

Pivot Planning: Drafting to Maximize Flexibility



January 20, 2022

Chicago Estate Planning Council

Christine Quigley and Allison Pfeifle, Schiff Hardin LLP

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Chip Flanagan
Managing Director, Private Bank



Becky Juhant
Vice President/Senior Trust Advisor

Welcome and Announcements



Julie Pleshivoy

CEPC President



Diversity Committee Report



Amy Schoeffel
Diversity Committee Co-Chair



Donald Gottesman
Diversity Committee Co-Chair



Diversity Committee Report



Mission: improve all forms of diversity by:

1. recruiting and retaining members who increase CEPC's diversity; and
2. encouraging students in universities to enter the field.

CEPC Diversity Committee – FY2022

Co-Chairs: Don Gottesman and Amy Schoeffel

Committee Members

Fay Ahmed*	Jonathan Grossman	Bryan Pitts	Gina Shkoukani*
Julie Alcala	Mary Ann Korenic	Anne-Marie Rhodes	Jennifer Tolsky
Terri Baron	Robin Maher	Carly Robin	Kathy Van Eeuwen
Deborah Daly	Paul O'Keefe	Ryan Ross	Kevin Williams
Sonia Garcia	Raveet Phull	Maureen Ryan	

*Emerging Leader graduates

Diversity Committee Report



Emerging Leader Program (initiated in 2018)

2021-2023

**Aisha E. Henry
Jonathan Glover**

**H. Nicholas Luther
Keyana Payne**

Previously Selected Emerging Leaders

2020-2022	2019-2021	2018-2020
Fay Ahmed	Eric Huang	Ilana Bley
Kimberly Harris	Melyse Mpiranya	Gina Shkoukani
De'Andre Peer	Venson "Vince" Gill	
	Jennifer Thomas	

Diversity Committee Report



Student Outreach Program

Committee members:

1. coordinate panel discussions at local law schools and universities; and
2. participate on the panel discussions with students with a goal of encouraging students to enter the field

Law Schools (Kevin Williams, Lead)

Chicago-Kent, Depaul, Northwestern, UIC Law, University of Chicago

Business Schools (Ryan Ross and Fay Ahmed, Co-Leads)

Depaul, Northwestern, Roosevelt, University of Chicago

Announcements New Members



Emerging



Melissa Bulshteyn, ATTY
Kelleher & Holland



Victoria L. Cejka, ATTY
SATC Law



Kris Lundgren, CIC
MarshMcLennan Agency



Karrie E. Virgin, ATTY
Aronberg Goldegehn

UPCOMING



EVENTS



VIRTUAL MONTHLY PROGRAMS

February 17, 2022

Recent Developments

Ryan Walsh, Croke Fairchild Morgan & Beres LLC

March 17, 2022

Securing the Right Result Under the New IRA Rules

Svetlana Bekman; The Northern Trust Company

Upcoming Events – Fundamentals Course



A five-part Fundamentals Course designed to provide beginning estate planning professionals (0 - 5 years experience) with a deep introduction to the essential components of trust and estate planning and administration.

In addition to junior estate planning professionals, experienced practitioners looking to bolster their trust and estate knowledge and skills are also welcome to attend. CEPC will make its Fundamentals Course available to all estate planning professionals in the adjacent Midwest/Great-Lakes region. We are excited to expand this opportunity!

Dates:

January 26 - *Overview of Estate, Gift and
Generation-Skipping Transfer Tax*

February 2 - *Income Tax Considerations for
Trusts and Estates; and Illinois Trust Code*

February 9 - *Drafting Estate Planning Documents*

February 16 - *Putting It All Together*

4th FRIDAY'S



Informal Virtual Networking

2022 CEPC 'MEMBER ONLY' NETWORKING SCHEDULE

All programs will be held via Zoom

DATE	TOPIC	TIME
January 28	'Member Only' Fourth Fridays - Informal Virtual Networking	8:30 a.m. – 9:15 a.m.
February 25	'Member Only' Fourth Fridays - Informal Virtual Networking	8:30 a.m. – 9:15 a.m.
May 20	'Member Only' Third Fridays - Informal Virtual Networking	8:30 a.m. – 9:15 a.m.
June 17	'Member Only' Fourth Fridays - Informal Virtual Networking	8:30 a.m. – 9:15 a.m.



