

# Drafting Wills, Trusts, and Other Estate Planning Documents

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1. Why good drafting matters.
  - 1.1 Communication—consider your audience.
  - 1.2 Ethics.
  - 1.3 Reduce your malpractice risk.
2. How badly do lawyers draft?
  - 2.1 My clients had recently moved into a retirement home under a life care contract that required them to pay an entrance fee of several hundred thousand dollars. Under the agreement with the home, when the second of them moved out, for whatever reason, 90% of the entrance fee would be refunded. The agreement provided that the residents could direct to which of them the refund would be paid, but the default was that their right to the refund was held jointly and the refund would be payable to the two of them or to the survivor. To balance the clients' estates for federal estate tax planning reasons, we wanted the refund to be payable only to the wife or, if she died first, to her estate or successors.
  - 2.2 Exhibit A is the direction for payment that I drafted and had my clients deliver to the home's management office.
  - 2.3 Exhibit B is what I got back from the home's lawyer—a partner with the Denver office of a national law firm.
  - 2.4 You be the judge.
3. Why don't estate planners draft better?
  - 3.1 The law is complex.
  - 3.2 It's hard work.
  - 3.3 We draft for too many audiences, or for the wrong audience.
  - 3.4 Law schools and law firms don't emphasize good drafting.

3.5 We are too cautious.

#### 4. Matters of Style

##### 4.1 Use standard English

- (A) The friendly audience
- (B) The potential unfriendly audience: the “reader in bad faith”
- (C) It is a myth that legalese is more precise than plain language:

[W]hen you redraft in plain language, you inevitably uncover gaps and uncertainties in legalistic writing. The fog lifts, the drizzle ends, and the light shines through. So I’ll say it again: plain language is usually *more* precise than traditional legal style. The imprecisions of legalese are just harder to spot.

Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 Scribes J. Legal Writing 109, 114 (1998-2000) (Emphasis in original; footnote omitted).

4.2 Ambiguity and vagueness: Strive to eliminate ambiguity and to use an appropriate degree of specificity or vagueness.

##### 4.3 Avoid the passive voice

- (A) “All trust property not disposed of under the foregoing provisions . . . shall be administered and distributed as provided in this article.” OB\* Form 13, Revocable Trust § 8.1.
- (B) “My agent is authorized to execute consents, waivers, and releases of liability on my behalf . . . .” OB Form 4 MDPA.
- (C) “All the remainder of my estate, including property referred to above that is not effectively disposed of, shall be referred to in this will as my ‘residuary estate.’” OB Form 6, Nontrust Will, § 3.1.

4.4 Words of authority: avoid the inconsistent and incorrect use of “shall”

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\* “OB” refers to *The Orange Book: Colorado Estate Planning Forms* (6<sup>th</sup> ed. 2005).

(A) Examples

- (1) “My agent shall have the following authority . . . .” OB Form 1, GDPA.
- (2) “The appointment of the guardian . . . shall become effective upon my . . . death . . . .” OB Form 3, Appointment of Guardian.
- (3) “I direct that no fiduciary shall be required to give any bond . . . .” OB, Form 6, Nontrust Will § 6.2.
- (4) “No beneficiary shall have any right to anticipate, sell, assign, mortgage, pledge, or otherwise dispose of or encumber all or any part of any trust estate established for his or her benefit under this instrument.” OB, Form 7, Contingent Trust Will § 8.4.
- (5) “During the life of my spouse, my trustee shall pay to, or apply for the benefit of, my spouse no less frequently than quarter-annually all of the net income of the Family Trust from the date of my death.” OB Form 8, Disclaimer Will § 4.2.

(B) Adopt either the ABC rule or the American rule.

4.5 Use the present tense when possible and write trusts and powers of attorney, not just wills, in the first person.

4.6 Dig up buried verbs and re-verbify them.

(A) Buried verbs or nominalizations are verbs that have been turned into nouns. Buried verbs give documents an abstract sense and often obscure the actor and the action.

(B) Verbs are more powerful than nouns. Change the nouns back into their verb forms to make your writing more concrete.

(C) Buried verbs are characterized by the endings *-tion*, *-sion*, *-ment*, *-ence*, *-ance*, and *-ity*. Search for these endings and turn the nouns back into verbs.

(D) Examples:

- (1) A “memorandum directing the disposition of” property becomes a “memorandum disposing of” the property.

(2) “Without diversification” becomes “without diversifying.”

4.7 Numbers: “I give Four Hundred and Eight Thousand Dollars (\$480,000.00) to my friend, John.”

4.8 Keep it Short

(A) Omit needless words.

(B) Prefer short, ordinary words.

(C) Keep sentences short—reduce your average sentence length to 20–25 words.

