DRAFTING QUALITY OF LIFE PROVISIONS FOR REVOCABLE TRUSTS AND POWERS OF ATTORNEY

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(The author wishes to express his thanks to Professor Valerie J. Vollmar, Willamette University School of Law; James A. Perry, Vice President and Manager, U.S. Bank Trust Group; and Marcia L. Jory, Vice President and Manager, First Interstate Bank Trust Department; Kathy Kearns, Carol Gundlach and the staff at Resource Connectors, Ltd., a Health Care Management and Consultation Firm providing private case management in Portland, for their assistance with these materials.)

(The author also wishes to thank NAELA member, Janet L. Kuhn, Attorney at Law in McLean, Virginia, for permission to use portions of her article published in the NAELA Quarterly entitled **Revocable Living Trusts: Planning for the Possible Incapacity of the Affluent Client**, Fall 1991, pp 12-14.)

I. INTRODUCTION

As attorneys, our first priority is to promote the objectives of our client. For estate planners, this has historically been planning of our client's death. The client's primary objective was to maximize the inheritance by reducing or avoiding taxes and probate expenses. Wills and trusts were the tools used most often to accomplish these goals.

Many attorneys are now seeing a change or "evolution" in client objectives. Clients now are less interested in maximizing an "inheritance" and more concerned with maximizing and preserving their personal autonomy and providing for their continued care and comfort.

Society has been changing. Many people are no longer able to rely upon a close and supportive family to be there in times of need. They are looking for other options and other protection.

Elderlaw attorneys are now being asked to find the legal mechanisms which will assure that the client's wishes for both personal care and asset management will be implemented. This becomes even more important when the client is faced with an incapacitating illness or injury.

Elderlaw attorneys are beginning to use the revocable trust, the power of attorney and other documents as the tools to facilitate more options and, therefore, more protection for our clients. But to do this, we must go beyond the normal estate planning philosophies (death and taxes) and look at the types of drafting options that can protect and preserve our client's quality of life.

II. PERSONAL ISSUES AND DRAFTING OPTIONS

For the past 20 years, the Revocable Living Trust has been increasing in popularity. The primary purpose of the revocable trust (or at least the focus of its marketing) has been to avoid the time and expense of probate. While this is an admirable goal, it is this author's opinion that the revocable trust can be, and should be, much more. (The following materials and drafting options also apply to the drafting of durable powers of attorney. For simplicity, the materials will focus upon the Revocable Living Trust.)

A properly drafted Revocable Living Trust can do more than - avoid probate. The revocable trust, in combination with powers of attorney and other documents (advance directive, etc) can also afford our clients with more protection and more assurance that their wishes will be implemented.

The revocable trust can allow the client to be her own trustee and retain control over her finances for as long as possible - hopefully, forever. If the client becomes incapacitated, a successor trustee, appointed by her, steps in to control the trust and provide for the client. The trustee **must** follow the client's instructions and directions. In this manner, the client is still able, as much as is possible, to control the management of her assets and her personal care.

The Revocable Living Trust is flexible and can be tailored to the specific needs, desires and financial resources of the client. This includes the ability to provide for the care and comfort of the settlor/beneficiary.

Specific instructions for care and comfort are even more important when the successor trustee is an institution (bank or trust company) or a family member who is very busy or geographically remote.

The following options should be discussed with the client and included in the trust document, if the client so desires:

1. <u>Make clear the first priority of the successor trustee is to spend the client's money - on the client</u>. He should be made as comfortable as possible. If this results in the remainder beneficiaries receiving less, so be it.

> ***Drafting Option 1: Trust Purpose***
> *"The primary purpose of this trust is to provide me with the highest possible quality of life. My trustee is instructed to exercise in a liberal manner my trustee's power to make distributions for this purpose. The rights of other trust beneficiaries shall be secondary to my rights as a trust beneficiary."*
>
> ***Drafting Option 2***
> *"I direct my trustee to conserve my assets to a point; however, my quality of life and the provision for that quality of life shall take precedence over the rights of*

the remainder beneficiaries, upon my death."

