Minimising the potential for trust disputes

Todd D Mayo and Kevin W Rethore

Trust disputes can be tremendously costly, by any number of measures. Legal fees, the costs of hiring experts and other professional service providers, as well as opportunity costs and the costs attendant with the often emotionally charged atmosphere that can pit family members against one another – can add up quickly. Despite this high toll, trust litigation in the United States continues to increase – both in the number of matters being initiated and the amounts in controversy – as trust instruments become increasingly important vehicles in the management and transfer of wealth. Though the specific battlegrounds continue to evolve, a core group of issues continue to manifest themselves, from year to year.

Experience is often the best teacher, of course, and, in the legal context, few experiences have the potential to educate more than trial experience. Leveraging the insights gained from engaging and defending trust litigation can provide ample and effective guidance for trustees and other fiduciaries to achieve what should be a primary goal: avoiding disputes in the first place. This article aims to provide initial thoughts as to the current trends and common problems fuelling trust litigation, outline potential steps to mitigate the risk of disputes, and provide guidance as to how to manage litigation, if and when it is manifested.

Avoiding disputes through design, creation and processes

Fires need three things to start: a source of ignition, a source of fuel and oxygen. While time may transform their order of popularity – or even alter their precise nature – certain core causes spark and feed the vast majority of trust disputes. Poor drafting, diminished capacity, communication failures and net performance can all provide the elements necessary to ignite protracted, costly and emotionally damaging trust disputes.

Significantly, preventing a fire is substantially less costly than fighting one. Towards that end, thoughtful design and creation of a trust instrument, and well-considered processes for trust administration can reduce the potential for trust disputes.

Good drafting

Good drafting is fundamental to avoiding disputes. A trust instrument should articulate the settlor's intent and wishes clearly, in a manner that is both accessible to the reader and not susceptible to misinterpretation.[1] As Warren Buffett has observed, stilted jargon and complex constructions are usually the villains when a well-intentioned, informed writer fails to get the message across to an intelligent, interested reader.[2]

Writing in plain English is crucial. The best writing breaks concepts down into separate, easily digestible parts. Short, simple sentences are better than long, complex sentences.[3] Short paragraphs are better than long paragraphs. The best writing uses words and phrases that have a precise, consistent meaning. Good drafting eschews words that are potentially ambiguous, even though some have been staples of legal drafting. For example, the words 'shall', 'herein', 'hereunder', 'thereof' and 'notwithstanding' and the conjunctive-disjunctive 'and/or' do not have consistent meanings, can create confusion, and thus should be avoided.[4]

Using a defined term

Make certain the term is actually defined in the instrument.

Reliance simply on one's use of 'similar language in many prior instances' does not provide automatic validation. Best practice dictates revisiting 'carry-over' language every time it is used, to make certain the drafting is clear and concise, avoids misinterpretation, and is effective for the specific matter to which it is being applied. Good drafting is not an easy task. It takes time, effort and thought. Investing in good drafting reduces the risk of a dispute and the time, financial cost and emotional toll that any dispute takes.

Using the appropriate governance structure

A well-designed governance structure will mitigate the risk of disputes. First, it establishes the roles for governing the trust and allocates powers and duties among those roles in a manner that is appropriate to the complexity of the trust, the dispositive terms and the scope and type of property that it holds.[5] Second, it establishes a set of checks and balances, so that each trust official (ie, trustee, trust adviser, protector or enforcer) is accountable for her conduct. For example, a trust instrument generally should include mechanisms for removing a trust official and appointing a successor trust official. Third, it

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establishes rules that help to ensure that each trust official is well qualified for the role. Through qualification standards and appointment processes, a trust instrument should aim to ensure that each trust official has the skill and experience suitable to the role that the trust official plays within the trust. Fourth, it establishes an appropriate standard – fiduciary or non-fiduciary – to which the person will be subject in the performing of her duties.

Fiduciary versus non-fiduciary capacity

Whether a person holds a power in a fiduciary or non-fiduciary capacity can affect both how the person exercises that power, as well as the degree to which the exercise or non-exercise of the power creates risk of a trust dispute. A trust official can potentially hold and exercise one or more powers in either a fiduciary or non-fiduciary capacity.[6] The primary difference is accountability to the beneficiaries: with fiduciary status, a trust official potentially is more accountable to the beneficiaries, while non-fiduciary status often means less accountability. Accordingly, in designing the governance structure, careful consideration should be given to whether the trust officials will act in a fiduciary or non-fiduciary capacity.

