

# Denver Law Review

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Volume 14 | Issue 6

Article 2

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July 2021

## Trust Drafting Contest

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### Recommended Citation

Charles A. Baer, Trust Drafting Contest, 14 Dicta 133 (1936-1937).

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## TRUST DRAFTING CONTEST

Sponsored by the Trust Departments of the Denver  
Clearing House Banks

By CHARLES A. BAER, *Estates Division, Colorado  
National Bank*

**T**HE TRUST Departments of the Denver Clearing House Banks, desiring to stimulate intelligent interest among the law students of the Colorado Law Schools in the legal and practical aspects of Trust and Estate administration in Colorado, with particular reference to the work of corporate fiduciaries, with the approval of the Deans of University of Colorado, University of Denver and Westminster Law School initiated in each school a contest which it is hoped may develop into a permanent and useful institution.

A practical problem in the drafting of a will was selected as the subject matter for this first year, which problem is set forth in detail later in this article. In future contests it is planned to submit a set of facts pertaining to some other topic connected with fiduciary administration. As a part of his research, and before beginning the preparation of the paper, each contestant was permitted to consult with faculty members, other lawyers, business men and the trust officers regarding business or legal phases of the problem, exclusive of drafting, phrasing or arranging, much as a practicing attorney might do. However, the business and legal plan adopted and the substance, argument and conclusions set forth, were to be wholly the product of the contestant.

Three judges were selected for each school—one by the Dean of the school who was an alumnus of the institution, one by the president of the local bar association and one by the trust departments of the banks. Three prizes of \$75.00, \$50.00 and \$25.00 were awarded to each school.

The wills which follow are not offered as forms to be used by lawyers who may wish to draw wills creating testamentary trusts or as examples of perfect draftsmanship, but simply as examples of the type of work which can be performed, after some research, by students in our law schools. The judges who graded the wills, and selected those which follow as the winners, have reported that, while the work in

general was of high quality, none of the wills was perfect and the best of them contained a number of mistakes. As respects the published wills, no attempt has been made to point out or correct errors, some of which will be apparent to the casual reader, and some of which will be revealed by more careful analysis.

The problem submitted follows:

## PROBLEM FOR THE CONTEST OF 1936-1937

### STATEMENT OF FACTS:

You are an attorney engaged in the general practice of law in the City and County of Denver. Mr. Alfred Hunting, a resident of Denver, comes to your office and asks you to draw his will. He gives you the following information with respect to his family, his property, and the disposition which he wishes to make of his property in the event of his death.

His family consists of his wife, Ellen, who is thirty years old and wholly without experience in business matters, a daughter five years old named Mary, and a son eight years old named Robert. Mrs. Hunting has no independent means, but her relatives are all thoroughly capable of supporting themselves. Mr. Hunting's only other relatives are three brothers, all of whom are confirmed bachelors.

Mr. Hunting has been engaged in the business of buying and selling securities for his own account, and he has no downtown office.

Mr. Hunting's property consists of his residence (worth about \$15,000), his household furniture and equipment, an automobile, and miscellaneous personal effects such as clothing, fishing rods, golf clubs, books, and jewelry. None of his personal effects are heirlooms or are of more than ordinary value. He has, in addition to the property above described, stocks listed on the New York Stock Exchange having a market value of \$50,000; miscellaneous corporate bonds secured by mortgages outside of the State of Colorado having a market value of \$25,000; Denver Special Improvement District bonds having a value of \$25,000, and a bank account then amounting to about \$10,000. He has no insurance, being uninsurable.

Mr. Hunting's chief concern is the welfare of his wife and children, but he would like to make a gift of about one-tenth of his estate to one of the universities or colleges in Colorado or New York for the purpose of making a scientific investigation of the Dow theory. He wants his wife to

have the use of the family residence and furniture as long as she wishes. All the rest of his estate he wishes to give to a trustee with directions to pay the income to his wife as long as she lives, and after her death to be held for the children in such manner that income or principal or both can be used for their support and education while they respectively are under the age of twenty-five years. After his daughter reaches the age of twenty-five years he wants the income from her portion to be paid to her as long as she lives and then the corpus of her share to go to her descendants, if any, and, if none, then to his (the testator's) descendants, if any. When his son reaches the age of twenty-five years Mr. Hunting wants his son's portion to be paid to him as his absolute property, but if the son should die before receiving final distribution then his share is to go to the son's heirs at law.

Mr. Hunting says that if the income is insufficient to provide for the needs of his wife and children he wants the trustee to be able to use principal for their relief, and says that if they should all die before the estate is distributed he would want what is left to go to his brothers, or the survivor of them.

