a child of mine leaving no child of mine less than twenty-five years of age then living, and trustee shall divide and allocate the trust property then on hand among my then living descendants, per stirpes, or if there are none, the trust property shall be distributed in accordance with the provisions of section #.#. All trust properties and interests therein so allocated to any person who is a descendant of mine shall be distributed in accordance with section #.#.

Sample Language: Beneficiary Directed Division of a Pot Trust

Each Child has the power to direct the Trustee to divide the trust estate of the Pot Trust. Upon receiving direction from a Child exercised in accordance with this section, trustee shall divide and allocate the trust property then on hand among my then living descendants, per stirpes. All trust properties and interests therein so allocated to any person who is a descendant of mine shall be distributed in accordance with section #.#. This power to direct division can be exercised by any child, during life or at death, without the approval of any other person or entity. The exercise of such power to direct division shall be exercised in an acknowledged written instrument signed by the beneficiary and delivered to Trustee as provided under this Trust Agreement or by reference to this power to direct division either in the Child's Will or any codicil to a Will which is executed in accordance with the formalities required at the time of the exercise of the power of the laws of the state of the Child's domicile.

Planning Considerations with Boilerplate Provisions

Planning for Incapacity:

- Definition of Incapacity
 - **Who?** Who makes the determination? Who has to take affirmative action?
 - **What?** What is the standard?
 - **When?** Is it automatic or at the occurrence of a certain event?
- Substance Abuse Language
 - Definition of Substance
 - Disclosure Issues

Sample Language: Determination of Incapacity (Part 1 of 3)

- 1. In addition to the other provisions of this instrument and applicable law, if a Trust Actor is incapable of performing the Trust Actor's duties by reason of a determination of incapacity pursuant to this [section], the Trust Actor shall: (a) immediately cease serving; (b) be disqualified from serving; and (c) be deemed to have immediately resigned or been removed as Trust Actor. For purposes of this [section]: (a) Trust Actor shall include any individual (i) trustee, (ii) trust director or protector, (iii) fiduciary, (iv) designated representative or other holder of the power to represent, bind, or receive notices on behalf of a beneficiary, or (v) holder of a power over trust investments, management, distributions, or administration that is exercisable while the person is not serving as trustee; and (b) Trust Actor shall not include (i) a beneficiary with respect to his or her power of appointment or power over a trust to the extent the exercise or non-exercise of the power affects the beneficial interest of the beneficiary or any person virtually represented by the beneficiary, (ii) a person with respect to his or her power to appoint or remove a trustee or trust director, or (iii) the settlor with respect to his or her power to revoke or amend the trust.*

Sample Language: Determination of Incapacity (Part 2 of 3)

2. A Trust Actor shall be determined to be incapacitated under this [section] in the event of any of the following:
- *Entry of an order by a court with jurisdiction: (i) finding that the Trust Actor is incapacitated, a protected person, unable to manage property or financial affairs, unable to act rationally and prudently in financial matters, or unable to receive and evaluate information or make or communicate decisions; or (ii) appointing a conservator for the Trust Actor or subjecting the Trust Actor to a protective order related to the Trust Actor's property or financial affairs, whether plenary, limited, temporary, or emergency;*
 - *An unrevoked written certification by two licensed and independent physicians who have examined the Trust Actor, and who are unrelated to any Trust Actor or beneficiary, that the Trust Actor is incapacitated, unable to manage property or financial affairs, unable to act rationally and prudently in financial matters, or unable to receive and evaluate information or make or communicate decisions;*
 - *Failure by the Trust Actor to provide written certification by a licensed and independent physician who has examined the Trust Actor, and is unrelated to any Trust Actor or beneficiary, that the Trust Actor is competent, able to manage property and financial affairs, able to act rationally and prudently in financial matters, or able to receive and evaluate information and make and communicate decisions, within thirty (30) days after delivery to the Trust Actor of a written request for certification made by: (a) a majority of the trust beneficiaries who are then living and sui juris; (b) any trustee then serving; or (c) any successor trustee named to serve upon the resignation or removal of the Trust Actor; or*
 - *Written certification that there is credible contemporary evidence that the Trust Actor has disappeared, is unaccountably absent, or is being detained under duress, made by: (a) a majority of the trust beneficiaries who are then living and sui juris; (b) any trustee then serving; or (c) any successor trustee named to serve upon the resignation or removal of the Trust Actor.*