Gregg Simon
Vice President and Program Chair



Housekeeping Notes



- You were emailed a copy of the Speaker and Sponsor materials yesterday with the access link in a meeting invite. If you did not receive these materials, please email CEPC headquarters info@cepcweb.org
- If you are experiencing technical difficulties, please use the chat box, and someone will assist you.
- We will have a Q&A session immediately following this program. If you have any questions during the presentation, please enter them into the Q&A box on your webinar toolbar.
- Finally, attendees will be emailed a survey link immediately following this webinar.
- To receive credit, you'll need to complete the survey by end of business on Friday, January 21st
- Certificates will be emailed within the next few weeks.



Christine R. W. Quigley
Schiff Hardin LLP

Christine R. W. Quigley

Christine R. W. Quigley is a Partner with Schiff Hardin LLP. Christine advises affluent individuals and families in wealth transfer planning, tax planning, estate and trust administration, and business succession planning. Her clients include principals of private equity, hedge fund, and venture capital firms; owners of closely-held businesses; and executives of public corporations.

Christine's practice focuses on the complex estate and personal planning needs of her clients. She regularly represents entrepreneurial clients who have built significant wealth from the ground up.



Allison K. Pfeifle
Schiff Hardin LLP

Allison K. Pfeifle

Allison is a strategic tax and estate planning attorney with a diverse professional background at Schiff Hardin LLP. She takes pride in translating her clients' complex planning issues into more digestible concepts, equipping them to make informed decisions about their estate plan. When counseling clients, Allison draws on her experience in multiple roles within the legal and financial services industries, including private practice, work for a family office, and managing complex fiduciary relationships for an established trust company.



Joanna Morrison
UBS Financial Services Inc.

Joanna Morrison

Joanna Morrison is Executive Director and Senior Wealth Strategist Advanced Planning Group with UBS Financial Services Inc.

Joanna works with ultra-high net worth individuals and their advisors, aiding in the development and implementation of tax planning and business succession strategies. She also works with clients to assist with meeting their philanthropic goals. In addition, she reviews clients' estate planning documents to help ensure that their plans accurately reflect the family's philosophy, needs, and objectives.

Chicago Estate Planning Council

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January 20, 2022



Introduction

Introduction

- ▶ “The only constant in life is change.”
– *Heraclitus, c. 500 BCE*
- ▶ “The best way to predict your future is to create it.”
– *Abraham Lincoln*

Things We Take For Granted

The Last Twenty Years Have Brought...	In Effect Since
Federal Estate Tax Exemption over \$1M	2002
Illinois Decoupled from Federal Estate Tax	2003
Illinois Estate Tax Exemption over \$1M	2005
Illinois State-Only QTIP	2009
Portability	2011
“SLAT” as a popular acronym	2012
Statutory Decanting (Illinois)	2015
Federal Estate Tax Exemption over \$10M	2018
SECURE Act, Illinois Trust Code	2020

- Things change, and we need to be prepared to adapt!



The Role of Counselor

- ▶ Clients don't simply want your knowledge of the subject matter...they want your wisdom!
- ▶ The “Now” and “Later”

Today's Agenda: Flexibility At Every Stage

- ▶ Fiduciary Selection
- ▶ Payment and Deferral of Tax
- ▶ Distribution Purposes; Timing; Permissible Distributees
- ▶ Powers of Appointment
- ▶ Trust Investments and Accountings
- ▶ Trust Modification and Termination Under the Illinois Trust Code
- ▶ Trust Modification and Termination Under the Trust Instrument
- ▶ Precatory Language and Letters of Wishes



Fiduciary Selection

Define Who Can Act (Flexibly)

- ▶ Use Caution in Defining Who Can - or Cannot - Act As a Fiduciary
 - Minimum Age Requirement for Individuals?
 - Minimum Size Requirements for Institutions?
 - Relationship Requirements or Prohibitions?
 - Special Qualifications?
- ▶ Should a Trustee Appointer, Independent Trustee, or Trust Protector be able to modify the criteria?