Designating a trust official as a non-fiduciary may have appeal because it can (at least partially) insulate the trust official from liability. But fiduciary status and the attendant liability for breaching fiduciary duties can be an important check on the trust official. Fiduciary status can incentivise the trust official to act prudently and in accordance with the terms of the trust. Such an incentive can reduce the risk of trust disputes.

Compensation and succession planning

Similarly, in designing and creating a trust instrument, consideration should be given to two areas that often lead to litigation: trustee compensation and succession planning. Trustee compensation can be a lightning rod for generating the scepticism and mistrust that often leads a beneficiary to commence litigation against a trustee. All too often, trust drafters utilise standard language providing that trustees shall be entitled to 'reasonable trustee fees'. Ambiguous language like this simply kicks the can down the road, leaving the question of 'what is reasonable' up for judicial determination – a time-consuming process that can invite dispute as to other issues with the trust or trust administration, concurrently.

Control the narrative at the outset, instead. Rather than leaving ambiguity to be determined by the court system, drafters should discuss the issue with settlors and provide guidance on the issue in the trust instrument itself. Some trusts and trust assets bring more daily management and administrative responsibilities than others. Even in jurisdictions where the courts have found a fee equal to a certain percentage of trust assets to be 'reasonable', trust assets do not always lend themselves to a ready valuation for which a fixed percentage may be appropriate.[7] Further, significant cost can be devoted to determining the valuation to which the percentage is attributed, each year. While not all trust assets are alike, settlor guidance on the issue can save significant time and cost.

Similarly, the proper design of a trust instrument should include guidance on trustee succession. At a minimum, that means detailing the process for appointment and removal of trustees. But also consider the appropriateness of non-traditional considerations, such as limitations on a trustee's term of service and mandatory retirement ages. The less ambiguity, the fewer grounds for dispute.

Selecting the right person for each role

The risk of a dispute is mitigated by making certain the right person occupies the right role for a given trust. Simply stated – a person who is well suited for a given role is more likely to act appropriately and avoid problems. A person who is ill-fitted for a role is more likely to act inappropriately (whether intentionally or unintentionally) and create problems. Whether it is the settlor selecting the initial trust officials or someone else appointing an additional or successor trust official, the imperative is the same – choose wisely.

An array of persons can serve as trust officials: individuals and institutions; professionals and non-professionals; big and small. There are advantages and disadvantages to each of them, which should properly be considered in the design and creation phase.

Family members, friends and business partners

A non-professional individual, such as a family member, friend or business partner, typically is selected because he or she has intimate knowledge of the settlor's values and wishes, as well as the family's situation and dynamics. That knowledge can inform decisions concerning distributions, investments and other matters affecting the trust. A non-professional individual, however, may not know how to properly administer a trust, leading to breaches of trust or other problems. A non-professional individual may also be more susceptible to making decisions based on personal emotion or bias. Additionally, with any individual serving as a trust official, apathy, incapacity or death will affect her ability to serve. Of course, good advisers can mitigate that risk – but care must be exercised in selecting advisers properly suited to the task.

Professional individuals

A professional individual, like an attorney, accountant or investment adviser, can often provide highly attentive and personal service. While they tend to have specialised knowledge in a given field, professional individuals may have limited skills in others. For example, an attorney may not be as skilled in managing an investment portfolio as an investment professional. Similarly, some professional individuals have an in-depth understanding of trust administration, while others do not. A business attorney who serves as trustee for clients may be well versed in mergers and acquisitions while lacking an understanding of the laws governing trust investments and fiduciary duties (and may be more susceptible to making decisions based on his client's directions than the terms of the trust). In some cases, professional individuals work within a firm that provides a suite of trust-related services, complementing each professional's skills and enabling each professional to administer a trust more fully and effectively.