Sample Language: Determination of Incapacity (Part 3 of 3)

3. No trustee shall have a duty to seek a judicial determination of the capacity of a Trust Actor. The reasonable costs, including attorneys' fees, incurred in good faith by a trustee to seek a judicial determination of the capacity of a Trust Actor shall be paid from the trust assets as costs of administration. Any action of a trustee taken under this [section] in good faith shall not be subject to challenge by any person. The reasonable costs, including attorneys' fees, incurred in good faith by a Trust Actor in an attempt to comply with the requirements of this [section] shall be paid from the trust assets as costs of administration.

Planning Considerations with Boilerplate Provisions

Definitions and Administrative Provisions:

- Definition of Children
- Administrative Considerations:
 - Successor Trustee Provisions
 - Disclosure and Reporting
 - Confidentiality
 - Directed Allocation of Receipt and Expenses Between Principal and Income
 - Undistributed Income added to Principal
 - Flexibility
 - Special Asset Provisions
 - Situs
 - Single Signatory

Sample Language: Definition of Children

An individual's child(ren) will include only the individual's child(ren) living on the date of this Agreement and born subsequent hereto, and those who are legally adopted prior to attaining age 18 by the individual. An individual's descendants will include only the individual's child(ren), grandchild(ren), and other persons of a lower generation of whom the individual is the lineal ancestor, including persons born subsequent hereto, and those who are legally adopted prior to attaining age 18 by the individual or any such person. Notwithstanding the preceding, references to my children mean only _____, _____, _____, and any other child hereafter born to or adopted by me.

Sample Language: Principal Place of Administration (Situs) and Governing Law

The principal place of administration (situs) shall be the state of _____. The trustee may, in its discretion, move the principal place of administration to another jurisdiction.

The validity, construction and administration of this trust shall be governed by the laws of _____. The trustee may, in its discretion, elect that the law of another jurisdiction govern the administration of the trust, but no change in the principal place of administration shall result in a change in the law governing administration absent an express written election by the trustee filed with the trust records.

The trustee shall not be under any duty to exercise the foregoing powers to change the principal place of administration and/or law governing administration, nor shall the trustee be under any duty to monitor any fact or circumstance to determine whether any such change may be in the interests of the beneficiaries or further the purposes of the trust, nor shall any trustee incur any liability to any beneficiary or other person as a result of its good faith exercise or non-exercise any of the foregoing powers, absent willful misconduct by the trustee proved by clear and convincing evidence in the court with primary jurisdiction over the administration of the trust.

Beyond the Drafting

Funding

- Type of Assets
 - Concentration
 - Diversification
 - Family Business
 - Life Insurance
- Liquidity Concerns

Gift Tax Returns

- No Gift Tax Returns
- Adequate Disclosure
- Automatic Allocation Issues

Charitable Intent

- Charitable Deductions
- Flexibility

Grantor Trusts

- What happens when they are too successful?
- Reimbursement

Sample Language: No Duty to Diversify

The Settlor understands that under applicable law, the Trustee of this Trust or any trust created hereunder may have an investment duty to diversify the assets into other businesses or investments. However, Settlor does hereby provide, that no such Trustee shall have any duty to diversify any assets, and any such Trustee shall be released and discharged from liability hereunder for any failure to so diversify. The Settlor specifically directs that the Trustee shall have no duty to diversify its interests in _____ or _____ and specifically intends for the Trust to retain such assets.

Gift Tax Returns



*"Ma'am, I'll be happy to help you with your gift tax return,
but you must stop crying first."*

Cartoon created by Chat GPT.

B

BESSEMER
TRUST