Appointment and Removal

- ▶ A Fiduciary Standard: “The [Trustee Appointer/Remover] shall act only in a fiduciary capacity in the best interests of all trust beneficiaries.”
- ▶ Beneficiary as Appointer/Remover
 - Is trustee limited to ascertainable standard? See Treas. Reg. § 20.2041-1(b).
 - If not, is beneficiary limited to appointing independent party? Rev. Rul. 95-58, Estate of Wall, 101 T.C. 300 (1993)
 - Removal for Cause: PLR 9303018



Payment and Deferral of Tax



Payment or Deferral of Tax Generally

- ▶ On Funding
 - Marital/Family Trust Funding in Revocable Trusts
 - Formula Funding in Irrevocable Trusts
- ▶ Flexibility in Tax Payment/Reimbursement Provisions
 - Source of Tax
 - Permissive vs. Mandatory Reimbursement
 - Consider GST Consequences

Marital Trust Funding

- ▶ Optimum Marital vs. Single Fund QTIP
- ▶ Adding Layers:
 - Partial QTIP
 - Clayton QTIP
 - Disclaimer

Going Old School: Optimum Marital

If my spouse survives me, the trustee shall allocate, as of the date of my death, to the Marital Trust the smallest fraction of eligible trust property necessary to produce the least aggregate federal and state estate tax payable by reason of my death.

Getting Hip: Single Fund QTIP

- ▶ All assets to QTIPable trust for surviving spouse
- ▶ Executor may elect marital deduction or rely on portability
- ▶ Give trustee power to sever
- ▶ Deferral of Decision



Building the Layers

- Partial QTIP:
 - ▶ Critical for Single Fund Plan
 - ▶ Critical for State-Only QTIP election
 - ▶ Portability
- Clayton QTIP:
 - ▶ Add non-elected portion to Family Trust (even if not QTIPable)
 - ▶ Independent fiduciary decision (requires additional fiduciary)
- Disclaimer

Irrevocable Trust Funding: Formula Gifting

- ▶ Formula Gift with Pour Over (see McCord, Christiansen, Petter, Hendrix)
 - I give 100 units of My Company LLC, to be allocated as follows:
 - ▶ \$12.06M to Gift Trust, and
 - Remainder to (Lifetime QTIP, GRAT, charity)
- ▶ “Wandry” Formula Clause
 - I give \$12.06M worth of units of My Company LLC to Gift Trust.

Funding Strategies in Uncertain Times

- ▶ Use of QTIPable Trusts
- ▶ Sale for Promissory Note with Option to Forgive at a Later Date





Distribution Purposes; Timing; Permissible Distributees

Drafting Discretionary Distribution Provisions

- ▶ The grantor may want to provide flexibility to allow a beneficiary more control over the trust and to make the trust adaptable to changing or unforeseen circumstances. A properly drafted trust can provide a beneficiary or a trustee (depending on the power) with the following capabilities:
 - The power over the timing and type of distributions;
 - The power to direct assets of the trust to certain individuals or entities (such as charitable organizations) during the beneficiary's lifetime or at death;
 - The power over the removal and appointment of trustees; and
 - Various powers governing the administration of the trust.

Discretionary Distributions

- ▶ A grantor may provide the trustee narrow or broad authority to make distributions of trust property to the trust's beneficiaries. Grantors wishing to maximize trust flexibility may wish to provide the trustee with broad discretion.
- ▶ Beneficiary as Trustee/Co-Trustee
 - A trust beneficiary serving as trustee may distribute trust property to themselves and others if the distributions are made for the limited purposes of health, education, maintenance and support (“HEMS standard”).

Discretionary Distributions

► Independent Trustee

- A trust document may provide for the appointment of an independent third party trustee. An independent trustee may distribute trust property to trust beneficiaries beyond the HEMS standard.
- Drafters may consider allowing the independent trustee to make distributions for a beneficiary's "best interests" or in the trustee's "sole and absolute discretion."
- Additionally, the trust document may provide the independent trustee authority to distribute for life events that fall outside of the HEMS standard, such as starting a new business or paying for a wedding.

