Florida Law Review

Volume 9 | Issue 4 Article 6

December 1956

Drafting Dispositive Provisions

D. H. Redfearn

DRAFTING DISPOSITIVE PROVISIONS

D. H. REDFEARN*

Fifty years ago a lawyer could do a creditable job of drafting a will or trust instrument with very little knowledge of his client's business affairs. The draftsman of that day was primarily concerned with stating his client's wishes in clear and unambiguous language. In this age of complex taxation and complicated business interests, however, the lawyer must give careful attention to many technical matters in connection with his client's property and business. For example, in preparing the dispositive provisions of a will or trust instrument the draftsman should note particularly the manner in which the testator owns his property, whether outright or conditionally, individually, jointly, or in partnership. Consideration should be given to the specific types of property interests, such as property held in trust for him, anticipated inheritances, future interests, and powers of appointment.[1] Not to be ignored are the absolute debts and contingent liabilities of the testator, his past and present marital status, his obligations under prenuptial and separation agreements, and many facts about the members of his family and others for whom he wishes to provide.

Although there is no legal requirement that the language employed in a will or trust instrument be free from grammatical errors, an attorney invites litigation when he fails to express in correct, modern English, without ambiguity or redundancy, every instrument he prepares. The use of correct grammar tends to free an instrument from ambiguities and usually creates a favorable impression upon those whose task is to interpret and enforce it. A well-expressed pleading or brief may be a great aid in winning a case, but a legal document containing poor spelling, improper punctuation, incorrect capitalization, and bad grammar brands the writer as partly illiterate. This may result in the loss of valuable business, since a client seldom desires to retain an attorney whom he considers poorly educated in fundamentals.[2]

---

*B.S. 1910, LL.B. 1909, University of Georgia; Author of WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA; Member of Miami, Florida, Bar.

[1]See Note, *infra* p. 545.

[2]3 CORBIN, CONTRACTS 19 (1950): "[I]t can hardly be insisted on too often or too vigorously that language at its best is always a defective and uncertain instru-

Although it may be true as a general rule that lawyers indulge in verbiage, they probably err in the opposite direction when drafting dispositive provisions. A sketchily drafted provision or instrument indicates incompleteness of thought and failure to anticipate future contingencies. For example, the phrase "to my children" has the merit of being brief, but it is subject to several meanings and is one of the great breeders of litigation. At the expense of a little more time and thought the draftsman could have stated the intended provision accurately and precisely. The consequences of such brevity are too costly to be ignored.

Another hazardous tendency is the indiscriminate use of forms. Forms, properly used, can be of valuable assistance to the draftsman. They contain, however, limitations and inadequacies that should be recognized and compensated for. Forms are necessarily prepared on the basis of an average situation; they rarely reflect the individual needs of a particular client. The careful attorney will use a form as a basic working plan, to be studied and analyzed with the desires of his client in mind. Parts inapplicable or ambiguous will be deleted, and other parts will be added or expanded. The end product of this tailoring process is the transformation of a form for the "average" purpose into an integrated instrument calculated to serve its function adequately.

Troublesome Drafting Areas

Rule in Wild's Case

Prior to 1600 the word "children" had a definite meaning that always prevailed in the construction of wills unless qualifying or explanatory words or expressions were included to indicate the testator's contrary intent. In the absence of explanatory language the term was construed as one of purchase and not of limitation, that is, it identified the persons who were to take the property and not the estate transferred by the instrument. On the other hand, recognized words of limitation in a grant or devise, such as "heirs of the body," "heirs male or female," "heirs by John Corkshire," and "issue," created an express estate tail unless a contrary intent could be gathered from the context of the instrument.

---

ment, that words do not define themselves, that terms and sentences in a contract, a deed, or a will do not apply themselves to external objects and performances . . . ."

An exception to the established meaning of the word "children" as a word of purchase came into being as a result of the *Wild's Case,*[3] decided in England in 1600. It held that a devise or grant to a person and his "children" created an estate tail if there were no children in being at the time the transfer took effect. Under these circumstances, therefore, the word "children" was thenceforth to be considered as one of limitation. If, however, there were children in being at the time the transfer was effected, the word was assigned its customary meaning as a word of purchase and an estate tail would not be created.

The Rule in Wild's Case is in force in Florida;[4] however, a statute[5] prohibiting estates tail destroys an express estate tail created through the operation of the rule and creates a life estate in the transferee, with a remainder per stirpes in fee to his lineal descendents living at the time of his death. When the rule does not create an estate tail, that is, when there are children living at the time of transfer, the transferee and each of his children take as tenants in common. Parol evidence is admissible to prove whether children were in being at the crucial time.

The rule is applicable only when the word "children" is coupled with the name of the parent without further qualification; if the transfer is to Jones for life, remainder to his children, the rule is inapplicable and the obvious intent is effectuated. Because of the double meaning of the word in Florida, the draftsman should exercise extreme caution when employing the term in a will, deed, or other instrument of conveyance.

Rule Against Perpetuities

A thorough understanding of the Rule Against Perpetuities is vital in the drafting of wills or trust instruments. Unless an instrument meets the requirements of the rule a remote interest will fail; the draftsman holds the balance in his hands.