He then says: "That, in a general way, is what I want to do, but I know very little about wills and trusts and want your advice. The only thing I have decided definitely is that I should like to have the X Bank and Trust Company, where I have done my banking for the last ten years, act as executor and trustee, but I am not sure whether it would be best to have it act alone or as co-executor and co-trustee with my wife. What I want you to do is to think over my problem, make such changes, adjustments or elaborations as you think best, and draw a will for me just as you think it should be to best accomplish my purpose, and then send it to me with a letter containing any explanations which you think are necessary or pertinent. I am going away next week for a vacation and I want to take the will and letter with me and study them while I am away."

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You are to draw a will naming the X Bank and Trust Company executor and trustee, either alone or with the wife as co-executor or co-trustee, or both, as you may consider best. The will should be drawn so that it will carry out Mr. Hunting's wishes, but it should also represent your best judgment as to the manner in which this should be done. The will should confer upon the executor and trustee such power and authority as you think necessary or proper to permit the executor or trustee to administer and invest the estate according to sound business principles, but so that the beneficiaries will receive full benefit of the trustee's skill and ex-

perience, and so that the estate will produce the maximum income consistent with safety of the principal.

You should also prepare a letter for Mr. Hunting explaining your reasons for any changes that you have made in the details of his plan, why you think the executor and trustee should be given the power and authority with respect to investments, etc., that the will confers upon it, and explaining any other matters which you think the layman might not understand.

Both substance and style of the will and letter will be considered by the judges in awarding the prizes.

The following is the production of the winner from the University of Colorado. The universities will appear alphabetically and the productions from the University of Denver and from Westminster Law School will appear in our May and June issues.

The judges for the University of Colorado were Mr. Edward C. King, Trust Officer, International Trust Company, Mr. Irving Hale, Jr., of the Denver Bar and Mr. Ralph S. Newcomer, of the Boulder Bar.

University of Colorado

January 14, 1937.

MR. ALFRED HUNTING,  
Denver, Colorado.

DEAR MR. HUNTING:

Enclosed you will find a rough draft of the will you requested me to draw. I feel that you will want some explanations regarding the various sections.

The first section with the usual provision as to debts and expenses which the court would order in any case. The provision for the payment of taxes out of the trust estate is probably in line with what you would wish and will prevent any confusion or contest as to how they are to be paid.

The second section you may alter if you want some of your effects to go to your brothers or children—this will not add to the taxes involved since each will have an exemption that will be more than sufficient to cover these effects. I provided all should go to your wife since you did not indicate how you would have it go, and I thought she no doubt

would herself make such disposition as you would wish. I have given her absolute title to the household furniture since a number of complications arise on the giving of a life estate in personalty. If, however, you wish these household effects to go with the residence, this can be changed.

I have given your wife a life estate in the house by the third clause with a general power of appointment that assures her as complete control as if she had a fee simple. Yet, by not exercising this power, she can allow the house to go in default of appointment to the children (as you both would probably wish it), and this avoids the levying of a second Federal estate tax on such transfer. The Colorado estate tax cannot be avoided in this way for it taxes the non-exercise of such a power as well as the exercise of it.

In the fourth clause I have added to your gift to the University of Colorado two conditions for your consideration: that whatever is left of the bequest after the investigation is completed should return to your estate and that if your estate should be so shrunken that it is not sufficient to provide adequately for your family no gift should pass for this purpose. I have provided a sum certain, ten thousand dollars, rather than a percentage of the total estate, for the sake of definiteness—you may, of course, modify this if it does not meet with your ideas. I have named the University of Colorado as the recipient of this bequest not only because the reputation of its Business School suggests that the investigation can be satisfactorily pursued there but because a bequest to this institution will be tax free whereas a similar provision in favor of an institution outside of the state would not.

In the fifth section I have attempted to spell out your wishes as to the distribution of the trust estate. Subdivision two gives the trustee certain powers as to how it may provide for the support and education of the children that will enable it to meet and circumvent possible difficult situations such as an unsatisfactory guardian.

Subdivision four may strike you as peculiar at first. It attempts to meet such a situation as this: suppose, in case you have more children, that one of your sons reaches the age of twenty-five and is paid his part of the corpus of the estate; then much later another son reaches twenty-five, but in the

meantime the trustee has found it necessary to dip heavily into the principal—you can readily see that the younger son is going to get much less than his older brother. Moreover, paying out the corpus before the younger children reach their majority might result in there not being enough left adequately to maintain and educate them, especially if there should be many children and the estate shrink. The provisions I have made are on the assumption that you are more interested in the support and education of the younger children than in having a sum given those who have attained twenty-five.

