



Problematic Trust Language

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PROBLEMATIC TRUST LANGUAGE

Today's Agenda

1. Reviewing Trusts for New Business Acceptance
 - Protocol for Legal, Risk and Fiduciary review for acceptance
 - Problematic language
2. Trust Administration with Problematic Language
 - Discretionary distributions
 - Precatory language and letters of wishes
3. Modifying Irrevocable Trusts
 - Different modification options
 - Protocols for deciding on modification
 - Risk inherent in modifying
4. Takeaways

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Reviewing Trusts for New Business Acceptance

Best practices for Legal, Risk and Fiduciary review for acceptance

“The Big Three”

- Ability to resign. Is court approval required?
- Compensation provisions. There should be no ceiling on trustee’s fees. Is the language regarding compensation to trustees, or other named trust advisors, clear and flexible?
- Identify the trust’s governing law. Is it clear what law governs? Does the trustee named have the power to act as trustee in the designated jurisdiction?
 - Directed Trust issues
 - Uniform Law Commission drafting committee on Conflict of Laws in Trusts and Estates Act



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Reviewing Trusts for New Business Acceptance

Best practices for Legal, Risk and Fiduciary review for acceptance

Can the Trust be administered as written?



- Are there gaps in the dispositive provisions, inconsistencies or ambiguities, or other issues in administration?
- Examples:
 - Is it clear who the beneficiaries are now and at future stages of the trust?
 - Are all income and all principal disposed of under all possible circumstances?
 - Are the dispositive provisions workable and avoid conflict or litigation?
 - How does the trust terminate? Can it terminate if it falls below a minimum value?
 - Give the size of the current trust and number of remainder beneficiaries, is there any risk many small trusts will be created?

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Reviewing Trusts for New Business Acceptance

Best practices for Legal, Risk and Fiduciary review for acceptance

Can the Trust be administered as written? - continued



- More Examples:

- Are any discretionary or non-discretionary powers clear: who holds it, how is it exercised?
- Who has investment responsibility for non-marketable assets?
- Is corporate trustee authorized to use an affiliate for investment or other services?
- Are the provisions related to multiple trustees clear? Is action by majority vote or is unanimity required? Is there a tie-breaker provision?
- Are there provisions for accounting and for appointment of successor trustees without having to go to court?

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Reviewing Trusts for New Business Acceptance

Problematic Language

Examples

- Mandatory arbitration or mediation provision
- No contest clause/disinherited heir
- Language allowing trustee to change situs
- Successor trustee directed to accept accounts of predecessor trustee without review
- Broad and/or unworkable discretion including trustee determination of incompetency
- Language on who receives accountings/notices
- Confidential or silent trusts and designated representative
- Will trustee be acting as both trustee and lender?
- Conflict waivers



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Reviewing Trusts for New Business Acceptance

Problematic Language

More Examples

- Trustee power to amend to eliminate or add a power of appointment or exercise power
- Trustee power to appoint successor trustee or investment director
- Power to decant or modify trust
- Backdating
- Asset concentrations
- Special or non-publicly traded assets/real estate
- Delegation
- Pot trusts or common fund
- Drug or substance abuse provision (testing)



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Trust Administration

Discretionary Distribution Issues

- Standards
 - Support and maintenance
 - Health
 - Education
 - Best interests and welfare
 - Comfort
 - Happiness
 - Standard of living
 - In trustee's sole discretion