2. Specify that the client prefers to be cared for at home. Make it clear that the client prefers this, even if the cost of such care would be significantly greater than the cost of nursing or other community based care.

Drafting Option: Stay at Home
"My trustee is specifically directed to use income and principal of the trust to allow me to live in my home as long as medically possible. My trustee may retain a geriatric care manager to establish and supervise home care for me and to develop a care plan which will allow me to remain at home. If 24-hour nursing care is required in order for me at home, I direct my trustee to obtain such care (including any necessary equipment) as is reasonable under the circumstances. I express my strong desire to remain in my home, rather than being placed in any convalescent or long-term care facility."

3. Authorize the trustee to retain a geriatric care manager. Private case management services are becoming more available and more popular to assist trustees in the daily management and care needs of the beneficiary. The geriatric care manager can be assist with assessment and identification of the client's health and psycho-social concerns, and to make recommendations about the best method of addressing those concerns.

Drafting Option: Hire Care Manager
"I authorize my trustee to retain and utilize the services of a Geriatric Care Manager (optional: who adheres to the standards for care management as outlined by the National Council on Aging and/or the National Association of Professional Geriatric Care Management), to manage my health and psycho-social concerns."

4. Authorize the trustee to retain a geriatric care manager to establish and supervise home care for the client.

Drafting Option: In-home Care
"I authorize my trustee to retain a Geriatric Care Manager to assess my functional needs and to assist me, my family and my trustee in establishing and supervising in-home support services, including hiring and supervision of household help and personal care providers. It is my express intention to remain at home for the longest possible time and that shall be the goal of the care manager."

5. Authorize the trustee to provide additional services and care monitoring if the client become hospitalized or requires placement in a long-term care facility.

Drafting Option: Care Monitoring and Personal Needs
"If I am hospitalized or require placement in a nursing or other long-term care

facility, I direct my trustee to take such steps as are necessary to assure frequent monitoring of the quality of my care and to provide for my health and psycho-social needs, including, but not limited to, providing for a private room, extra caregivers and companions, therapy, availability of my favorite foods and entertainment."

6. Authorize the trustee to provide for other personal needs and comforts.

Drafting Option 1: Recreation and Travel
"My trustee shall provide me with appropriate recreational and sports activities, including travel as my health permits, and attendance at concerts and other musical, theatrical or sporting events."

Drafting Option 2: Companions
"My trustee shall employ or arrange for volunteer companions when necessary to enhance my quality of life to assist me to live in my own residence and avoid institutionalization. In selecting companions, my trustee shall consider my personal preferences."

Drafting Option 3: Spiritual Concerns
"My trustee shall provide for the involvement of clergy or spiritual leaders in my care, give them access to me at all times, maintain my membership in religious or spiritual organization or arrange for memberships in such groups, as I may select and enhance my opportunities to derive comfort or spiritual satisfaction from activities, books, tapes, and other materials.

Drafting Option 4: Group Affiliations
"My trustee shall continue to provide for my involvement and membership in any social, political or spiritual groups or organizations I was affiliated with prior to my incapacity. This shall include, but not be limited to, continuing my membership, payment of dues and membership fees, allowing my attendance at group meetings and activities, allow for gifts similar to my previous gifting, provide for the purchase of books, tapes, and other materials."

7. Authorize the trustee to provide for or continue legal representation.

Drafting Option 1: Legal Representation
"If I so request, my trustee shall retain, at the expense of the trust, an attorney, who shall act as my individual counsel, for the purpose of protecting my interests and assuring that my instructions, as expressed in this trust instrument, are followed and will be accepted by a court as being in my "best interests." If I am incapacitated to such an extent that I cannot so request, I authorize my trustee to act in the same manner, if my trustee deems is it appropriate."