Small institutions

A small institution may offer attentive, personal service but tends to offer a more limited array of services. Further, it can often lack the sophistication to handle more complicated trust structures or investment portfolios. An institutional trustee can provide more continuity than an individual trustee, although staffing changes can affect the quality of the institution's service. For matters affecting a trust, an institutional trustee also generally makes decisions by committee or by at least two individuals. Although this more bureaucratic process may be slower than decisions made by an individual acting alone, it can reduce the risk of cognitive and emotional biases. A small institution also may be susceptible to acquisition by a larger institution, which can presage changes in scope, nature and cost of the service that it provides.

Large institutions

In contrast to a small institution, larger institutions may offer more sophisticated services or, at least, a broader suite of services. As with any institution, a large entity may experience staff turn-over, which can erode personal connections with the family and institutional knowledge about the trust. A large institution may also be more likely to implement risk management policies that apply without exception across all trust relationships, forcing out trust structures that do not conform to its established set of rules for permissible arrangements. This is evident in many large institutions eschewing trusts that hold interests in family businesses, for example. As experience has shown, a large institution may also be more likely to 'de-risk' or otherwise abandon trust services as a business line, which can leave trust officials scrambling for a suitable replacement.

Private trust companies

For a family that already has a family office, a private trust company can be especially attractive, as it can provide control, attentiveness and a personalised service. Generally, a family can mold a private trust company to its needs and circumstances. Although a private trust company provides continuity as trustee, succession planning within the private trust company is critical. Of principal concern is that the private trust company needs to develop and retain talent. For a family that does not already have a family office or is not already working together in a family business, a private trust company can be a bit daunting, because the family is internalising certain responsibilities for what essentially is a family-run business focusing on managing the family's trusts.

The duty to inform and the use of quiet trusts

The duty to inform has proven to be another

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significant potential breeding ground for trust disputes – particularly where a beneficiary believes the trustee is not being forthright about trust holdings, performance and distributions. As a general rule, a trustee has a duty to keep each beneficiary reasonably informed about the trust and the material facts relating to the trust's administration. However, the trust instrument can potentially alter that obligation.

At the extreme, a settlor can establish a quiet trust. A quiet trust (or silent trust) is a trust in which the trustee either has a limited duty to inform – or no duty at all. The typical rationale for creating a quiet trust is that it helps to promote good character, because it insulates the beneficiaries from the corruptive knowledge about their family's wealth. The underlying reasoning is that, if the beneficiaries knew about their potential 'inheritance', they would be less likely to engage in productive activities, such as pursuing education or employment. They would be more likely to evolve into 'trust fund babies'.[8]

Reducing or eliminating the beneficiaries' right to receive information about the trust impairs their ability to ensure that the trust officials are acting in accordance with the terms of the trust. Thus, it weakens or defeats a valuable check and balance. Accordingly, if a trust instrument reduces or eliminates the duty to inform, it is essential that the trust design incorporate other methods for protecting the beneficiaries and enforcing the terms of the trust. Importantly, throttling communication from the trust officials to the beneficiaries can also lead to the beneficiaries feeling distrustful of the trust officials. That feeling can ignite fires.

In some cases, a quiet trust goes too far, tying the trust officials' hands in a manner that can be problematic. A trust instrument may contain a mandatory non-disclosure provision, which bars a trustee (or other trust official) from notifying one or more beneficiaries about the trust or its administration. Such a provision effectively precludes the trustee from seeking judicial approval of the trustee's accounts or judicial resolution of an issue. By commencing a judicial proceeding, the trustee generally must notify all interested parties, which would include the beneficiaries whom the trustee cannot notify without breaching the terms of the trust. That is poor trust design.

Non-judicial dispute resolution

Non-judicial dispute resolution options – including arbitration and mediation – should also be vetted in trust design, as there may be significant benefits in pursuing such an option – including the ability to maintain privacy and confidentiality. Contrary to common perception, arbitration is not necessarily a more cost-efficient process. However, it does bring flexibility in selecting both the tribunal and applicable procedures, which can lead to a more expedited (and less costly) process. To reiterate a common theme – clear and concise language in constructing an arbitration provision is key. The main variables to an arbitration agreement should consider a number of central criteria, including the scope and seat of the arbitration, the number, qualifications, and process for selecting arbitrators, the arbitral institution and applicable rules, and, when arbitration is made binding, the grounds required for appeal.