The Rule Against Perpetuities requires that a future interest or estate in personal or real property vest during the period comprised within a life or lives in being at the time of its creation plus twenty-one years and the usual period of gestation.[6] Under this rule there is

---

[3]16 Coke 16b, 77 Eng. Rep. 277 (1600).
[4]*Cf.* McLeod v. Dell, 9 Fla. 427 (1861).
[5]FLA. STAT. §689.14 (1955).
[6]See Smith and Keathley, *Future Interests in Florida,* 9 U. FLA. L. REV. 123 (1956).

theoretically no restriction as to the number of lives that may be chosen as long as they are reasonably ascertainable. For practical reasons, however, the draftsman should discourage the use of so large a number as to be unwieldy. If the testator elects to shorten the standard of measurement by not using the time of the life or lives in being and uses an absolute period of years, this period cannot exceed twenty-one years.[7] Also, the period of twenty-one years may not precede the measuring lives.

The Rule Against Perpetuities does not apply to vested estates or interests but only to remote contingent estates and interests, legal or equitable. A future interest or estate is invalid unless there is absolute certainty that it will vest within the period prescribed by the rule.[8] Strong possibility of vesting or the subsequent occurrence of events to vest the interest is not enough. Consequently, the draftsman should satisfy himself that there is no possibility of failure to vest within the proper time. When the testator attempts to create a perpetuity, that is, a remote interest that violates the rule, the law invalidates the remote interests and gives effect to limitations not too remote. But if the remote interests are so related to the legal limitations that the two are inseparable parts of a general plan, the legal as well as the remote limitations may be declared void,[9] since in this case to destroy one without destroying the other would defeat the dominant purpose of the testator.

The draftsman should remember that the Rule Against Perpetuities also applies to the creation of future interests or estates through the exercise of powers of appointment.[10] Whether an estate created by the exercise of a testamentary power of appointment is too remote and therefore void under the Rule Against Perpetuities must be determined, according to the weight of authority in the United States, from the date of the creation of the power and not from the date of its execution.[11] A power created in a will becomes operative and is considered to be created at the time of the testator's death rather than at the time of the execution of the will.[12] The careful draftsman can

---

[7]Crawford v. Carlisle, 206 Ala. 379, 89 So. 565 (1921); Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 So. 733 (1910); 1 PERRY, TRUSTS §380 (7th ed. 1921).

[8]Ould v. Washington Hospital, 95 U.S. 303 (1877).

[9]Moroney v. Haas, 277 Ill. 467, 115 N.E. 648 (1917); 75 A.L.R. 124 (1931).

[10]St. Louis Union Trust Co. v. Bassett, 337 Mo. 604, 85 S.W.2d 569 (1935).

[11]41 AM. JUR., *Powers* §83 (1942).

[12]Schaefer v. Voyle, 88 Fla. 170, 102 So. 7 (1924); Colcord v. Conroy, 40 Fla. 97, 23 So. 561 (1898).

give effect to most of the desires of the testator or grantor without violating the Rule Against Perpetuities provided he thoroughly understands the rule and considers its possible operation in every section of the instrument.

Restraints on Alienation

The Rule Against Perpetuities is concerned only with the vesting or commencing of a future interest or estate and is to be distinguished from the rule against restraints on alienation, which is concerned with the duration of the interest or estate created. When the rule against restraints on alienation is violated, the interest or estate created is not void as it is when the Rule Against Perpetuities is violated; instead, the interest is freed from the restraint and its enjoyment is accelerated.[13] The rule against restraints on alienation applies to life estates[14] as well as to fee simple estates. It also applies to personal property and to equitable estates.[15] Since one of the incidents of the ownership of property is the right to convey it, neither a grantor nor a testator will be allowed to dispose of property and to maintain control over its future alienation at the same time. There is a generally recognized exception to this rule in the case of spendthrift trusts,[16] but otherwise the draftsman should view restrictions with caution and attempt to discourage the owner from imposing disabling restraints.

PROBLEMS IN PARTICULAR PROVISIONS

Marital Deduction

The marital deduction section[17] of the Internal Revenue Code permits the deduction from the gross estate of the value of property "passing" from the decedent to the surviving spouse in an amount not exceeding fifty per cent of the adjusted gross estate. This provision,

---

[13]Story v. First Nat'l Bank, 115 Fla. 436, 156 So. 101 (1934).

[14]McCleary v. Ellis, 54 Iowa 311, 6 N.W. 571 (1880); Bank of Powhattan v. Rooney, 146 Kan. 559, 72 P.2d 993 (1937).

[15]Reimer v. Smith, 105 Fla. 671, 142 So. 603 (1932).

[16]Nichols v. Eaton, 91 U.S. 716 (1875).

