

DRAFTING TO AVOID LITIGATION

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

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance". (F.S. §736.1009)

Increase in use of long-term trusts (generation-skipping, increase perpetuities term) makes the use of clarity in drafting all the more important.

**EXAMPLES OF SUBJECTS WHERE THOUGHTFUL
DRAFTING IS IMPORTANT TO REDUCE POSSIBILITY OF
LITIGATION:**

- Fiduciary issues
- Disposition of tangible personal property
- Change of situs or governing law
- Substance abuse
- Digital assets
- Business valuation
- Coordination among various estate planning documents

DISCRETIONARY TRUST ISSUES



Meaning of frequently used standards:

1. Health
2. Education

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

- At what **moment in time** is the standard to be applied?
- To what extent should the beneficiary's other resources be considered?
- Consider use of **statement of intent** when broad grant of discretion is given.

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

- Will or trust reformation to correct mistakes
- Will or trust modification to achieve tax objectives
- Judicial/nonjudicial modification of irrevocable trust
- Modification or termination of uneconomic trust
- Decanting
- Declaratory judgment action

CONCLUSION:

“Costly litigation produces only a guess as to what the settlor would have intended if the precise question in issue had been presented to him. As is often the case with constructional problems, recurring questions can readily be dealt with if not overlooked by the draftsman.”