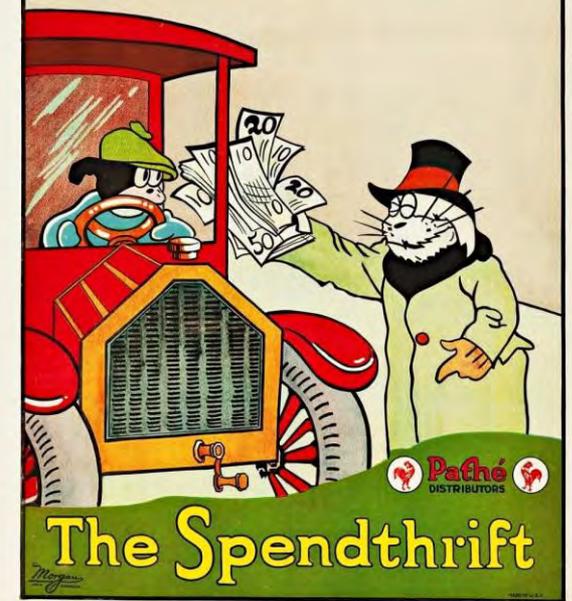


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Trust Administration

Discretionary Distribution Issues

- Consideration of assets outside of trust
- Authority to make gifts from a trust
- Co-trustee approval
- Spendthrift provisions
- Distributions to purchase a home or start a business



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Trust Administration

Precatory language and letters of wishes

- Statement of Wealth Transfer Intent or Letter of Wishes?
- Examples



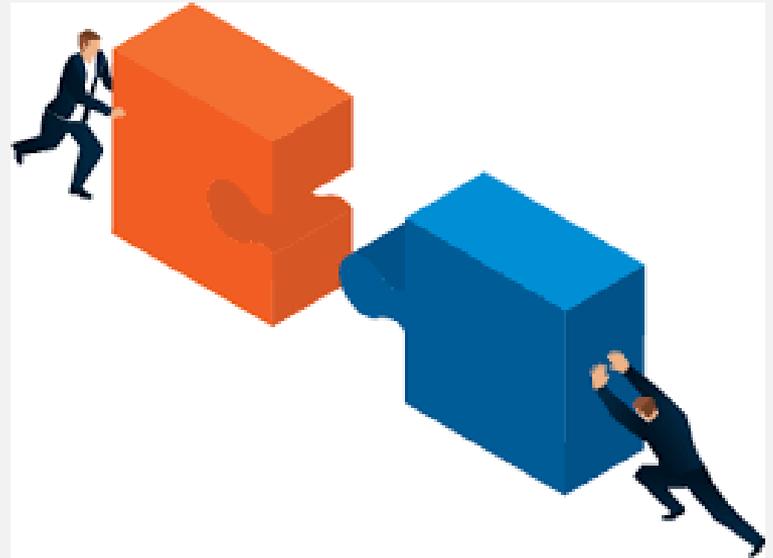
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Modifying Irrevocable Trusts

Different Modification Options

I thought irrevocable meant irrevocable?!

- Judicial Modification and Reformation
- Nonjudicial Settlement Agreements
- Merger
- Decanting



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Modifying Irrevocable Trusts

Protocols for Deciding on a Modification

Best Practices

- Role of Settlor's Intent/Material Purpose
 - Identifying Settlor's Intent
 - Four Corners of the Trust Document—Plain Meaning Rule
 - Extrinsic Evidence: Statement of Intent/Letter of Wishes
- Use of Trust Protectors to Assist in Modification
- Change of Law or Situs
- Does Trustee have a duty to modify?



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Modifying Irrevocable Trusts

Protocols for Deciding on a Modification

Best Practices

- Judicial Modification and Reformation
- Nonjudicial Settlement Agreements
 - Do you have everyone represented, actually or virtually?
 - When should you obtain court approval anyway?
- Merger
 - Trustee is required to ensure any merger will not substantially impair the accomplishment of the trust purpose.



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Modifying Irrevocable Trusts

Protocols for Deciding on a Modification

Best Practices

- Decanting
 - Consent or Notice
 - Changing a Beneficial Interest
 - Term of the Second Trust and the Rule Against Perpetuities



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Modifying Irrevocable Trusts

Risks Inherent in Modifying

Do No Harm

- Can you modify a Spendthrift Trust to terminate it?
- Modifying a Grandfathered Trust for GST Purposes
- Modifying a Zero Inclusion Ratio Trust for GST Purposes
- Is it a happy family situation?
- Successor Beneficiaries
- Risk of Litigation



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Takeaways

5 Lessons



- Onboarding process is key.
- If the parties are in litigation in the past or now, they will be fighting in the future.
- Start any new trustee relationship in the cleanest possible way.
- Ensure all parties to any modification are represented.
- Fiduciaries need to remember they have fiduciary duties.

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