Power to Remove & Replace Trustees

- ▶ A grantor will typically create a list with the initial trustee and successor trustees at the creation of the trust. This prepared list may not always work for the entire duration of the trust.
- ▶ For a variety of reasons, individuals or institutions that were once good choices may not be ideal as time goes by. In many cases, without other provisions otherwise in the trust agreement, if there is a vacancy in the position of trustee, the beneficiaries (or interested persons) must petition a court to appoint trustees, which is both costly and time-consuming.
- ▶ To prevent this result and optimize flexibility, a trust agreement may provide a list of persons allowed to remove and replace and may also provide a mechanism to supplement the list of individuals with that power.



Flexibility Among Permissible Distributees

- ▶ Spousal Lifetime Access Trusts
 - Prevent Donors' Remorse
 - Can be made QTIPable
 - (Almost Always) Grantor under IRC 677

Reciprocal Trust Doctrine: Estate of Grace

- ▶ Two Prong Test:
 - Trusts are interrelated
 - Arrangement leaves grantors in the same economic position
- ▶ Factors
 - Substantially identical terms
 - Created at the same time

Avoiding Reciprocity


- ▶ Trust establishment timing
- ▶ Funding
- ▶ Fiduciary Succession
- ▶ Powers of Appointment
- ▶ Beneficial Interests

Power to Add Beneficiaries

- Common as a grantor trust provision:

During my lifetime, the independent trustee may add or delete one or more charitable organizations as beneficiaries of the trust, and the independent trustee may distribute such amounts of income and principal to them, in such proportions, as the independent trustee believes to be desirable.

- May also grant an independent trustee the power to add non-charitable beneficiaries.



Trust Investments and Notice & Accountings

Trust Investments and Notice & Accountings

► Trust Investments:

- Prudent Investor Rule (see ITC Section 901-902)
- Environmental, Social and Governance Considerations (see ITC Section 902(c)(7) and (8))
- Life Insurance as Trust Asset (see ITC Section 913)

► Notice & Accountings:

- Accountings: Illinois Trust Code vs. Uniform Trust Code
- Mandatory vs. Default (see ITC Section 105)
- Representation



Uniform Powers of Appointment Law



Powers of Appointment

- ▶ Black's Law Dictionary: "A power created or reserved by a person having property subject to disposition, enabling the donee of the power to designate transferees of the property or shares in which it will be received."
 - Types:
 - ▶ General or Nongeneral/Limited/Special
 - ▶ Lifetime or Testamentary

Powers of Appointment in Illinois

- ▶ Where do we find Illinois' laws on powers of appointment?
 - Illinois Trust Code, Article 13 (760 ILCS 3/1301 et seq.) (the artist formerly known as 760 ILCS 105 et seq.)
 - ▶ First entered the law effective January 1, 2019
 - ▶ Based on the uniform act, with some modifications
 - ▶ Intended to consolidate prior provisions in Illinois law
 - ▶ Adoption in other states
 - Case law
 - Probate Act of 1975, Article 2 (755 ILCS 5/2-7), Disclaimer

Powers of Appointment


► Drafting Considerations

- Determine type of power of appointment – what are you trying to achieve?
- Identify the power holder and when the powerholder can exercise
- Identify the class of appointees
- Specify conditions on exercise of the power
- Describe the method of exercise
- Tax flexibility



Powers of Appointment and Representation

- ▶ Illinois Trust Code, Article 3, Section 302 (760 ILCS 3/302): Allows for representation of beneficiaries by:
 - (a) Holder of a testamentary or presently exercisable power of appointment that is: (1) general, or (2) a broad special; and
 - (b) Holder of a testamentary or presently exercisable power of appointment other than one described in (a) *where there is no conflict of interest between the holder and the person(s) represented.*
- ▶ *New Section 302(c) (Trailer Bill)*

An aerial photograph of a large industrial complex, possibly a refinery or chemical plant, featuring numerous storage tanks, distillation columns, and a dense network of pipes and walkways. The image is split diagonally by a blue line. The upper-left portion is faded and semi-transparent, while the lower-right portion is in sharp focus with vibrant colors.