Subdivision five is what is called a spendthrift clause, and I am sure that a glance at its provisions will convince you of its desirability. Such clauses are allowed and enforced in Colorado.

Subdivision six gives the trust company rather broad powers. The confidence reflected in your long dealing with the X Trust Company and your determination to have it act as trustee made me the more willing to recommend the granting of such powers. As a practical matter, much of the advantage of having such a company act as trustee is lost if it is not given wide powers to exercise its judgment in matters of administration of the trust estate. The reputation and personnel of such a company is a sufficient guarantee of good faith and caution; and its experience and wisdom in handling an estate is very likely the equal, if not the superior, of the court that will supervise the trust and the legislature that has passed regulatory measures in regard to the investment and management of trusts. Moreover, court rules and regulatory statutes do not readily take into account the rapidly shifting conditions in the financial world, to which a trust company and bank must of necessity be sensitive.

In clause (a) of subdivision six I have provided that the X Trust Company may retain the investments you now have or shall have at your death; otherwise such investments as your stocks and bonds of private corporations might have to be disposed of as unsuitable for trust investments. By statute in Colorado the investments which a trustee may make are limited in a way a business man is likely to consider narrow. For that reason I have provided that the trustee here

is not to be so limited—this is the effect of (d). These provisions in the will are felt by most authorities and the Restatement of Trusts to free the trustee from the restrictive regulations of the statute, and I feel this is probably a safe view although there are as yet no cases on the matter. At any rate, it will do no harm for us to indicate a willingness that the X Trust Company is to be unrestrained.

The sixth clause is made necessary by a statutory provision in Colorado that a man may not leave over half of his estate away from his wife. Mrs. Hunting can not be forced to take under the trust you have set up if she does not wish; however, if you point out to her that under the trust arrangement she will get the income from the whole estate for life whereas otherwise she will have the income from but half as large a sum, I am sure, in view of the fact that none of her relatives are dependent and therefore in need of having some of the corpus, that she will acquiesce in your wishes.

In the seventh section I have made the X Trust Company sole and independent executor and trustee. In view of Mrs. Hunting's inexperience in business matters, it would seem that appointing her to act along with the X Trust Company would be a handicap to it while, because of that same incompetence, it would do no actual good and would provide no safeguard.

I have made no provision for your brothers for, if your family die before you, they will take by intestacy; and if your family survive you, you wish the estate to go to them and their descendants. The possibility of all of your family dying immediately after you do is so remote that it seems unwise to provide for that contingency in view of the fact that the Colorado statute results in higher taxes if that is done. By "family" here, I have meant your wife and children.

I advise your coming to the office to execute your will; but, if you decide to do so while on your trip, I advise your having three witnesses attest your will even though Colorado requires only two for some states require three and, if you should ever own realty in such a state, that requirement would have to be complied with—this will prevent the question's arising as to the bonds secured by realty outside the state.

## LAST WILL AND TESTAMENT OF ALFRED HUNTING

I, Alfred Hunting, of Denver, Colorado, being of sound and disposing mind and memory, do make, publish and declare this to be my last will and testament, hereby revoking and annulling any and all former wills and testamentary dispositions by me made.

*First:* I order and direct my executor; hereinafter named, to pay all my just debts and funeral expenses as soon after my death as practicable. I also direct my said executor to pay all inheritance taxes and other governmental charges, taxes, or liens imposed upon my estate passing under the terms of this my last will and testament, or upon the interest of any of the legatees, devisees or beneficiaries therein, by any present or future law of the United States or of any state, relating to transmission of property by descent or devise, and that all such charges, taxes and liens be considered and treated as expenses and costs of administering my estate and be paid out of the same before distribution thereof, if possible.

*Second:* I give and bequeath to my dearly beloved wife, Ellen Hunting, all of the clothing, fishing rods, golf clubs, books, jewelry, automobiles, musical instruments, pictures, silverware, family stores, household furniture and other articles of household and family use or personal use or ornament, of which I may die possessed, and in the event that she shall not survive me, then I give all of said articles to my children me surviving.

*Third:* I give and bequeath to my dearly beloved wife, Ellen Hunting, our family residence to be held by her for life and as regards which she is to have a general power of appointment by deed or will, but in default of such appointment it is to go in fee simple absolute to my children me surviving.

*Fourth:* I give and bequeath to the University of Colorado the sum of ten thousand dollars (\$10,000.00) for the purpose of making a scientific study of the Dow Theory of Market Fluctuation. If, in the judgment of the Board of Regents of the University of Colorado, this work is completed before the sum of ten thousand dollars (\$10,000.00) is exhausted, whatever remains is to be paid into the trust fund hereinafter provided for. Provided, however, that, if, in the opinion of the X BANK AND TRUST COMPANY, my estate on my death is not of the value of eighty-five thousand dollars (\$85,000.00) or more, this provision is to be of no effect, and no money is to be provided the University of Colorado for this or any other purpose.