Mediation is another common alternative dispute resolution process. As with arbitration, mediation is kept out of the public eye. What transpires during mediation is confidential. Unlike arbitration, however, the mediator does not decide the merits of the case. Instead, the mediator is a neutral third party, working to facilitate agreement between the parties. Mediation has proven to be effective in achieving resolution of disputes quickly – often before court proceedings commence in earnest. Further, mediated settlements tend to hold up over time as the parties themselves have created them. Significantly, a mediator can also provide an objective perspective – a reality test on each party's understanding of the strengths and weaknesses of their respective cases. In matters like trust disputes, it can be difficult for parties to be impartial or disimpassioned about their claims. Mediation can also be an effective vehicle for preserving working relationships between the parties or make termination of relationships more amicable.

No-contest or forfeiture provisions

Inclusion of a no-contest or forfeiture provision (also known as an *in terrorem* clause) potentially discourages litigation, but in doing so can weaken a useful check on the trust officials. By definition, such provisions terminate a beneficiary's interest in a trust if the beneficiary contests the trust or the actions of a

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trustee or other trust official. Consequently, for a beneficiary deciding whether to litigate or not, a no-contest provision can change the economic calculus.

When a trust instrument does not include a no-contest provision, the downside to a beneficiary on the losing end of a trust dispute is generally equal to the legal fees incurred in litigating the dispute.[9] In fact, in some US jurisdictions, the beneficiary's costs may be negligible because some lawyers are willing to pursue trust contests on a contingency fee basis, collecting a fee only if the lawyer succeeds in obtaining some financial benefit for the beneficiary. When a trust instrument includes a no-contest provision, a beneficiary's economic cost of losing a trust dispute includes the loss of her interest in the trust. In other words, the stakes are much higher. As such, a rational beneficiary must have a higher degree of confidence in her claim. Of course, not all beneficiaries are rational, and a beneficiary who unsuccessfully challenges a trust that contains a no-contest provision and consequently loses her interest in the trust may turn on her advisers.[10]

A no-contest provision may neutralise an important check on the trust officials. A beneficiary generally has the right to seek judicial review of a trust official's conduct. But the existence of a no-contest provision may have a chilling effect on the beneficiary – making her less likely to seek judicial review, unless the conduct at issue is egregious. As a result, absent other checks and balances, trust officials may feel less constrained to avoid borderline improper conduct. Ensuring that the trust's governance structure creates effective checks and balances on trust officials thus takes on greater importance when a trust instrument contains a no-contest provision.

Getting a litigator involved early

Typically, litigators do not get the call until after a problem arises. However, experienced trust litigators can be an incredibly useful resource in trust design and creation. Simply put, a trust litigator's experience in the trenches – developing evidence, arguing over what a trust instrument does or does not state, what a trustee did or did not do, or all of the above – can be leveraged to help drafters and planners spot red flags and avoid potential disputes before they happen. Among other things, experienced trust litigators can help detect signs of diminished capacity in the settlor, challenge the qualifications of a proposed trustee, detect potential down range issues with family dynamics, and query the appropriateness of including age-triggered distribution provisions for beneficiaries who are currently minors. Litigators who have represented both trustees and beneficiaries offer an even more unique perspective and can be used to play devil's advocate even after trust formation, when measures like decanting or trust modification are being considered.

The investment in seeking a trust litigator's experience on the front end is consistent with the theme that preventing a fire is substantially less costly than fighting one.

Administration practices and procedures

Developing best practices and procedures in trust administration should be an ongoing process, and one that is subjected to regular review for improvement and refinement. One issue that can build mistrust is lack of communication by trustees to the beneficiaries. In designing a trust instrument, drafters can help settlors develop measures to facilitate communication, set expectations, and perhaps undertake novel concepts like establishing a beneficiaries committee to regularly sit down with beneficiaries, discuss investments being made, and evolve from the norm of investment adviser quarterly reporting – some of which has lost efficacy through standardisation and self-promotion.

Records and information management

An integral part of effective administration centres on modern record-keeping, the parameters of which can evolve as quickly as technology. Consideration should be given to proactive filing for accounts on a regularised basis, even when not required by rule or law. When litigation occurs, claims can call for discovery of records dating back years and even decades. Gathering and reviewing records over such a time-frame can be labour-intense, expensive – and can inherently lead to gaps in record-keeping, which become instant fodder for trial. Towards that end, careful consideration should be records and information management (RIM), including records retention practices and policies, cyber-security and privacy protections. Further, good RIM practices should apply not just to the trust officials, but extend to ensure that the trust's advisers, managers and vendors comply with proper guidelines, as well.