[17]INT. REV. CODE OF 1954, §2056. When the assets of a husband and wife are approximately equal, it may be best not to provide for a marital deduction in either estate. If assets are unequal, some gain is usually available by taking a marital deduction in the larger estate.

like most others in the code, fairly bristles with limitations and terms of art that are not appropriate for discussion here. For present purposes it is enough to point out that the maximum benefit of this allowance is not obtained by making at the time of drafting the will a calculated prediction as to the size of the adjusted gross estate. Moreover, it is not necessary to guess. The marital deduction provision in the will may pass the precise deductible value in property to the surviving spouse outright, or in trust if the section's limitations are borne in mind, if it simply states that the property so passing shall be in that amount.[18]

Remainder Interests

A remainder is an estate created by will or deed[19] that takes effect in possession immediately upon expiration of a prior estate created at the same time and by the same instrument.[20] It is vested when limited to an indentifiable person upon the happening of a necessary event that must take place before the termination of the preceding limited estate.[21] It is contingent if the person who is to enjoy the estate is presently unidentifiable,[22] or if the estate is to vest only upon the occurrence of an event that may not happen before the termination of the preceding estate.[23] The contingency must occur before or upon

---

[18]For an illustration of this device see Item IV of the appendix to this article.

[19]Jordan v. Jordan, 274 Ill. 251, 113 N.E. 631 (1916); see Phillips v. Phillips, 186 Ala. 545, 65 So. 49 (1914).

[20]Adams v. Adams 147 Fla. 267, 2 So.2d 855 (1941); Commercial Bldg. Co. v. Parslow, 93 Fla. 143, 112 So. 378 (1927).

[21]Smaw v. Young, 109 Ala. 528, 20 So. 370 (1896); Travis v. Ashton, 156 Fla. 529, 23 So.2d 725 (1945); Hill v. Hill, 264 Ill. 219, 106 N.E. 262 (1914). An example of a clause creating a vested remainder would be "to *B* for life, then to *C* and his heirs." The estate given to *C* is vested, since it necessarily follows immediately after termination of the preceding estate, that is, at *B's* death.

[22]An example of a contingent interest resulting from unidentifiable takers is "to *B* for life, then to the heirs of *C*." The heirs of *C* cannot be ascertained until *C* dies; since *C* is presently alive and may be alive at *B's* death, the remainder is contingent, for the heirs cannot be identified until *C's* death, which may not occur until after *B's* death.

[23]Doe v. Considine, 73 U.S. (6 Wall.) 458 (1868); Rewis v. Rewis, 79 Fla. 126, 84 So. 93 (1920); Kingsley v. Broward, 19 Fla. 722 (1883); Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N.E. 980 (1911). An example of a contingency that may not occur before termination of the preceding estate is "to *B* for life, then to *C* if he survives *D*." The remainder is contingent, since *C* and *D* are presently alive and may be alive at the termination of *B's* estate; thus the remainder may not vest in

the termination of the preceding estate; if it does not occur prior to that time the remainder is destroyed under the common law destructibility doctrine.[24] If a remainder interest is transferred to a person subject to divestment upon the occurrence of an event that may take place, the condition is subsequent and not precedent; in this situation the remainder is vested and not contingent.[25]

Remainders may be created for persons not in being[26] or not ascertained. Such a remainder is contingent, but when a person answering the description of the remainderman comes into being during the existence of the prior estate the remainder is no longer contingent; it becomes vested immediately, subject to being opened for all persons within the description coming into being up to the time the remainder commences as an estate in possession.[27]

There are several important restrictions on the creation of remainder interests that if violated may produce results adverse to the intentions of the would-be creator. The requirement of simultaneousness of the creation of the prior estate and the latter estate must be met. This is usually accomplished by creating both estates in the same instrument; however, this requirement apparently is also met if the prior estate is created in a will and the remainder in a codicil to that will. Anything less than this would fail to create a remainder. Likewise, a remainder cannot follow a purported gift of the entire estate owned by the transferor, since the subsequent interest must necessarily divest the preceding estate.[28] If an inter vivos transfer is not executed with the formality required in the execution of wills, a

---

possession at *B's* death. If the remainder cannot vest in possession at *B's* death because *C* and *D* are both alive, the remainder is destroyed. See note 26 *infra.*

[24]See Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931); for a thorough discussion of the doctrine see Smith, *Destructibility of Contingent Remainders in Florida,* 3 U. FLA. L. REV. 319 (1950).

[25]For example, "to *B* for life, then to *C* and his heirs, but if *C* predeceases *B,* then to *B* and his heirs." *C* has a vested remainder, since his interest immediately follows the termination of *B's* estate. It is subject to divestment by the executory interest in *B* if *C* predeceases *B.*

[26]Tankersley v. Davis, 128 Fla. 507, 175 So. 501 (1937).

[27]For example, "to *B* and his heirs, but if *B* predeceases *C,* then to *C* and his heirs." *C* has an executory interest that is in derogation of the fee simple grants to *B;* it must therefore divest the preceding estate, since it does not vest at the termination of the preceding estate. For a discussion of executory interests see SIMES and SMITH, LAW OF FUTURE INTERESTS cc. 6, 7 (2d ed. 1956); see also Leach, *Perpetuities in a Nutshell,* 51 HARV. L. REV. 638 (1938).