*Fifth:* All the rest, residue and remainder of all my property, real, personal or mixed of whatsoever character and wheresoever situate, of which I may die seized or possessed, or which I may own or have any interest in at the time of my death, I give, devise and bequeath to the X BANK AND TRUST COMPANY as trustees, to hold upon the following trusts, to-wit:

1. My trustees shall pay the entire net income derived from the trust estate to my dearly beloved wife, Ellen Hunting, as long as she may live.

2. Upon the death of my said wife, my trustees shall use the income or principal or both for the support and education of my children. This they are to be allowed to do by payments to the guardian of the children, to a relative, to the children themselves or by expending the same directly for the education and maintenance of said children.

3. If at any time it becomes necessary, in the judgment of my trustees, to use part or all of the principal for the needs of my wife or children, they are to have power to do so.

4. After, but only after, the death of my said wife, I wish each of my children to have an equal share of my estate in the following manner: as each daughter attains the age of twenty-five (25), the income from her portion is to be paid to her for life and, on her death, the corpus of her share is to go to her descendants per stirpes, if any, and if none, to my descendants per stirpes. As each son attains the age of twenty-five (25), his portion is to be paid him as his absolute property. If any son or daughter die before reaching the age of twenty-five (25), the corpus of that person's share is to go to his or her heirs per stirpes and in fee simple and, if there are none, to my heirs at law per stirpes. Provided, however, that it shall be within the discretion of the trustees whether any such proportionate payments of income or principal shall be made so long as any child has not attained his or her majority. And after all the children have attained his or her majority, it shall lie with the trustees to devise a plan whereby all shall share as equally as possible in any accumulations that may have accrued or be expected to accrue or in any reductions in the principal that have been made or are expected to be made.

5. The income payments, from every trust created by this will shall commence from the date of my death but only be made when and as such income, after it shall have accrued, shall be in the possession of my trustees for payment. No disposition, charge or encumbrance of the income of any trust hereunder or of any part thereof, by any beneficiary by way of anticipation shall be of any effect, or be in anywise regarded by my trustees; and no such income, or any part thereof, shall in anywise be liable to any claim of any creditor of such beneficiary.

6. My trustees shall have the following powers, duties, and discretions in connection with this trust provision:

a. In their discretion to retain and continue to hold as part of the trust estate any property or investment owned by me at the time of my death without liability for depreciation or loss occasioned by doing so;

b. To sell in any way and for whatever consideration they determine on, and to borrow, and to mortgage.

c. To prosecute or settle claims.

d. To invest any money in the trust estate in stocks, bonds, and other securities or property, real and personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, or otherwise, either within or without the state of Colorado, as they deem advisable, without any limitation whatsoever as to the character of under any statute or rule of law regarding trust funds or investments by fiduciaries or otherwise;

e. To vote in person or by proxy any stock in the trust estate;

f. To employ agents and attorneys, to pay these and other expenses out of principal or income, to make leases and borrow money;

g. To do all other acts in their judgment necessary or desirable for the proper and advantageous management, investment and distribution of the trust estate.

*Sixth:* If my wife elect to take absolutely the one half of my estate secured to her by statute, which I earnestly desire and counsel her not to do, then she is to be excluded from all provisions made for her above. My personal effects are to go to my children, my residence is to be sold, and the trust is to be administered as to the other one half of the estate in the same manner provided for in the event of my wife's death.

*Seventh:* I hereby nominate, constitute, and appoint the X BANK AND TRUST COMPANY as sole executor and trustee under this my last will and testament. It is my desire that no bond shall be required of my executor or trustee for the faithful performance of their duties as such. In case the said X BANK AND TRUST COMPANY, trustee and executor hereunder, shall at any time or times hereafter become consolidated or shall merge with any other corporation or corporations, or in case the said X BANK AND TRUST COMPANY shall reorganize or reincorporate and the corporation so formed by such consolidation or merger or the corporation that shall so acquire the assets and succeed to the business of said X BANK AND TRUST COMPANY shall become the executor and trustee hereunder.

Executed at Denver, Colorado, this..... day of....., 1937.

.....  
Testator.

Signed, published, and declared by Alfred Hunting, testator, as and for his last will and testament in the presence of us, who at his request and in his presence and in the presence of each other have subscribed our names to attest thereto.

..... at .....  
..... at .....  
..... at .....

EDITOR'S NOTE: *To be continued in May issue of Dicta.*