Trust Modification and Termination Under the Illinois Trust Code

Nonjudicial Settlement Agreements

- ▶ ITC, Section 111
- ▶ Nonjudicial Settlement Agreements allow the interested persons with respect to a trust enter into binding agreements to address certain trust matters
 - Requires “interested persons”:
 - ▶ Trustee;
 - ▶ Beneficiaries or their representatives;
 - ▶ Certain advisors or other powerholders (not the holder of a power of appointment).
- ▶ If charitable interest → notice to Attorney General, who can object to and block the agreement
- ▶ NJSAs can no longer address “any matter a court could address”

Nonjudicial Settlement Agreements

- ▶ Matters that may be resolved by a nonjudicial settlement agreement include (see Section 111(b)):
 - Validity, interpretation, or construction of the terms of the trust.
 - Approval of a trustee's report or accounting.
 - Exercise or nonexercise of any power by a trustee.
 - The grant to a trustee of any necessary or desirable administrative power if the grant does not conflict with a clear material purpose of the trust.
 - Questions relating to property or an interest in property held by the trust if the resolution does not conflict with a clear material purpose of the trust.
 - Removal, appointment, or removal and appointment of a trustee, trust advisor, investment advisor, distribution advisor, trust protector, or other holder, or committee of holders, of fiduciary or nonfiduciary powers, including without limitation designation of a plan of succession or procedure to determine successors to any such office.
 - Determination of a trustee's or other fiduciary's compensation.
 - Transfer of a trust's principal place of administration, including, without limitation, to change the law governing administration of the trust.
 - Liability or indemnification of a trustee for an action relating to the trust.

Nonjudicial Settlement Agreements

- ▶ Matters that may be resolved by a nonjudicial settlement agreement include (see Section 111(b)):
 - Resolution of bona fide disputes related to trust administration, investment, distribution, or other matters.
 - Modification of the terms of the trust pertaining to the administration of the trust.
 - Determining whether the aggregate interests of each beneficiary in severed trusts are substantially equivalent to the beneficiary's interests in the trusts before severance.
 - Termination of the trust, except that court approval of the termination must be obtained in accordance with subsection (d), and the court must find that continuance of the trust is not necessary to achieve any clear material purpose of the trust. The court shall consider spendthrift provisions as a factor in making a decision under this subsection, but a spendthrift provision is not necessarily a material purpose of a trust, and the court is not precluded from modifying or terminating a trust because the trust instrument contains spendthrift provisions. Upon termination, the court shall order the distribution of the trust property as agreed by the parties to the agreement, or if the parties cannot agree, then as the court determines is equitable and consistent with the purposes of the trust.

Nonjudicial Settlement Agreements

- ▶ Representation of interested persons
 - Representation by **holders of certain powers** (ITC, Section 302)
 - Representation by **court-appointed guardian** (ITC, Section 303(b))
 - Representation by **agent under power of attorney** (ITC, Section 303(c))
 - Representation by **parent** (ITC, Section 303(d))
 - Representation by **person having substantially similar interest** (ITC, Section 304)
 - *Representation by **designated representative** (ITC, Section 307)*
 - Representation **per trust instrument**
 - NOTE: Consider Section 301(d) where a person may be represented by two or more representatives

Trust Modification and Termination under the ITC

- ▶ Who can institute a proceeding for modification or termination of a trust under Article 4?
 - ITC, Section 410(b): “A proceeding to approve or disapprove a proposed modification or termination under Sections 411 through 416, or a trust combination or division under Section 417, may be commenced by a trustee or beneficiary or by the Attorney General for a trust with a charitable interest.”

Trust Modification

- ▶ What methods are provided in the ITC for modification or termination of an existing irrevocable trust?
 - Judicial Modification:
 - ▶ By Beneficiary Consent
 - ▶ For Unanticipated Circumstances or Inability to Administer Trust Effectively
 - Cy Pres
 - Uneconomic Trusts
 - Mistakes
 - Modification to Achieve Tax Objectives
 - Combination and Division of Trusts

Judicial Modification by Beneficiary Consent

► ITC, Section 411

- A court may terminate a noncharitable irrevocable trust with **consent** of all beneficiaries if continuance not necessary to achieve any **material purpose**. Upon termination, the trustee must distribute the trust property as agreed to by the beneficiaries.
- A court may modify a noncharitable irrevocable trust with **consent** of all beneficiaries if it is not inconsistent with a **material purpose** of the trust.
- A court may proceed with termination or modification **without a beneficiary's consent** if the beneficiary is treated equitably and consistent with the purposes of the trust.