[28]See SIMES and SMITH, *op. cit. supra* note 27, §134.

reversionary interest is created in the original transferor if the vesting of a remainder is postponed until after his death, since the delay makes the transfer testamentary.[29]

Although the foregoing terminology may seem clear and simple when considered abstractly or in a vacuum, it becomes far less so when applied to concrete facts. Considering the difficulty courts have experienced in drawing a line of demarcation between these terms, the conscientious draftsman will realize that here is another point where ambiguous language and careless expression cannot be used. Failure to indicate clearly the particular type of interest intended may result in an adverse construction, possibly resulting in differing legal consequences. For example, if the testator intends that the beneficiary take a vested remainder but, because of an erroneously placed condition, it is construed to be a contingent remainder, the interest will be subject to the Rule Against Perpetuities; it may be destroyed under the destructibility doctrine and may be alienable.[30] Conversely, if a contingent remainder is intended, the draftsman should spell out the contingency, for the courts have generally resolved ambiguity with the presumption that favors vested remainders. If a vested remainder is desirable, the draftsman, by a carefully prepared clause, can probably create it rather than a contingent remainder, even though a contingency is set forth.[31]

Class Gifts

Compared with the niceties of drafting a class gift provision, the problems of drafting a disposition of specific property to specific persons are relatively few. The gravity of the draftsman's responsibility in stating the terms of a class gift is manifested by the floundering of the courts in their attempts to interpret these provisions. An intelligent discussion of class gifts might very properly be the subject

---

[29]SCOTT, 3 LAW OF TRUSTS §330.4 (2d ed. 1956), says: "If the owner of property transfers it to a trustee but no interest, vested or contingent, passes before his death to any beneficiary other than himself, the trust is testamentary, and he can at any time revoke it."

[30]Assume that the testator desires that *C* take only if he survives *B*, the life tenant. A grant "to *B* for life, then to *C* if he survives *B*" would create a contingent remainder. A vested remainder may be given to *C* by providing "to *B* for life, then to *C* and his heirs, but if *C* predeceases *B*, then to the heirs of *D*." See note 25 *supra* and accompanying text.

[31]Doe v. Considine, 73 U.S. (6 Wall.) 458 (1868).

of a major article; only a few of the problems that have been productive of litigation will be pointed up in this section. It is axiomatic that most of these problems can be avoided by careful draftsmanship.

One of the major problems that has confronted courts is the determination of the persons who are to be included in the class. This usually is brought about by the widespread use of such terms as "heirs,"[32] "heirs of the body," and "children," without the inclusion of any qualifying definitions. Much of the confusion in this respect could be eliminated by abandoning their usage or by properly defining them in the will. For example, the word "heirs" becomes a more identifiable concept if provision is made that it be interpreted in accordance with the intestate succession statute. It might also be defined in some other manner, but the critical point is that it should be defined whenever its use is attempted. When the word "children" is used as the group designation, it also should be defined to include or exclude adopted children, step-children, unborn children, and illegitimates.

Another troublesome question that can and should be settled by the draftsman is the time when the transfer should vest. If the testator intends that a transfer take effect at a time later than his death, his intent should be clearly delineated. The time at which the members of the class will be identified usually is the time fixed for vesting; to resolve any doubt, this direction should be specifically stated.

Provision should be made for alternative dispositions, since it is possible that none of the group will survive the date set for vesting. This can be done by a savings clause.

Division of the property among the takers is another problem that should be laid to rest by a specific direction in the will. The language "share and share alike," "equally divided," and other similar words frequently have been employed and just as frequently have been given different constructions by the courts. Their use should be avoided. In the absence of any direction in the will, courts generally have favored a per stirpes distribution, which may be suitable in some cases but in others may be completely contrary to the wishes of the testator. It is therefore the responsibility of the draftsman not only to provide for distribution but also to do so as clearly and precisely as possible, whether this necessitates distribution per stirpes or per capita, or by some other appropriate method.

---

[32]FLA. STAT. §731.02 (8) (1955). "Heir" and "heir at law" have the same meaning as "next of kin."

It is quite possible that a member of the class will predecease the testator. In the absence of any contrary intent of the testator, a deceased member's share usually passes to the surviving members. The draftsman should expressly provide for disposition of any such share according to the testator's wishes.

Inter Vivos Trusts[33]

The expense of administering a trust usually prevents its inclusion in the plan for a small estate. The owner of an estate of considerable size, however, usually is concerned about the future management and disposition of his assets, and for that reason he may wish to establish an inter vivos trust.

Revocable Trusts. There are certain advantages and disadvantages in establishing a revocable trust. An elderly donor usually does not desire to gamble with revocable trusts for several reasons. Among the disadvantages are the following:

(1) The income is likely to be taxed to the settlor.
(2) The value of the trust is included in the settlor's gross estate.
(3) In Florida revocable trust assets may be subject to the claims of the settlor's creditors.

If the donor is young enough to gamble on living for a substantial period of time, he may desire to make the trust revocable in order to observe the conduct of the beneficiaries, thus allowing him to revoke or modify the trust if his desires are being thwarted. Some of the advantages of a revocable trust are as follows:

(1) A trust under the control of the donor may be less expensive to operate than one over which the donor has surrendered control.
(2) The revocable trust controls disposition of the trust property unless it is revoked by will or other method.
(3) The donor can reserve the right to change trustees, add co-trustees, or implement or subtract from the trustees' powers.
(4) The trust can be made irrevocable by a simple release of the donor's power to revoke.