Identifying and assessing changes that may affect the trust is crucial to ensuring the proper administration of a trust.

Annual trust evaluation
Each year, any number of factors can impact a trust, including changes that could potentially undermine the settlor's intent or implicate a trust official's fiduciary duties. Consequently, consideration should be given to implementing a practice that considers various questions, at least on an annual basis. Proactively evaluating circumstances surrounding the ongoing administration of a trust can lead to action that heads off possible disputes.

What has changed?
Identifying and assessing changes that may affect the trust is crucial to ensuring the proper administration of a trust. Circumstances change. Births, deaths, adoptions, marriages and divorces can affect who and how people benefit from the trust, which in turn can affect other aspects of how the trust officials should administer the trust. A family's business may experience success or encounter financial challenges, and those changes can affect the management of business interests and other investments held in the trust. Laws also change. Legislation or case law – including changes in the tax laws – can affect how the trust officials should administer a trust.

Are the right people still placed in the correct roles regarding the trust?
People and circumstances change. Sometimes, the change is sudden. Other times, the change occurs more slowly. For example, in the case of an individual trust official, personal circumstances – such as divorce or health issues – may impair her ability to perform her duties, thus warranting a change. In some cases, a person is selected to serve as a trust official, because that person has close ties to the family. Over time, however, those ties may slacken. A bank in which the family had a significant interest may be sold, and family members may cease to serve as directors. A long-time friend or business partner may drift away from the family. Of course, the change may involve the trust rather than the trust official. The complexity of the trust's activities may evolve to the point where they exceed a trust official's skills and experience to fulfil the trust official's duties.

Are the trust officials working together?
A good working relationship among the trust officials is crucial to avoiding disputes. Are the trust officials communicating effectively? Are they each 'staying within their lanes'? If the governance structure allocates powers among trust officials, are the trust officials refraining from engaging in actions outside their respective spheres of responsibility? Conflicts can arise when trust officials fail to communicate or overstep their bounds.

Would a change of situs be better for the trust?
Situs selection is a crucial aspect of designing and administering a trust to minimise disputes. First, there is a direct correlation between the quality of applicable trust laws and the probability of a dispute. Where applicable laws provide more certainty, there is less people can fight about. Where applicable trust laws provide a variety of tools for resolving ambiguities or other administrative problems, issues can be resolved more readily and with less risk of snowballing into a more significant dispute. Second, the quality of the judiciary similarly affects the probability of a trust dispute and the alacrity with which it can be resolved. In certain jurisdictions, the courts are more likely to mollify beneficiaries. Lawyers know that and will try to take advantage of it when possible.

A trust instrument should include provisions allowing the trust officials to change the trust's situs and the laws governing the trust's validity, construction and administration, so that the trust can adapt to evolving laws and changing circumstances.

Is modification or decanting warranted?
The evaluative process may reveal that modifying the terms of the trust or decanting the trust would be advantageous. Modification or decanting can be used to resolve conflict, but it can also foment conflict. For example, if the proposed decanting would change rights held by a beneficiary in the original trust, the decanting may be inviting conflict. Decanting can also implicate the duty of impartiality, to which trustees are generally subject.[11]

A recent case illustrates how a decanting can exacerbate conflicts. In *Hodges v Johnson*,[12] the trustees attempted to use a series of decantings to avoid future disputes involving a family business but breached their duty of impartiality when exercising the decanting power. In 2004, a successful real estate developer created two irrevocable trusts, which he funded with interests in the family business. The trusts' key purpose was to maintain that business. A family dispute subsequently arose. Two family members were fired from their jobs in the family business and the settlor got divorced.

Through a series of decantings, the trustees eliminated four beneficiaries, including the two family members who were fired, the settlor's former spouse, and the settlor's estranged daughter. The trustees asserted that the decantings would reduce the risk of fractious litigation designed to force the liquidation of the family business. Two of the excluded beneficiaries sued the trustees, and the court ultimately voided the decantings, finding that the trustees violated their statutory duty of impartiality.[13] Notably, one trustee testified that he had not considered the beneficiaries' interests when deciding whether to decant the trusts. Query whether, if the trustees had properly exercised their decanting power, the decanted trusts would more effectively achieve the trust's purpose and mitigate disputes involving the trust and the family business.

