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TRUST DRAFTING: THE WAY AHEAD[1]

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Trust drafting raises many questions: of principle; of trust law; of family law; of tax law; and more. The purpose of this article is to discuss a medley of problems of contemporary trust draftsmanship. The article will conclude with an illustration in the form of an interest in possession settlement.

The comments in this article apply equally to will trusts and lifetime settlements. More care is normally lavished on lifetime settlements than will trusts; this can be measured by the prolixity of a typical settlement, and the brevity of a typical will. But there are few differences of principle between the two.

Drafting Qualifications

Before putting pen to paper - before switching on the word processor, perhaps - the draftsman might ask: am I qualified?

The general rule is that drafting must be done by a solicitor or barrister. The non-solicitor, who, for a fee, "draws or prepares an instrument relating to real or personal estate" is guilty of an offence.[3]

The expression "an instrument relating to real or personal estate" clearly covers the drafting of a settlement. It is a criminal offence for a firm of accountants or a trust corporation to draft a settlement. This is so even if the work is done by an employee of the firm who is a solicitor; for it is the firm which supplies the service and receives the reward. The drafting of other trust documentation, such as an appointment of new trustees, is also forbidden.

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1 This article is drawn from *Drafting Trusts and Will Trusts* by James Kessler, (Sweet & Maxwell, 1992).

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3 S.22 Solicitors Act 1974.

In some circles, the law is not known - or at least, not scrupulously observed. Interesting questions arise where the law is broken. Suppose an accountant drafts a settlement. Could he sue for his fees? It is thought not. Suppose the document was negligently drafted and the firm was sued for negligence. Would the firm be covered by its professional indemnity insurance? That would depend on the terms of the insurance policy involved. Clearly, the penalty for breaking the solicitors' monopoly may extend much further than the maximum statutory penalty, a fine at level three on the standard scale.

The restriction does not apply to the drafting of wills.

Duration of the Settlement

How long should a settlement last? In principle, the longer the better. This offers many advantages. Trust property is safe in the settlement. It should be secure from creditors in the event of insolvency; and secure from a spouse in the event of divorce. There are substantial, even extravagant tax advantages. Conversely, the termination of a settlement will usually lead to an unnecessary CGT charge.

It is at this point that the views of the client may be furthest from those of his professional adviser. The client may wish (say) his children to become absolutely entitled to the trust property on attaining the age of 25 or so. It should be pointed out that the trustees **may** transfer the trust fund to the beneficiaries at the desired age. If the client leaves a memorandum of wishes the trustees may be expected to do so if appropriate. The advantage of the long-term settlement is that one can consider the implications before an irrevocable step is taken: trustees have the chance to look before they leap.

The expression of wishes can, if appropriate, be strongly worded. The client who still insists his children should become entitled to his estate at 25 may be prepared to accept the following compromise: the will or trust may provide that the trust fund should be held on trust for the children absolutely, once they attain the age of 25. However, let the trustees retain an overriding power so they may act *before* they reach that age, so as to extend the life of the trust if need be.

Beneficiaries: Profligacy and Insolvency

One of great advantages of a trust is of course that it can protect the financially irresponsible beneficiary from himself.

Every settlement can have infant beneficiaries. Such beneficiaries may turn out to be insufficiently mature to handle capital; at the age of 18 or 25 or 40 or at all.

How should the settlement be drafted so as to secure against a beneficiary's profligacy or insolvency?

The following methods will **not** give adequate protection:

(1) "The trustees shall stand possessed of the trust fund upon trust for X on attaining the age of 25."

This confers little protection. When X attains the age of 18 he can sell his contingent interest. If he became insolvent, the interest passes to his trustee in bankruptcy.

(2) "The trustees shall hold the trust fund upon trust for X if he attains the age of 40 absolutely."

This is little better. X may only become absolutely entitled to the trust property at the age of 40; but were he so minded, he could sell his contingent interest at the age of 18.