(D) Use short paragraphs.

4.9 Eliminate provisos.

4.10 Eliminate legalisms

(A) In the event

(1) “In the event it becomes necessary to appoint a guardian or a conservator for me, I direct . . . .” OB Form 1 GDPA.

(2) “In the event that the only procedure I am being provided is artificial nourishment, I direct . . . .” OB Form 5, Living Will.

(B) Such

(1) “I am married to \_\_\_\_\_. Any reference in my will to my spouse is to *such* person. My children now living are \_\_\_\_\_, born \_\_\_\_\_, and \_\_\_\_\_, born \_\_\_\_\_. Any reference in my will to my children is to *such* children.” OB Form 6 Nontrust Will, Article 1. Emphasis added.

(2) “I give all my household goods, personal effects, and other articles of tangible personal property, together with any insurance policies covering *such* property and claims under *such* policies, to my spouse . . . . If my spouse does not survive me, I give *such* property in accordance with any memorandum . . . . If my spouse does not survive me, and if for any reason no *such* memorandum is in

existence at my death, or to the extent *such* memorandum fails to dispose of all of *such* property effectively, I give *such* property not disposed of, except *such* property used in any business in which I may have an interest, to my children . . . . in shares of substantially equal value, to be divided among them as they and *such* other person as my personal representative may select to represent any child of mine believed by my personal representative to be incapable of acting in his or her own best interest, shall agree. In case my children and *such* other person do not agree upon the division of such property within three months after the appointment of my personal representative, my personal representative shall make the division. Notwithstanding the foregoing, should my personal representative determine that it would not be in the best interest of my children to receive possession of any item of *such* property, my personal representative may sell *such* item and add the proceeds to my residuary estate.” OB Form 6 Nontrust Will, Article 2. Emphasis added. Twelve instances of *such* in five sentences, or a *such* ratio of 2.4:1.

(C) Others and suggested replacements:

<b>Eliminate</b>	<b>Replace with</b>
and/or	
commence	
corpus	
deem (as in “the trustee may distribute such amounts of income as the trustee deems appropriate”)	
during such time as	
executrix	
Federal	
following (as in “following my death”)	
hereby	

<b>Eliminate</b>	<b>Replace with</b>
herein	
indebtedness	
issue	
notwithstanding	
prior to	
predecease	
pursuant to	
residue	
spouse	
subsequent	
subsequently	
testatrix	
Will	

4.11 Observe the distinction between *that* (restrictive) and *which* (nonrestrictive).

- (A) *Which* is frequently used when *that* is called for, as in: “The marital deduction amount shall be reduced by the value of any interest in property *which* qualifies for the marital deduction and *which* passes or has passed from me to my spouse other than by this article.” OB Form 8, Marital Deduction Will § 3.2(b).Emphasis added.
- (B) *That* is not often used when *which* is called for, but the comma required before *which* is often omitted, as in:“Settlor reserves for settlor’s lifetime the following powers *which* settlor may exercise at any time or times . . . .” OB Form 13, Revocable Trust § 2.6.
- (C) Hints:
- (1) If you need a comma before the word that introduces the next phrase, then that word should be *which*, not *that*.

- (2) Remember the song from *Grease*: it's not "You're the One Which I Want."

#### 4.12 Definitions

- (A) Be a minimalist.
- (B) Flagging defined terms
- (C) Where to put definitions
- (D) How to write definitions
  - (1) Lexical definitions: "Code" *means* [not *refers to* or *shall refer to*] the United States Internal Revenue Code of 1986, as amended.
  - (2) Stipulative definitions: "'Personal representative' includes an executor, administrator, guardian, and conservator."

### 5. The physical appearance of your documents

#### 5.1 Consider the typeface (font).

<b>Serif fonts</b>	<b>Sans-serif fonts</b>
Courier 12-point	Arial 12-point
Times New Roman 12-point	Century Gothic 12-point
Times New Roman 13-point	<b>Franklin Gothic Medium 12-point</b>
Book Antiqua 12-point	<b>Quick Type Condensed 12-point bold</b>
Bookman Old Style 12-point	<b>Tahoma 12-point bold</b>
Garamond 12-point	Vrinda 16-point bold

#### 5.2 Don't double-space between sentences.

#### 5.3 Consider alignment.

“4.1 PERSONAL REPRESENTATIVE: I nominate my spouse as my personal representative. If my spouse fails or ceases to act as my personal representative, I nominate \_\_\_\_\_ of \_\_\_\_\_ as my personal representative.”  
OB Form 6, Nontrust Will, § 4.1.