Managing trust disputes

Once litigation is threatened or begins, trust officials need to take a number of additional steps to effectively manage the litigation. A cardinal rule, of course, is to avoid exacerbating matters. Continue to abide by your obligations and duties, preserve and protect evidence, and engage experienced trust litigation counsel. For trust officials, understanding and preserving the scope of the attorney-client privilege is also an important part of managing trust disputes.

Preserving the attorney-client privilege

With sound legal advice, a trust official is better equipped to fulfil her duties and the trust's purposes. Sound legal advice can help to avoid improper conduct, and it can help craft an appropriate solution, if there has been improper conduct. Sound advice requires an open dialogue between a trust official and her attorney. As one jurist wrote, "the purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client by guarantying the inviolability of their confidential communications".[14] In addition to the customary admonishment to avoid disclosing privileged communications to third parties (and thereby waiving the privilege), trust officials must consider the effect of the venue (or potential venue) for trust litigation and the implications of the appointment of a temporary or successor trust official.

For trust officials, the jurisdiction in which trust litigation occurs can affect whether the attorney-client privilege applies. In the United States, some courts have adopted the fiduciary exception to the attorney-client privilege. Under that exception, the attorney-client privilege does not apply to communications between a trust official and the trust official's attorneys.[15] Some states have statutorily rejected the fiduciary exception.[16] If a trust's situs is in a jurisdiction that applies the fiduciary exception or a trust official resides or has a principal office in a jurisdiction that applies the fiduciary exception, then the attorney-client privilege may not apply.

Trust officials must also be mindful of how the appointment of a temporary or successor trustee may affect the attorney-client privilege. In trust litigation, a beneficiary may request the appointment of a temporary trust official who would serve during the pendency of the litigation. A temporary trust official, however, may have the power to waive the attorney-client privilege with respect to communications between the predecessor trust official and the predecessor trust official's attorneys.[17] Similarly, a successor trust official may also have that power.

Review invoices carefully

Responsible trust management involves exercising care in paying expenses – including costs incurred when the trust or trustees are the subject of litigation. Irrespective of the source from which they are ultimately paid, legal fees and other professional services should always be carefully monitored. Asking for litigation budgets, negotiating expense costs into the engagement, and understanding the service provider's billing practices are important. Perhaps most importantly, invoices should be reviewed carefully.

Invoice levels are a by-product of two obvious factors: rates and volume of hours. Often, the primary driver of an unexpectedly high invoice is the latter. Significantly, the ability to add time-keepers without prior client approval is often overlooked at the engagement stage. Consider negotiating prior approval into the engagement. Once the invoice arrives, are there unauthorised time-keepers billing time to the matter? Also, consider the time entry

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narratives. Are you being provided with ample detail to understand the nature of the work being performed? Is the work being performed by a time-keeper actually administrative in nature (eg, is a time-keeper billing time to make copies or make a filing)? If so, discuss the issue with the provider. There may well be an explanation, but keeping watch over expenses remains a constant, even when under challenge in court.

Conclusion

The emotional, financial and opportunity costs of trust disputes can be staggering. Preventing fires – and thus the imposition of those costs – is a multi-faceted effort. For the family office working with the family to establish and administer their trusts – especially trusts intended to hold the family's wealth for multiple generations – minimising the risk of trust disputes starts with thoughtful trust design and formation. It continues with establishing and implementing processes for administering the trusts, including a continuous process for evaluating and adapting the trust structures. Thoughtful design, formation and administration are crucial measures for preventing fires. Open communication among the family office, trust officials and beneficiaries can also often play an important preventative role. Despite even the best efforts, a fire may still ignite. At that point, it is vital that the trust officials avoid adding fuel to the fire. At the first sign of a potential dispute, they should engage an experienced trust litigation lawyer. And even though they may feel under attack, they must faithfully fulfil their duties and preserve evidence. By doing so, they will be better able to avoid a conflagration.