(3) "The trustees shall stand possessed of the trust fund upon trust to pay the income to X during his life with remainder to such of his children as shall attain the age of 21..."

This gives X a life interest; he might sell that life interest for a capital sum. Again, on his insolvency the interest would be lost.

The traditional solution is a protective trust. If the life tenant becomes insolvent, or sells his interest, then the income becomes held on discretionary trusts for the beneficiary and his family.

The laudable purpose of a protective trust is to prevent a prodigal beneficiary selling his income interest for a lump sum which might be dissipated, and to protect the trust fund from his creditors.

Protective trusts have disadvantages. There may sometimes be doubts whether the life tenant's interest has been forfeit. More significantly, protective trusts are inflexible. A life tenant may have good reasons to dispose of his interest but the "protection" can make this difficult. In the 1940s and 1950s protective trusts were created as a matter of routine; they caused such difficulties that the Variation of Trusts Act 1958 was required to allow the protection to be overridden, at untold trouble and expense. The necessity of that Act reflects a failure of vision of that generation of draftsmen; or a failure of the then state of trust law or trust draftsmanship to provide them with appropriate tools for their work. Special

provisions govern the taxation of protective trusts but overall they do not enjoy tax advantages of any value.[4]

What is the answer to the problem of the profligate beneficiary? The best solution is also a simple one: the beneficiary's interest should be *revocable at the trustees' discretion*. The interest of the beneficiary is then transferable but unsaleable. No purchaser would pay a penny for it: it would be revoked by the trustees the next day. If the beneficiary became insolvent the interest could be revoked and the trust fund applied for his benefit in the most appropriate way.

Divorce

This is the most common concern: that the beneficiary's spouse, the son-in-law or daughter-in-law of the settlor, might claim an interest in the trust property in the event of divorce. On this point the settlor can be reassured. In the event of a divorce the court may divest the beneficiary of his property, including his interest under a trust. For the reasons set out above that interest will be of no value.

The court cannot vary the terms of a settlement under which the beneficiary benefits unless it is an "ante-nuptial or post-nuptial settlement."[5] This power is not widely used. Only a settlement made in consideration of marriage, or during a marriage is an "ante or post-nuptial settlement."

Of course the courts will take into account the beneficiary's rights under the settlement in deciding the fate of his other property, or the level of maintenance payments.[6]

Definition of "The Beneficiaries"

The definition of the class of "Beneficiaries" for the purpose of the overriding power of appointment is an important issue in the drafting of a settlement. The aim is not to compile a list of persons who *will* or who *should* benefit from the trust fund; but rather to compile a list of those whom it *might in any circumstance* be desired to benefit. The following clause is the starting point:

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4 S.88 IHTA 1984. On the cessation of the principal beneficiary's interest, he is treated for IHT purposes as if his interest continued. The settlement thus faces a tax charge on his death without the usual CGT uplift. For a deservedly unsuccessful attempt to exploit the exemption in a tax avoidance scheme see *Cholmondley v IRC* [1986] STC 384 and [1987] BTR 55. The settlement has the capital gains tax disadvantages of a discretionary trust.

5 S.24 Matrimonial Causes Act 1973.

6 *Brown v Brown* [1989] 1 FLR 291.

"The Beneficiaries" means:-
(i) The children and remoter descendants of the Settlor;
(ii) The spouses, and former spouses of (i) above; and
(iii) The widow (whether or not remarried) of the Settlor.

Illegitimate Children

The topic of illegitimacy raises a question of principle and a problem of drafting. Should illegitimate descendants of the settlor or other beneficiaries be included as beneficiaries under the settlement? This is a matter for the settlor; but if the draftsman may offer tentative advice, the author's preference is to include them. This is not a moral judgment, or an assessment of the spirit of the times,[7] but a matter of practical advantage. Parents of the illegitimate child have the legal obligation to maintain their child. A family trust is a source of funds for the purpose, and the exclusion of such children from the trust may cause inconvenience.