5.4 DON'T SHOUT. NEVER USE ALL CAPS!

5.5 If you want to highlight names, use **bold** or *italic* or **both**, but don't use ALL CAPS.

6. Becoming a better drafter is a life-long process.

6.1 Write and rewrite.

6.2 Cultivate the “confident drafter’s attitude.” Your goal is to be able to look at any provision from an estate planning document and say, “that’s okay,” or even “that’s pretty good,” but also say “but I can make it better.”

Exhibit A—Direction for Payment

## Written Directions Concerning Payment of Refund of Entrance Fee

To: Home, LLC (“Home”)

From: Husband and Wife

Date: August 18, 2006

Re: Payment of Refund of Entrance Fee to Wife

We are residents of Home, Unit 1234, in accordance with a Care and Residence Agreement dated January 1, 2005. In Section II. of the Multiple Resident Rider attached to the Care and Residence Agreement, we elected to be treated as Joint Occupants. Section III. of the Multiple Resident Rider provides that because we elected Joint Occupant status, the right to obtain the refund of the Entrance Fee is joint and several and that the Entrance Fee Refund will be payable to us jointly or to the survivor, unless we specify otherwise in written directions to Home. We now direct that, instead of being payable to us jointly or to the survivor, the Entrance Fee Refund will be payable solely to Wife or, if she is not living at the time the refund becomes payable, to her estate or to the beneficiary of her estate that acquires the right to the refund.

Date: \_\_\_\_\_, 2006

\_\_\_\_\_  
Husband

\_\_\_\_\_  
Wife

### Acknowledgment of Receipt

Home acknowledges receipt of these Written Directions Concerning Payment of Refund of Entrance Fee.

Home, LLC

Date: \_\_\_\_\_, 2006

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**DIRECTION FOR PAYMENT OF ENTRANCE FEE UPON TERMINATION OR  
VACATION UNDER RESIDENCY AGREEMENT  
WITH [HUSBAND] AND [WIFE]**

This Direction for Payment of Entrance Fee Upon Termination or Vacation (the “Direction”) is made this \_\_\_\_ day of August, 2006 by [HUSBAND] AND [WIFE] (collectively, the “Residents”).

RECITALS:

A. Home, LLC (“Home”) owns and operates the continuing care retirement community known as Retirement Community (the “Retirement Community”) for persons 55 years of age and older.

B. The Residents have entered into a Care and Residency Agreement dated as of January 1, 2005 (the “Residency Agreement”) with Home for occupancy by Resident of Apartment Number 1234 at the Retirement Community (the “Apartment”) and, in connection therewith, the Resident has, on behalf of and for the benefit of the Residents, paid to Home an Entrance Fee in the amount of [\$\_\_\_\_\_] (the “Entrance Fee”). The Residency Agreement requires a refund of a portion (equal to 90% thereof) of the Entrance Fee upon the vacation of the Apartment by the Residents or otherwise upon termination of the Residency Agreement under the terms and in accordance with the time frames set forth in the Residency Agreement. Capitalized terms used and not defined herein shall have the meaning given such terms in the Residency Agreement.

C. The Residents desire to deliver this Direction to Home for the purpose of directing that any Refund of the Entrance Fee otherwise due and payable to the Residents shall be payable as set forth herein in the event of the death of both Residents.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Residents hereby direct that, UPON THEIR DEATH, any Entrance Fee Refund due to the Residents shall be payable as follows: (i) the Entrance Fee shall be deemed to be held for the benefit of both Residents under the terms and as required pursuant to the terms of the Residency Agreement and, in the event that one of the Residents pre-deceases the other, the Entrance Fee shall be held and maintained solely for the benefit of the other surviving Resident under the terms of the Residency Agreement, and (ii) in the event that the last of the two Residents is deceased (or if both Residents die together), then the Entrance Fee shall be payable to the estate of Wife only (the “Directed Recipient”). In the event that there is a Refund due to the Residents or either of them upon the vacation of the Apartment while such Resident or Residents are still living, then the Refund shall be paid directly to such Residents or Residents under the terms of the Residency Agreement. This Direction is applicable only upon the death of both of the Residents.

The Resident acknowledges and agrees that (A) the Refund due to be refunded under the terms of the Residency Agreement shall be net of all costs and expenses allowed to be offset by Home or that are otherwise due from the Residents under the terms of the Residency Agreement, (B) this Direction for payment of Entrance Fee Refund to the Directed Recipient does not grant to the Directed Recipient any right, title or interest in or to the Residency Agreement or the rights therein granted to the Residents and does not grant to the Directed Recipient the right to determine the rights or obligations of the Residents (including, without limitation, the right to determine whether the Residents or either of them is to be moved to a higher level of care or otherwise required to vacate the Apartment (it being the intent that only the Residents shall have the rights and obligations under the Residency Agreement unless a person has been appointed a legal guardian with the right to make such determinations on behalf of the Resident), and (C) the Refund to the Designated Recipient under the terms of (ii) above shall be made subject to the conditions and restrictions (including the timing of payment thereof) as set forth in the Residency Agreement.