Other Judicial Modification Methods

► ITC, Section 412

- A court may modify the **administrative or dispositive** terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.
- A court may modify the **administrative** terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.
- Upon termination under Section 412, the trustee must distribute the trust property as agreed to by the beneficiaries. If the beneficiaries cannot agree, then the court determines a distribution that is equitable and consistent with the purposes of the trust.
- A judicial modification cannot diminish a charitable interest or alter a charitable purpose.



Other Modification Methods

- ▶ ITC, Section 413: Cy Pres
 - Cy Pres Doctrine = “as near as possible”
 - Charitable Trusts
- ▶ ITC, Section 414: Uneconomic Trusts
 - Small Trust Termination (ITC, Section 414(a)): permits a trustee to terminate a trust with total value less than \$100,000 if the trustee determines that the cost to continue the trust administration will impair accomplishment of the purpose of the trust. The trustee must first give notice to the qualified beneficiaries of the trust.
- ▶ ITC, Section 415: Mistakes
 - A court may reform the terms of a trust, *even if unambiguous*, to confirm the terms to the settlor’s intention if it is proved by **clear and convincing evidence** what the settlor’s intention was and that the terms of the trust were affected by a mistake of fact or law.

Trust Modification and Termination under the ITC

- ▶ **Modification to Achieve Tax Objectives**
 - ITC, Section 416
 - A court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention.
 - The court's modification may be retroactive.
- ▶ **Combination and Division of Trusts**
 - ITC, Section 417
 - Requires notice to the qualified beneficiaries
 - The trustee may:
 - ▶ Consolidate 2 or more trusts with substantially similar terms;
 - ▶ Sever any trust on a fractional basis into 2 or more trusts; and
 - ▶ Segregate into a separate account or trust a specific amount or specific property.
 - Material Purpose limitation

Decanting

- ▶ ITC, Article 12
- ▶ Decanting is another way to modify an irrevocable trust.
 - Determine level of trustee's discretion. The trustee can decant if they have:
 - ▶ Expanded Distributive Discretion (see ITC, Section 1211); or
 - ▶ Limited Distributive Discretion (see ITC, Section 1212).
 - The trust agreement can restrict, eliminate, or expand the trustee's power to decant.
- ▶ Charitable trusts may not be decanted

Decanting

▶ Decanting Under **Limited** Distributive Discretion (Section 1212):

- What must/should stay the same:
 - ▶ Beneficiaries;
 - ▶ Standards for distributions;
 - ▶ Power of appointment;
 - ▶ Rule against perpetuities;
 - ▶ Trustee compensation? (See ITC, Section 1216)
- What could change:
 - ▶ Administrative provisions;
 - ▶ Trustee succession;
 - ▶ Governing law.

▶ Decanting Under **Expanded** Distributive Discretion (Section 1211):

- What must/should stay the same:
 - ▶ No additional beneficiaries;
 - ▶ Rule against perpetuities;
 - ▶ Trustee compensation? (See ITC, Section 1216)
- What could change:
 - ▶ Eliminate beneficiaries;
 - ▶ Distribution standards;
 - ▶ Powers of appointment;
 - ▶ Administrative provisions;
 - ▶ Trustee succession;
 - ▶ Governing law.



Decanting

- ▶ ITC, Section 1206 protects a trustee or other person who reasonably relies on the validity of a decanting.
- ▶ ITC, Section 1222 provides a “savings provision” for imperfect decanting:
 - Read out any impermissible provisions in second trust;
 - Read in required provisions missing in second trust;
 - Trustee must take corrective action.

An aerial photograph of a large industrial facility, possibly a refinery or chemical plant, featuring a complex network of pipes, storage tanks, and processing units. A blue diagonal line runs from the top left towards the bottom right, separating a semi-transparent white area on the left from the darker, more detailed industrial scene on the right.

Trust Modification and Termination Under the Trust Instrument



Modification under Trust Instrument

- ▶ May be broader (or narrower) than under ITC
- ▶ Must be within public policy limits
- ▶ Must comply with 760 ILCS 3/105 (re Default and Mandatory Rules)
- ▶ Within those constraints, there is tremendous flexibility!