Drafting Option 2: Legal Representation
"If there should be a conflict as to my care needs and/or for the provision for

those care needs, I authorize my trustee to seek the assistance of my attorney to assist in the resolution of the conflict. I believe my attorney is in the best position to understand and represent my concerns and intentions.

III. LEGAL ISSUES AND DRAFTING OPTIONS

The "terms of the trust" control every aspect of the trust, including the trust purpose, the incapacity of the settlor/beneficiary, the appointment of successor trustee(s), the duties and powers of the trustee, and the nature and extent of distributions to the beneficiaries. See ORS 128.007.

Each of the following legal issues requires attention by the drafter of the trust.

A. Statement of Trust Purpose

Although often neglected in the modern Revocable Living Trust, the statement of trust purpose is an important component in a well-drafted trust.

In Rushlight v. Seton, 145 Or. 1, 23 P.2d 1112 (1933) at page 4, the court stated:

> "... in our opinion it (the decision of the trustees) is not in keeping with the **true purpose** and **spirit** of the will (testamentary trust). Under such circumstances, it becomes the duty of the court of equity to supervise the execution of the trust that the **will of the testator** will be carried into effect." (emphasis added)

The objective of the Statement of Trust Purpose is to clearly express the intent of the settlor. As such, it provides direction and it empowers the trustee to act accordingly. It is the philosophy and the goal of the trust.

> ***Drafting Option 1: Trust Purpose***
> *"The primary purpose of this trust is to enhance my comfort and personal dignity during my lifetime."*
>
> ***Drafting Option #2 - Trust Purpose***
> *"The primary purpose of this trust is to provide me with the highest possible quality of life. My trustee is instructed to exercise in a liberal manner my trustee's power to make distributions for this purpose. The rights of other trust beneficiaries shall be secondary to my rights as a trust beneficiary."*

B. Incapacity

The "quality of life" drafting discussed in this chapter is most often implemented when the settlor/beneficiary becomes incapacitated. At that time, the settlor is no longer able to modify the trust or direct distributions. Also, a successor trustee is appointed to administer the trust and make distributions to the beneficiary(ies).

The first legal issues to consider are, therefore:

(a) when is the settlor/beneficiary considered to be incapacitated; and
(b) who will make that decision.

When is a client or client's family member no longer capable of making decisions for themselves? I have yet to find a more difficult question to answer or a more difficult decision for a family to make. For a more detailed discussion of the legal issues concerning capacity, see Attachment 1 to this outline on Page 4A-16.

The drafter should define the term "incapacity" or "incapacitated" and should create a procedure to determination. The client should be directly involved with the drafting to insure that the client's personal wishes and desires are followed.

Drafting Option 1: Incapacity
"If I become incapacitated, I name (successor trustee) to act as successor trustee. For purposes of this instrument, I shall be considered incapacitated if any physical or mental condition renders me unable to manage the trust estate, including the endorsement and writing of checks, and if such condition is likely to continue for a period greater than 90 days.

My incapacity shall be conclusively established if my regular attending physician (or two physicians, authorized to practice medicine in Oregon or in any state or country in which I am then residing) certify in writing that I am incapacitated. In the absence of such certification, any co-trustee or successor trustee or any beneficiary of the trust may petition any court having jurisdiction to remove me as trustee and if no co-trustee exists, appoint a successor trustee. No trustee or beneficiary shall incur liability as a result of filing a petition, provided the petition is filed in good faith and in the reasonable belief that I am incapacitated."