Trustees should not be deterred by the fear that unknown illegitimate descendants might later emerge with claims against them; they have ample protection.

If it is desired to include the illegitimate beneficiaries then nothing need be done. The words "child", "descendant" and so forth are understood to include illegitimate children and descendants.[8]

If it is desired to exclude illegitimate children then what form of words should the draftsman use to achieve that end? A common formula after the Family Law Reform Act 1969 was as follows:

> "In this settlement references to family relationships shall be construed as if the Family Law Reform Act 1969 had not been enacted."

The Family Law Reform Act had reversed the common law rule, that references to relationships did **not** include the illegitimate. The effect of this provision is thus to restore the former position. The form of wording used has the advantage of seemliness; avoiding the word "illegitimate" let alone any more offensive synonym. This might suit a settlor who wishes to exclude his illegitimate children

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7 The hope was expressed by Lord Reid, in *S v S* [1972] AC 24, "that the prejudice against a person unfortunate enough to be illegitimate is decreasing." This has been fulfilled. The status of "illegitimacy" has been deleted from English law; the illegitimacy rate, currently 25% of births in the UK, is still rising.

8 See ss.1, 19 Family Law Reform Act 1987, re-enacting (and slightly extending) s.15 Family Law Reform Act 1969. Settlements made before 1st January 1970 are governed by the old rule that expressions such as "children" do not include illegitimate children.

from the settlement without openly admitting their existence: an example of Talleyrand's maxim that *la parole a été donnée a l'homme pour déguiser sa pensée*. In more usual circumstances there is much to be said against this form. It offends the principles of simplicity and clarity. In addition, the old form has been overtaken by events; the Family Law Reform Act 1969 has been re-enacted by the 1987 Act. It would nowadays be necessary to provide:

> "references to family relationships shall be construed as if the Family Law Reform Acts 1969 and 1987 had not been enacted."

Where needed, therefore, the author would prefer a more explicit clause.

Spouses of Beneficiaries

The class of beneficiaries should normally include spouses. There is a practical advantage. It may be desired to benefit a spouse: a beneficiary might die and leave an impecunious widow. There are also substantial tax advantages. Married women are now taxed separately from their husbands. It will then be desirable to arrange that they receive an independent income so they can use their personal reliefs and lower rates of tax. The settlement is a convenient source of income,[9] for this purpose. Further, inheritance tax may be avoided or deferred by arranging for a beneficiary's interest in possession to be followed by a short-term interest in possession by his spouse or widow.[10]

Widow of Settlor

There will rarely be any intention to use the funds to benefit the settlor's widow. Nevertheless, there are possible advantages in including her in the class of beneficiaries. It is conceivable that a widow might find herself in need after the death of the settlor. More significantly, the existence of the power to benefit her may be a comfort to her; and, specifically, it may enable her to make lifetime gifts to her family, confident in the knowledge that the trust fund is there to fall back on in case of unforeseen need. The inclusion of the widow of the settlor in the class of beneficiaries may be an important aid to long-term Inheritance Tax planning.

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9 and, with a little ingenuity, capital gains.

10 S.53(4) IHTA 1984. Note the exemption does not apply if the spouse is not UK domiciled for IHT purposes.

This does not apply where (as sometimes happens) husband and wife are each making a settlement around the same time. It would be unwise for each settlor to allow his/her spouse to be a beneficiary of the settlement: tax difficulties could then arise.[11]

Power to Add Beneficiaries

The power to add beneficiaries has become very popular, and for obvious reasons. But the power is drastic and could be used to frustrate the wishes of the settlor. The author would not be satisfied with a power to add beneficiaries unless it is subject to restraints which prevent abuse.

The power to add beneficiaries will occasionally be tax-disadvantageous where the trust property consists of shares in a family trading company; see below.