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1 For discussion of drafting to protect settlor intent, see Todd D Mayo, "Protecting Settlor Intent", *International Family Offices Journal*, December 2018, pp30–37.
2 Warren E Buffett, Preface to *A Plain English Handbook: How to Create Clear SEC Disclosure Documents* (US Securities and Exchange Commission, 1998), p1.
3 Though the plain English concept is well-developed, convoluted provisions continue to find their way into legal documents, including trust instruments, which often utilise form language. In a recent matter involving one of the co-authors of this article, opposing counsel proposed language in a trust-related document that began with a sentence comprised of over 200 words. Sentences of that length invite ambiguity, among other things.
4 See, eg Bryan A Garner, "Learn Them and Ax Them", *ABA Journal*, April 2014, pp26–27; Bryan A Garner, "Shall We Abandon Shall", *ABA Journal*, August 2012, pp26–28; *Bayerische Landesbank v Aladdin Capital Management LLC*, 692 F.3d 42 (2d Cir 2012) (construing the word herein in a contract); *Weichert Co of Maryland, Inc v Faust*, 419 Md 306 (2011) (construing the word hereunder in a contract); *Trustees of First Union Real Estate Equity & Mortgage Investments v Mandell*, 987 F.2d 1286 (7th Cir 1993) (construing the word thereof in a lease agreement); and *Raine v Drasin*, 621 S.W.2d 895, 905 (Ky 1981) (Lukowsky, J, dissenting) (criticising the use of and/or). Disputes involving the construction of contracts can be instructive in drafting trust instruments.
5 For a discussion of trust governance models, see Todd D Mayo, "Trust Governance Models", *International Family Offices Journal*, June 2017, pp28–38.
6 The laws governing the trust's validity, construction and administration determine the degree to which a trust official can act in a non-fiduciary capacity. Jurisdictions like the Bahamas and New Hampshire statutorily recognise non-fiduciary trust advisers and protectors and have judicial traditions that provide a high degree of confidence that a trust provision governed by those statutes would be respected. In other jurisdictions, the lack of well-developed law poses a risk that a trust adviser or protector may have a non-waivable fiduciary status.
7 Where the sole asset of a trust is a deceased artist's collection of works, for example.
8 Query whether that rationale is logically sound. In most families, family members have a general sense of the family's wealth based on the family's lifestyle. In addition, for some families, a significant amount of public information may exist about the family's wealth. Shielding family members from knowledge about a trust that holds some of the family's wealth may not be the most effective way to mitigate the corrosive effects of affluence.
9 The beneficiary's own fees, in jurisdictions applying the American rule, or both sides' legal fees, in jurisdictions applying the English rule.
10 See, eg *Tamposi v Denby*, 136 F.Supp. 3d 77 (D Mass 2015).
11 Under this duty, a trustee must treat each of the beneficiaries fairly, considering each of the beneficiary's interests in making decisions that may affect the beneficiaries differently. For example, a trustee must consider the other beneficiaries' interests when making a distribution to one beneficiary or when making an investment decision that might favour one beneficiary or a group of beneficiaries over the other beneficiaries. Fair does not mean equal. However, it does mean that the trustee considers all of the beneficiaries' interests.
12 *Hodges v Johnson*, 170 NH 470 (2017).
13 On this point, the court's opinion seems to ignore the express terms of the trust. The trust instruments seemingly waived the trustee's duty of impartiality. See *Hodges*, 170 NH 470, 475 (the trustee had the power to decant into a trust "for the benefit of any one or more, but not necessarily all, of the group consisting of [the settlor's spouse] and [the settlor's] descendants, or any trust established by [the settlor] under another trust instrument for the benefit of any one or more, but not necessarily all, of the members of such group").
14 *Riddle Spring Realty Co v State*, 107 NH 271, 274 (1966).
15 See, eg *Riggs National Bank of Washington v Zimmer*, 355 A.2d 709 (Del Ch 1976); *Wells Fargo Bank v Superior Court*, 22 Cal.4th 201, 212–213 (2000); and *Hammerman v Northern Trust Company*, 329 P.3d 1055 (Ariz Ct App 2014).
16 Fla Stat Ann § 90.5021; NH RSA 564-B:2-205; and SC Code Ann § 62-1-110.
17 In New Hampshire, a temporary or successor trustee does not have the power to waive the attorney-client privilege with respect to communications between the predecessor trustee and the predecessor trustee's attorney, unless the predecessor trustee consents. NH RSA 564-B:2-205(c) and (d).

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