[33]This discussion is not applicable to charitable trusts.

(5) The donor can reserve the right to change beneficiaries of the trust at any time.
(6) The trust assets can be changed, withdrawn in substitution, or enlarged.

Several drafting problems arise in connection with revocable inter vivos trust agreements. Designation should be made of the portion of estate, inheritance, and income taxes, if any, that are to be paid from the trust estate as well as whether these payments are to be made from the principal or income or both. The draftsman should specify whether the trust estate is to be liable only for the taxes against the trust or also be responsible for a share of the taxes levied against the estate of the settlor.

Another pitfall that should be anticipated in the drafting stage occurs when distributions are to be made to members of a group — children, for example — as each reaches a specified age. Alternative dispositions should be made of the shares of those prospective takers who do not reach the specified age. The donor may wish that each portion devolve upon the heirs of the deceased beneficiary or that it vest in pro rata shares to those whose right to actual payment is ripened by time. Controversy over the time of payment might be avoided by inclusion in the trust instrument of the birth dates of the prospective beneficiaries, thus binding the trustee and saving him from the trouble of independently establishing the dates on which the various beneficiaries become entitled to payment. Care must also be taken to avoid violation of the Rule Against Perpetuities.

Irrevocable Trusts. If carefully created, irrevocable inter vivos trusts not created in contemplation of death may escape taxation in the estate of the donor.[34] The chief disadvantage is that the donor parts with the title to his property and thus loses control over it. The trustee exercises economic control with the powers granted him by the trust instrument and by the statutes of the State of Florida. If the donor retains any power over the trust assets, they probably will be taxed as a part of his estate when he dies. Therefore if an irrevocable trust is to be created, the draftsman should meticulously separate the donor from the title and all control incident thereto.

In 1951 the Legislature of Florida enacted the Florida Trust Accounting Law,[35] which provides that a person named as trustee in

[34]See INT. REV. CODE OF 1954, §2035.
[35]FLA. STAT. c. 737 (1955).

a will cannot act until he has established his qualifications by a decree of the circuit court; it further provides that he must make annual accountings to the court appointing him, thus making his qualifications subject to annual inspection. Annual accountings may be waived in certain instances.[36] Although the law applies only to testamentary trusts, it can be applied to inter vivos trusts by a requirement to that effect in the trust instrument. This can be a useful device if the settlor desires to insure continual qualifications of the trustee.

The author recently prepared a will for a client whose estate is valued at approximately $400,000. His wife has practically no assets of her own. Since this will involves some of the problems discussed, it is appended to this article, with fictitious names inserted. It is not intended as a form to cover all contingencies, but it may be used as a general testamentary form.

APPENDIX

LAST WILL AND TESTAMENT OF JOHN DOE

I, JOHN DOE, of Dade County, Florida, being of sound and disposing mind and memory, do make this, my last will and testament, hereby revoking and annulling all others by me heretofore made.

I.

I desire and direct that my body be buried in a manner suitable to my circumstances in life and that all my just debts be paid without unnecessary delay by the executor hereinafter named and appointed.[1]

II.

I desire and direct that all estate and inheritance taxes chargeable against my estate be paid by the executor out of the residuary assets of my estate, but not out of the portion constituting the marital trust assets.[2]

---

[36]FLA. STAT. §737.12 (1955).

[1]It is immaterial whether the provisions of this paragraph are included in a will, since the law requires disposal of the body and payment of debts anyway. However, it pleases most testators to have these provisions in their wills. In some instances the testator may desire that a sentence similar to the following be added: "Any mortgage, lien, or other encumbrance upon any property bequeathed or devised hereunder, either outright or in trust, shall be assumed by the legatee or devisee of such property."

[2]Under FLA. STAT. §734.041 (1955) all legacies are required to bear their proportionate part of the estate taxes unless the will directs otherwise. The same rule applies to inter vivos trust instruments.

III.

I give, bequeath, and devise unto my beloved wife, MARY DOE, the following mentioned legacies, free from all debts and all kinds of taxes against my estate, and free from all administration expenses:

(1) Seven thousand five hundred dollars ($7,500.00) in cash, to be paid to her by the executor at any time during the administration of my estate.
(2) Twenty-five hundred dollars ($2,500.00) to be paid to her by the executor as soon as he qualifies, so as to assure her of having this amount as a support during the administration of my estate; this is not to take the place of any statutory allowance to which she is entitled under Florida law.
(3) All household furniture and furnishings which I may own at the time of my death and all my personal effects, clothing, and jewelry.
(4) A new, medium-priced automobile of her selection; the executor of my will shall purchase such automobile and pay for it out of the residuary trust hereinafter mentioned and deliver it to her during the administration of my estate.
(5) I do not attempt to devise the home in which we live or our joint bank account, as these are held as estates by the entirety and will belong to her upon my death, independent of my will.

The foregoing legacies are to be hers absolutely, but if she predeceases me the same shall lapse and become a part of my residuary estate.

IV.

All the rest, residue, and remainder of my adjusted gross estate, both real and personal wherever situated, I divide into two parts, one to be known as the marital deduction, hereinafter referred to as the "Marital Trust," and the other to be known as the "Residuary Trust."