Drafting Option 2: Incapacity
*"The term **"incapacity"** or **"incapacitated"** refers to a trustor's inability, without assistance, to properly manage or take care of his/her affairs and/or the administration of this trust. A determination of incapacity shall be made (a) by a decision of incompetency from a court of competent jurisdiction or, in the absence of such adjudication, (b) by written certificates executed by two licensed physicians. The trustee may rely conclusively on the certificates."*

Drafting Option 2: Incapacity - Personal Choice
"*I direct my trustee to consult with Dr. Jane Jones, if available, as one of the licensed physicians referred to in this paragraph.*"

PRACTICE NOTE: There are many client who, because of personal or religious beliefs or bias, prefer the decision be made by someone other than a physician. Consider including language which allows a practitioner, healer, clergy, friend or family member to be the decision maker (or co-decisionmaker). AVOID naming the successor trustee or a beneficiary, unless you have fully discussed the potential conflict of interest with your client.

Drafting Option 4: Incapacity - Ability to Contest Decision
"In the event that the grantor disagrees, in writing, with the determination of one or more physicians that the grantor is incapacitated, the above authorization is revoked. In that event, a co-trustee or successor trustee or beneficiary(ies) hereunder must petition the court having jurisdiction over this trust for a finding or determination of incapacity."

C. Appointment of a Successor Trustee

For clients with substantial assets, but with no close family, an **institutional trustee** (bank or trust company) can be a good choice for successor trustee. Many authors recommend the combination of co-trustees, one of which is a family member and the other of which is a corporate banking institution. The individual member can provide the necessary family tie and discretionary insight while the banking institution can provide the financial expertise in asset management. Although each of the trustees is entitled to a fee, the family trustee may accept a nominal or reduced fee.

Drafting Option: Individual and Corporate as Co-trustees
" My individual trustee and my corporate trustee shall divide their responsibilities as follows:

"(a) Decision about trust administration, management, and distribution shall normally be made by mutual agreement of the trustees. If the trustees cannot agree, the decision of my individual trustee shall control and my corporate trustee shall not be liable for any action taken as a result of the decision. It is my intention that my individual trustee shall control all decisions governing my quality of life, my care and comfort.

"(b) My corporate trustee shall have custody of cash and securities in the trust and be responsible for their safekeeping. My corporate trustee shall also maintain books and records for the trust, submit periodic financial statements to my individual trustee and trust beneficiaries, receive and deposit payments to the trust, and distribute trust funds without the signature of my individual trustee. However, except for routine distributions, my corporate trustee shall distribute trust funds only with prior approval of my individual trustee.

"(c) My corporate trustee may hold securities and other property in its name or in the name of a nominee. No person dealing with my corporate trustee shall be required to verify that my individual trustee has approved of any action.

"(d) My individual trustee may delegate or revoke the delegation of any

trustee powers to my corporate trustee at any time. Any delegation or revocation shall be in writing and delivered to my corporate trustee."

D. Duties of the Trustee

As we discussed in the introduction, historically, trusts were created to preserve assets and maximize the inheritance and ultimate distribution to the beneficiaries. As a result, many of the duties of the trustee are founded upon the principals of assets preservation and growth.

One of the duties created to facilitate these purposes is the **duty to make the trust property productive**.   The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive. Restatement (Second) of Trusts, Section 181 (1959). Hull v. Heimrich, 138 Or. 117, 3 P.2d 758, 6 P.2d 41 (1931).

Also ORS 128.057, dealing with investments by fiduciaries, focuses upon the "*permanent disposition of their funds, considering the probable income as well as the probable safety of their capital*."

With respect to land, the trustee is normally under a duty to lease it or to manage it so that it will produce income. Personal possessions ordinarily must be sold or leased. Restatement (Second) of Trusts, Section 181, Comment *a.* and *b.* (1959).

This power is subject, however, to the **terms of the trust** and the **intent of the settlor**. The Restatement (Second) of Trusts, Section 181, Comment *a.* provides:

> "By the terms of the trust, however, it may be his (the trustee's) duty to give possession of the land to the beneficiary. It may be the duty of the trustee merely to hold the land without making it productive."