Caveat: A Word to the Wise!

- ▶ ITC and public policy leave a lot of leeway. The following slides offer powerful alternatives, which should be used with caution and for specific situations.
- ▶ Just because you “can” do something, does not mean you “should” do something.
- ▶ But these are uncertain times we live in...

Trust Merger

- ▶ What is “substantially similar”?
- ▶ Could (should) you allow for merger:
 - Without regard to interests of non-qualified beneficiaries?
 - To shorten the perpetuities period?
- ▶ Could (should) you broaden the standard, for example, to allow for merger if the terms are merely “similar”? What about for limited purposes, such as to achieve tax objectives?

Non-Statutory Decanting/Early Termination

- ▶ The independent trustee of any trust created under this trust instrument (the “original trust”) shall have the power at any time and from time to time, in the sole and absolute discretion of that trustee, to distribute any portion or all of the principal of any trust held hereunder to the trustee of another trust under any other instrument, by whomever created, provided that the exercise of such power (1) does not reduce any current fixed income interest of any beneficiary of the original trust; (2) is in favor of the beneficiaries of the original trust; and (3) does not violate any applicable rule against perpetuities.
- ▶ The independent trustee may at any time, in the independent trustee’s sole discretion, terminate the trust in whole or in part and distribute the assets, either outright to or in trust for, Beneficiary and their descendants in such proportions as the independent trustee, in its sole discretion, shall determine.
- ▶ Consider including a clause to protect marital/charitable deductions, QSST/ESBT Elections, GST treatment, and other special characteristics.

Power to Modify Trusts

- ▶ May grant to independent trustee or trust protector
- ▶ Can be used broadly for almost any reason
- ▶ Subject to fiduciary standard:

“The Trust Protector may modify or amend the terms of the trust in order to achieve tax advantages or to preserve tax benefits otherwise available with respect to the trust, to convert a beneficiary’s interest to a supplemental needs interest, or for any other reason that the Trust Protector believes to be necessary or desirable.”

Small Trust Termination

- ▶ “If at any time [after my death] the independent trustee shall determine that the trust no longer has a value that makes it economical to administer, the trustee, after notice is given to all qualified beneficiaries, and without further responsibility, may (but need not) distribute the remaining trust principal to the beneficiary for whom the trust is named [, or, in the case of the Marital Trust or the Family Trust, to my spouse].”



Precatory Language and Letters of Wishes

Precatory Language

- ▶ Trust purpose statements
- ▶ Guidance to trustee as to distributions, investments, or other significant areas

Letters of Wishes

- ▶ A grantor may create a letter of wishes which provides the trustee with nonbinding guidance regarding the grantor's philosophy about trust distributions.
- ▶ Allows a grantor to effectively communicate their family values, life philosophy, and with trustees and beneficiaries long after the grantor has passed away.
- ▶ Precatory language may be included as nonbinding words of instruction. For instance, a trust may provide that "the trustee may, but is not required to, consider the income of the beneficiary from sources outside the trust in making a discretionary payment" or "it is my wish and expectation that my descendants be good stewards of the family wealth and to that end...."

How to Craft a Letters of Wishes

- ▶ Crafting a letter of wishes requires grantors to uncover their own personal values relating to wealth. Grantors should consider including their family members in this process so that everyone can participate in a purposeful dialogue. This affords the family an opportunity to thoughtfully consider their values and hopes.
- ▶ Legal and tax professionals should review and provide input as necessary on a grantor's letters of wishes.
 - Legal counsel can make sure that the letter is non-binding on the trustee; otherwise, since the grantor can change the letter of wishes at any time, there is a risk that it may appear that the grantor has retained control over the trust assets, and this could cause inclusion of the assets in the grantor's estate.
 - Legal counsel can also make sure that the non-binding suggestions to the trustee do not conflict with the terms set forth in the will or trust instrument.
 - Finally, it is also important that a letter of wishes not direct the trustee to treat the beneficiaries unequally; any differences in treatment should be stated in the will or trust instrument itself.



Other Considerations



Thank You!

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Questions and Answers