The Marital Trust is for the benefit of my wife, MARY DOE,[3] and it shall consist of fifty per cent (50%)[4] of the value of my adjusted gross estate as finally determined for federal estate tax purposes, less the aggregate amount of marital deductions, if any, allowed for such tax purposes by reason of other property or interests in other property passing to her under other provisions of this will, or which have already passed to her or for her benefit prior to my death, or which may pass or which might have already passed to her by operation of law,[5] it being my intention that my wife shall have the maximum value in assets that may be

---

[3]The marital deduction is allowable for either husband or wife. INT. REV. CODE OF 1954, §2056.

[4]The marital deduction can be any portion of the adjusted gross estate up to 50%, and it may be given outright or put in trust for the surviving spouse. The trust must provide that the surviving spouse shall have all the income from it, payable annually or more often, and the spouse must be given an exclusive, general power of appointment over the marital trust. The same rule applies to any portion of the marital deduction placed in trust.

[5]Examples of property transfers from husband to wife that may be taxed in the husband's estate and may be subject to the marital deduction, though not passing to the wife either under the will or by operation of law, are the following:

deducted from my estate as the marital deduction regardless of whether this increases the estate tax on the Residuary Trust or not. When said marital trust assets are delivered to the trustee, hereinafter named, any increase in value thereof and any interest or income earned thereupon, between the date selected for determination of the value of my estate for estate tax purposes and the date of the delivery of the marital trust assets to the trustee, shall belong to said Marital Trust.[6] Any depreciation in value of said marital trust assets between said dates shall be borne by the Marital Trust.

Except for that portion of the Marital Trust passing by operation of law or by other provisions of this will, as above explained, the executor shall have full authority and discretion to satisfy the said Marital Trust out of the assets of my estate wholly or partly in cash or in kind, and to select and designate the cash, securities, or other assets, including real estate, which shall constitute said marital trust assets. In no event shall there be included in said Marital Trust any asset or proceeds of the sale of any asset with respect to which a marital deduction would not be allowable if so included. The exercise by the executor of the authority and discretion hereby conferred shall not be subject to question by any person.

The part of my estate above referred to as the "Marital Trust" I give, bequeath, and devise to my brother, THOMAS R. DOE,[7] as trustee, in trust for the purposes hereinafter set forth. Said trustee shall have all the powers allowed to testamentary trustees under sections 691.03 and 691.04 of the Florida Statutes of 1955, as well as such other powers as may be authorized by the laws of the State of Florida at the time of my death. In addition to or in support of such powers, I authorize said trustee:

(1) To receive, hold, exchange, manage, and control said trust property

---

(1) Gifts during lifetime that are held to have been made in contemplation of death.
(2) Transfers that reserve a life estate in the husband. INT. REV. CODE OF 1954, §2036.
(3) Lifetime transfers that take effect at the husband's death. INT. REV. CODE OF 1954, §2037.
(4) Lifetime transfers that could be revoked or otherwise changed by the husband up to the time of his death. INT. REV. CODE OF 1954, §2038.
(5) Survivorship annuities. INT. REV. CODE OF 1954, §2039.
(6) Lifetime transfers for an insufficient consideration. INT. REV. CODE OF 1954, §2043.

All of the foregoing are properties that have already passed to the wife. They are included in the adjusted gross estate of the husband and should therefore be deducted from the property passing into the Marital Trust, since each of them qualifies for the marital deduction.

[6]This can be modified, if the testator so desires, by providing that the marital deduction shall be valued as of the date selected for the determination of the estate tax — date of death or one year from that date.

[7]It is usually better to name a bank or trust company as trustee or co-trustee, since an individual trustee may die or become incapacitated.

in his reasonable discretion for the benefit of this trust.

(2) To hold the same, or any part thereof, in cash from time to time, and to invest, reinvest, or keep the same invested in such income-bearing securities or other property, real or personal, as the trustee may deem advisable in his reasonable discretion, and to collect the income therefrom for the benefit of this trust and to dispose of said income as required by the provisions of this will.

(3) To have and to exercise full power to sell, exchange, lease, or otherwise dispose of, from time to time in his discretion for the benefit of this trust, all or any portion of the trust estate in the manner and upon such terms as the trustee may, in the exercise of his judgment and discretion, deem most beneficial to the trust estate.

(4) In the exercise of the powers and authority herein conferred for the benefit of this trust, the trustee is empowered, as often as may be necessary in his discretion, to invest, sell, encumber, or exchange, for cash or upon terms, without the order of any court, any part or all of the assets of the trust estate, either publicly or privately, with or without notice by publication or otherwise; no purchaser shall be required to see to the application of the purchase money.

(5) I hereby authorize the trustee to invest in securities other than those fixed by the statutes of the state of my domicile at the time of my death for the investment of trust funds, and I expressly relieve the trustee from any liability for depreciation in holding in his discretion any nonlegal investments owned by me at the time of my death.