The client's home, property and personal possessions often are more important to the client than any other concern. Many clients want the assurance that if they become incapacitated, they will not lose their home, and that their personal things will not be sold or given away. However, such a request is often directly contrary to the general duty to make property productive and **must be specifically drafted.**

Drafting Option 1: Personal Effects
"The trustee may, as the trustee deems advisable, withhold from sale or reinvestment any tangible personal property and may distribute the same to the beneficiaries of the trust created herein irrespective of age and without intervention of a Conservator, at such times and in such manner as the trustee deems advisable."

Drafting Option 2: Occupancy of Residence
"If I occupy any property of the trust estate as a residence, a second residence, or a vacation home, I shall be permitted to occupy or use them rent free. The

trustee shall have no obligation to consider sale of these properties or their contents to make them income-producing assets during such occupancy unless I require the trustee to make such property productive. The trustee shall pay all expenses relating thereto, including, but not limited to, taxes, mortgage or contract payments, insurance premiums, and maintenance costs."

(Drafting options 1 and 2 were developed by David N. Andrews, Attorney at Law, Eugene, Or., as part of his materials entitled **Protective Drafting: How to Stay Out of Trouble**, OSB CLE USING TRUSTS FOR ESTATE PLANNING, February 20, 1992.)

Drafting Option 3: Maintenance of Residence
"The trustee shall not sell nor liquidate my residence even if I am not able to live in my home. The trustee is further authorized to use trust funds to continue the maintenance of my residence while I am away."

Drafting Option 4: Personal Possessions
"The trustee shall not dispose of my tangible personal property unless I give the trustee written permission to do so. The trustee is authorized to use trust funds, if necessary, to store, package or otherwise protect and preserve my tangible personal property."

Drafting Option 5: Personal Possessions
"The trustee shall give to me any item of tangible personal property that I request. This provision shall be effective whether or not I have been determined incapacitated as set forth in this trust. The trustee shall not be liable for protection of any items that I have requested and which the trustee has given to me."

E. Distribution to the Beneficiary

As discussed above, when the settlor/beneficiary become incapacitated, his/her (often unlimited) right to demand distributions from the trust ceases. Most often, it is replaced by very general language providing for the "*support, maintenance and education of the beneficiary*."

The Restatement (Second) of Trusts, Section 128, Comment *d. Discretionary trusts* (1959) states:

> "By the terms of the trust it may be provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his discretion shall see fit to pay or apply. In such a case it depends upon the manifestation of intention of the settlor to what extent the trustee has discretion to refuse to make such payment or application. If the settlor manifests an intention that the discretion of the trustee shall be uncontrolled, the beneficiary **cannot compel** the trustee to make any payment to him or application for his benefit, ..." (Emphasis added.)

In addition, the Restatement (Second) of Trusts, Section 128, Comment *e. Trust for Support* (1959) states:

> "By the terms of the trust it may be provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary. In such a case the beneficiary **cannot compel** the trustee to pay to him or to apply for his benefit more than the trustee in the exercise of a sound discretion deems necessary for his education or support." (Emphasis added.)

Also see Swigert v. Straub/Dept. of Revenue, 9 Or. App. 75, 494 P.2d 888 (1972).

It is also common to see a provision requiring the trustee to "*take into consideration any other income or support received, or property possessed, by the beneficiary*," when making determinations about income or principal distributions.

The Oregon Court of Appeals has held that this language gives "great latitude to the trustee, **not to the lifetime beneficiary** to determine what sums as necessary and advisable." Barnard v. U.S. National Bank of Oregon, 8 Or. App. 608, 495 P.2d 766 (1972).

It is therefore very important that you discuss with your client the nature and extent of the distributions to the beneficiary and the extent of the trustee's discretion.
It may be necessary to specifically direct the trustee, as opposed to allowing the trustee "absolute discretion." Without specific directions, the trustee's discretions may take precedence to your client wishes and desires.