**Residents represent that, in directing payment of the Refund as set forth in (ii) above upon the death of the Residents, the Residents have made arrangements, whether in their applicable wills or otherwise, in a manner consistent with this Direction;** it is solely the responsibility of the Residents to take steps necessary to conform their wills and/or other estate planning documentation to conform to the requirements of this Declaration. By agreeing to comply with this Direction, Home bears no responsibility for the estate tax consequences, if any, of the delivery of the Refunds to the Designated Recipient under the direction outlined in (ii) above.

This Direction shall be maintained by Home with the Residency Agreement and shall be deemed to be effective unless the Resident revokes this Direction by written notice to Home.

RESIDENT:

\_\_\_\_\_  
Print Name: Husband  
Address: \_\_\_\_\_  
City/State/Zip: \_\_\_\_\_  
Telephone/Fax: \_\_\_\_\_

RESIDENT:

\_\_\_\_\_  
Print Name: Wife  
Address: \_\_\_\_\_  
City/State/Zip: \_\_\_\_\_  
Telephone/Fax: \_\_\_\_\_

**RECEIPT OF DIRECTION ACKNOWLEDGED THE \_\_\_\_\_ DAY OF SEPTEMBER, 2006.**

HOME, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## Exhibit C—Formatting Mistakes

### ARTICLE 3. - DISPOSITION OF TRUST PRIOR TO DEATH OF SETTLOR

Prior to the death of settlor, the provisions of this paragraph shall apply to transfers to the trust.

Powers of Withdrawal: Commencing with the date on which any property is transferred to the trust: (i) each beneficiary who is the subject of a designation pursuant to paragraph 3.2 shall have the power to withdraw from the trust the designated amount; or (ii) if no express designation was made pursuant to paragraph 3.2, then each member of the class consisting of settlor's spouse and children shall have the power to withdraw from the trust the least of: (A) an amount equal in value to that portion of the transferred property determined by dividing the value of such property by the number of persons possessing withdrawal powers; (B) the amount of the federal gift tax annual exclusion under IRC section 2503(b), per transferor; or (C) the maximum amount relative to which the lapse of a power of withdrawal is not considered a release of such power under IRC section 2514(e).

Transfer Defined: The term "transfer," for purposes of this article, means any direct or deemed transfer of property to this trust that is a completed gift for federal gift tax purposes. The amount of any transfer shall be its value for federal gift tax purposes.

Deemed Transfers: If any person other than trustee pays all or any part of a premium on a life insurance policy owned by the trust, such payment shall be deemed a transfer to the trust, as of the date of such premium payment, to which the powers of withdrawal provided in [the preceding] paragraph shall apply.

Withdrawal Procedure: The holder of a power of withdrawal under this paragraph may exercise the power by written request delivered to trustee. If a holder is incapacitated during part or all of a withdrawal period, his or her power of

**3. Disposition of Trust Prior to Death of Settlor.** Prior to the death of settlor, the provisions of this paragraph shall apply to transfers to the trust.

**3.1 Powers of Withdrawal:** Commencing with the date on which any property is transferred to the trust:

(A) each beneficiary who is the subject of a designation pursuant to paragraph 3.2 shall have the power to withdraw from the trust the designated amount; or

(B) if no express designation was made pursuant to paragraph 3.2, then each member of the class consisting of settlor's spouse and children shall have the power to withdraw from the trust the least of:

(1) an amount equal in value to that portion of the transferred property determined by dividing the value of such property by the number of persons possessing withdrawal powers;

(2) the amount of the federal gift tax annual exclusion under IRC section 2503(b), per transferor; or

(3) the maximum amount relative to which the lapse of a power of withdrawal is not considered a release of such power under IRC section 2514(e).

**3.2 Transfer Defined:** The term “transfer,” for purposes of this article, means any direct or deemed transfer of property to this trust that is a completed gift for federal gift tax purposes. The amount of any transfer shall be its value for federal gift tax purposes.

**3.3 Deemed Transfers:** If any person other than trustee pays all or any part of a premium on a life insurance policy owned by the trust, such payment shall be deemed a transfer to the trust, as of the date of such premium payment, to which the powers of withdrawal provided in paragraph 3.1 shall apply.

**3.4 Withdrawal Procedure:** The holder of a power of withdrawal under this paragraph may exercise the power by written request delivered to trustee. If a