(6) After paying all taxes and all costs of administering the Marital Trust, including reasonable trustee's fees and other charges and expenses incident to the care, operation, and maintenance of said Marital Trust, the trustee, commencing with the date of his qualification, shall pay all of the net income from said Marital Trust to my said wife in quarter-annual installments, or in more frequent installments in the discretion of the trustee, for the duration of this trust. My wife shall also be entitled to all net income earned from said marital trust assets from the date of my death to the date of the qualification of the trustee, and the same shall be paid to her by the executor or by the trustee in accordance with the law in force at the time of my death.

My wife is given the full and exclusive power to appoint the entire assets of the Marital Trust,[8] free of this trust, to herself or to her estate; she may make such

---

[8]To qualify for the marital deduction, the power must be general and the surviving spouse must be given the exclusive right to exercise it. If the power of appointment is not general, the trust does not qualify for the marital deduction.

The will or other trust instrument must provide that the power must be exercised exclusively by the surviving spouse; it may provide that the exercise may be solely by deed or other form of transfer executed during life, that the exercise may be solely by will, that a portion of the trust assets may be appointed during life and the balance by will, and that if the powers are not exercised the trust assets shall be disposed of as directed by the testator or donor.

appointment by will or by deed or by other form of transfer to any person, corporation, association, educational institution, church, or charity, jointly or severally, including her own creditors or the creditors of her estate, as she may desire. The singular number thus used in describing the possible beneficiaries of such appointment shall be construed to include the plural number also, and the plural number shall also be construed to include the singular number. My wife is also given the exclusive power to appoint from time to time any portion or portions of said marital trust assets by deed or other form of transfer and the remaining portion thereof by will.

If my said wife fails to make such appointment or appointments, then said marital trust property, or any portion not appointed at her death, shall become a part of the Residuary Trust created by the terms of this will and shall be administered accordingly.[9]

If my said wife does not survive me, the assets of the Marital Trust above bequeathed shall be added to the Residuary Trust.

V.

After the Marital Trust has been set apart, all the rest, residue, and remainder of my estate shall constitute the "Residuary Trust"; and I give, bequeath, and devise said residuary trust assets to my brother, THOMAS R. ROE, as trustee, in trust for the purposes hereinafter set forth. Said trustee shall have all the powers allowed to testamentary trustees under sections 691.03 and 691.04 of the Florida Statutes of 1955, as well as such other powers as may be authorized by the laws of the State of Florida at the time of my death. In addition to or in support of such powers, I authorize said trustee to exercise any or all of the powers above specified in paragraphs (1) to (5), inclusive, of Item IV of this will.

VI.

I authorize the trustee to pay all taxes and all costs of administering the Residuary Trust, including reasonable trustee's fees and other charges and expenses incident to the care, operation, and maintenance of said residuary trust estate. After paying all of said items, the trustee shall pay the net income to my wife, MARY DOE, quarter-annually or more often in the discretion of the trustee, until her death or remarriage. In the event of her death or remarriage, or in the event of her election to take dower, then the remaining assets of said residuary trust estate shall continue to be held in trust and administered for the benefit of the beneficiaries as specified in Item VII of this will until the termination of this trust. In the event my wife accepts the provisions of this will, then I desire that she shall have all the income from this Residuary Trust during her lifetime or until her remarriage.

In the event my wife does not remarry, and in the opinion of the trustee the income from said Residuary Trust is insufficient to support and maintain her in her accustomed manner of living, then the trustee may encroach upon the corpus

---

The average testator prefers not to give his wife a power to dispose of the assets of the marital trust during life, as she is usually not well versed in business affairs.

[9]The residuary trust may be for the exclusive benefit of the children of the trustor or for others. The marital trust must be solely for the surviving spouse. The residuary assets need not be put in trust and may be devised outright.

of the residuary trust assets to any extent he may think necessary for such purpose.

VII.

In the event of the death or remarriage of my wife before all of my children have reached the age of twenty-one (21), this Residuary Trust shall not terminate, but all the rights of her estate and all her rights in it shall cease, and it shall continue for the benefit of the beneficiaries until my youngest child has reached the age of twenty-one (21), at which time it shall terminate and division of the remaining portion of the residuary trust assets shall then be made to the beneficiaries in the manner set forth in this paragraph of my will. If my wife does not die or remarry until after my youngest child has reached the age of twenty-one (21), then the said Residuary Trust shall continue until her death or remarriage, at which time it shall terminate and final distribution shall be made. It is my will and desire that my children shall share equally in the final distribution of the residuary trust assets. The spouse and lineal descendents of any deceased child of mine shall, at the termination of this Residuary Trust, be entitled to the share of such deceased child per stirpes, the spouse taking a child's part in such share. I have only four children now, but the terms of this will also include any child of mine hereafter born.

I direct the trustee in the management and control of the Residuary Trust to refrain from delivering the share of any minor who may become entitled during his or her minority to share under the terms of this will in the distribution of either the principal or the income, or both, of the residuary trust assets until such minor is entitled to receive the same as above provided. The trustee may advance for the use of such minor as much of either the principal or the income, or both, to which such minor may become entitled as the trustee in his absolute discretion may deem proper for the education, maintenance, and support of such minor; but such advances shall be charged against the interest of such minor in the said Residuary Trust. The trustee in his discretion may make payments of any income or principal so applied to the use of a minor by making such payments to a parent or the guardian of such minor or by applying the same for the benefit of such minor. The receipt of such parent or guardian or other evidence of the proper expenditure of such money for the benefit of such minor shall be a full and sufficient discharge of the trustee for any such advancement, whether or not there is any legal guardian for such minor at the time of any such advancement.