> ***Drafting Options 1: Distributions upon Incapacity***
> *"The trustee shall pay to or apply for my benefit as much of the income and principal of the trust as I direct or as is necessary (optional: in the trustees discretion) for my health, medical care, support, maintenance, comfort and welfare, in accordance with my accustomed manner of living. It is my intention that my quality of life, as much as is possible, not change and that my trustee shall maintain my quality of life in as good or better condition than existed prior to my incapacity.*
>
> *"My trustee is instructed to exercise in a liberal manner my trustee's power to make distributions for this purpose. The rights of other trust beneficiaries shall be secondary to my rights as a trust beneficiary."*
>
> ***Drafting Options 2: Distribution for Support***
> *" My trustee shall (optional: in the trustees discretion) do all acts necessary for maintaining my customary standard of living, to provide living quarters by purchase, lease or other arrangement, or by payment of the operating costs of*

my existing living quarters, to provide domestic help for the operations of my household, to provide clothing, transportation, medicine, food and incidentals, and if necessary to make arrangements for me in a hospital or other medical facility, but with the first priority being care in my own residence; and to assure that all of my needs and comforts are provided for at such facility or in my own residence, as the case may be."

For more information about Trust Distribution Language and Trustee Powers, see S. Kantor, USING TRUSTS IN ESTATE PLANNING, Chapter 1, OSB CLE February 1992; D. Andrews, USING TRUSTS IN ESTATE PLANNING, Chapter 7, OSB CLE February 1992; C. Barrett, REVOCABLE LIVING TRUSTS: Drafting and Problem-solving, Chapter 6, OSB CLE September 1993; W. Fitzwater, REVOCABLE LIVING TRUSTS: Drafting and Problem-solving, Chapter 2, OSB CLE September 1993.

ATTACHMENT #1

(Excerpt from W. Fitzwater, **Planning for the Incapacitated or Disabled Family Member**, OSB CLE BASIC ESTATE PLANNING, May 6, 1994.)

Incapacity

When is a client or client's family member no longer capable of making decisions for themselves? I have yet to find a more difficult question to answer or a more difficult decision for a family to make.

Legally, the issue is one of "**capacity**." ORS 126.003 defines an "incapacitated person" as one whose:

> "*ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety or to manage the person's financial resources.*
>
> *'**Meeting the essential requirement for physical health and safety**' means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.*
>
> *'**Manage financial resources**' means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income*." (Emphasis added.)

Incapacitated persons who are unable to make decisions about their health and safety may require a court-appointed guardian. An inability to manage financial resources may require the appointment of a conservator. In both instances, the rights and the decision-making abilities of the person are substantially reduced.

Supreme Court Justice Douglas once said that we all have the "right to folly." Put another way, we all have the right to make the wrong decisions. The issue, therefore, is not whether we have made the wrong decision, but with what capacity the decision was made.

For example, is bouncing a few checks - evidence of incapacity. Probably not (if it is, we may all be in trouble). On the other hand, overdrafts for the past few months, together with an increased history of unpaid bills, misplaced funds, unexplained gifts, susceptibility to influence and related problems may be evidence of an "inability to manage financial resources."

Except for the language of the statute, there are no clear rules for determining capacity.

Each case must be evaluated independently. The court places weight in the opinions of doctors, psychologists, public social workers, private case managers, family and friends (in my opinion - in that order). The court (or the court visitor) will attempt to contact all relevant parties to get an overall picture of the individual's capacity.

> **PRACTICE NOTE**: A medical diagnosis of dementia (ie. Alzheimer's, organic brain syndrome, etc.) does not, in and of itself, constitute a legal finding of incapacity. Until a court determines, as a matter of law, that the individual is incapacitated, that person retains **all** of their rights and their decision-making abilities. They continue to have the "right to make the wrong decision." This includes the right to refuse assistance, casemanagement, placement, medical treatment and other forms of help. Until a finding of incapacity, the only hope is to convince the person to make the "right decision."