During the minority of any beneficiary, if it so happen that such beneficiary becomes entitled to any income from the Residuary Trust or to any portion of the principal thereof, the trustee may accumulate the same for the benefit of such minor; or the trustee, in his absolute and uncontrolled discretion, may advance the same or any portion of it, as above provided, for the education, maintenance, and support of such minor.

As each of the minor beneficiaries of this Residuary Trust reaches the age of twenty-one (21), if my wife has died or remarried the trustee is authorized, in his discretion, to deliver to such beneficiary thus reaching majority a portion of the principal of said residuary trust assets. The amount of such advancement shall be in the discretion of the trustee, and such advancement shall be charged against the interest of such beneficiary in the residuary trust assets. If a beneficiary dies while a minor, after receiving any advancements allowed by the terms of this will, the estate of such minor shall be relieved from repayment of such advancements.

In the event all of my children and their lineal descendants shall be dead at the time of my death, then this trust shall not arise, and all said residuary trust assets shall belong to my wife, if she is then living, absolutely and in fee simple.

In the event my wife and all my lineal descendants should predecease me, then it is my desire that fifty per cent (50%) of this residuary trust estate shall be divided equally between my mother and father or be delivered to the survivor of them. If both predecease me, then said fifty per cent (50%) shall descend per stirpes to my collateral relatives according to the laws of descent and distribution of the State of Florida. The other fifty per cent (50%) I give, bequeath, and devise to the UNIVERSITY OF MIAMI, Coral Gables, Florida, to be used in such manner as the board of trustees of said university may deem proper.

VIII.

In the event of the illness of my wife, MARY DOE, or of any one of my children, I authorize the trustee, in his discretion, out of the income or principal, or both, of the residuary trust assets, to make provisions for my said wife or for such child during such illness from time to time as he may think necessary. He may likewise make such provisions for the children of any deceased or sick child of mine. Any such provisions, except those for my said wife, made under this power shall be charged as an advancement to the beneficiary receiving the same; but I relieve the trustee from making such charge if he, in his discretion, thinks proper to do so under the circumstances. The provisions of this Item VIII of my will do not apply to my wife if she remarries, as she has complete power to appoint the assets of the Marital Trust, as hereinbefore provided by the terms of this will.

IX.

In the event my wife and I should die in a common disaster so that it is impossible to determine which died first, then this will shall continue in force in the same manner as though my wife has survived me. If my whole family should die with me in the same disaster and it is impossible to determine which survived, then all my property shall be disposed of in the manner specified in the last paragraph of Item VII of this will.

X.

I hereby nominate and appoint my brother, THOMAS R. DOE,[10] as executor and trustee under this will, to act in any jurisdiction where he is lawfully entitled to act, in either or both capacities, without any bond or other security.

I confer upon said executor full authority and power to sell or lease any part or all of my estate, at public or private sale, with or without notice, as he may deem best, and without any order of court. I authorize him to make good and sufficient conveyances to the purchaser and to hold the proceeds of any sale to the same uses and trusts as hereinbefore declared in the several items of this, my will. In the event it becomes necessary for the executor or trustee to borrow money for the use of my estate in any instance in which he thinks it proper and necessary, I expressly confer upon him the authority to borrow such funds as may be necessary, and to secure the same by mortgage or trust deed upon any part of my estate; this he may do without an order of any court.

I confer the same full powers on him as trustee, when he takes charge of the trust property bequeathed and devised under this will.

---

[10]See note 7 *supra*.

Whenever used in this will, the term "executor" and the term "trustee" shall include any successor or successors.

I hereby confer upon said executor all the rights, powers, duties, and exemptions hereby conferred upon him as trustee, and I confer upon him as trustee all rights, powers, duties, and exemptions hereby conferred upon him as executor under the terms of this will.

In the event my brother, THOMAS R. DOE, should predecease me, or in the event he should fail to qualify or should resign or die during the administration of my estate or of said trust, then it is my will and desire that my wife, MARY DOE, and THE NATIONAL BANK AND TRUST COMPANY OF MIAMI, FLORIDA, act as successor co-executors and co-trustees with the same rights, privileges, and powers as hereinbefore conferred upon my brother as executor and as trustee.

This April 30, 1956.

JOHN DOE (Seal)

The foregoing instrument was signed, sealed, declared, and published by John Doe as his last will and testament, in the presence of us, the undersigned, who, at his special instance and request, do attest as witnesses, after said testator has signed his name hereto, and in his presence, and in the presence of each other.

This April 30, 1956.

/s/ ZEON DOMEK	Miami, Florida
/s/ E. O. SIMON	Miami, Florida
/s/ MARY N. ETTIE	Miami, Florida[11]

[11]Only two witnesses are necessary in Florida, but it is always best to have three, since the testator may later move to another state where three witnesses are required, or he may own real estate in a state where three witnesses are necessary to the validity of a will transferring real estate.