The power raises questions of trust law. The High Court has twice upheld as valid a power for trustees to select almost anyone in the world[12] and add them to the class of beneficiaries. Yet the law is not settled: the view has been expressed that the wide power to add beneficiaries may be struck down in the higher courts.[13] The problem can and should be avoided. In this draft, the trustees are given a power to add beneficiaries nominated to them: that is clearly valid.

This is the basis of our draft:

> *"The Beneficiaries" means:*
> *(i) Children of settlor, spouses, etc., and*
> *(ii) Any person or class or persons nominated to the Trustees by any Beneficiary whose nomination is accepted in writing by the Trustees with the consent in writing of the Protector.*

This form does require the additional complexity of a "protector".

In a simpler settlement one would not wish to have a "protector". It is then harder to deal with the power to add beneficiaries. One could say that "the Beneficiaries" include:

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[11] Such arrangements amount to reciprocal settlements within ICTA 1988 part XV and s.77 TCGA 1992; and (more doubtfully) there may be a reservation of benefit within s.102 FA 1986.

[12] *Re Manisty* [1974] Ch 17; *Re Hay* [1982] 1 WLR 202.

[13] The objection is that this power is too wide to be exercised in a fiduciary manner; Underhill and Hayton, *Law of Trusts and Trustees*, 14th Edition p58.

> "any person or class of persons nominated to the Trustees by the Settlor and whose nomination is accepted in writing by the Trustees."

The disadvantage is that the power would cease to be exercisable on the death of the settlor.

Another form is to provide that "the Beneficiaries" include:

> "any person or class of persons nominated to the Trustees by two Beneficiaries and whose nomination is accepted in writing by the Trustees."

It is unlikely that two Beneficiaries and the Trustees should conspire to defeat the intentions of the Settlor. It may occasionally happen that there is only one adult beneficiary or none; the power to add beneficiaries would then be suspended until such time as there are two adult beneficiaries available.

One could combine the two forms, at the cost of a slight complication, saying that "the Beneficiaries" include:

> "any person or class of persons nominated to the Trustees by:-
> (i) the Settlor, or
> (ii) two Beneficiaries (after the death of the Settlor)
> and whose nomination is accepted in writing by the Trustees."

Where there is no protector, this is thought to be the best form.

Family Trading Companies: A Tax Complication

There is a further complication in the drafting of a settlement holding shares in a family trading company. The form of the settlement will often decide whether or not the company is a "family company"; this is important for CGT purposes.

The rule is that a company may be an individual's "family company" in two circumstances:

(1) If the individual holds 25% of the voting rights.
(2) If he holds 5% of the voting rights, and more than 50% are "family votes".

Trustees' votes count as "family votes" if (in short) the principal beneficiaries of the trust are members of the family. So to attain "family company" status may require restrictions on the class of beneficiaries.[14]

It will normally be advantageous to arrange, where possible, that the company is a "family company." "Family company" status offers two CGT advantages:

(1) It is necessary in order to qualify for retirement relief.[15]
(2) It also allows hold-over relief for the gift of assets used in trade carried on by the company.[16]

Drafting Styles

The ideal draft would be simple to understand. One must distinguish simplicity of *style* and simplicity of *concept*.

Simplicity of style suggests a preference for the shorter formula over the longer; the use of aids to the reader such as punctuation, clause headings, paragraphing and indentation; the revision of material which is archaic or surplusage.

If simplicity of style is desirable, as the author thinks it is, some innovation is required in adapting the drafting style established in earlier centuries to current use.

Views will differ as to how far this should be done. Perhaps the following points can be made without controversy.

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[14] See TCGA 1992 schedule 6 para 1 for the detailed rules. A general power to add beneficiaries, or to benefit charities, is not permitted.

[15] s.163(5) TCGA 1992.

[16] S.165(2) TCGA 1992. Family company status is also important in the rare case where the family company is quoted.

First, the principles of style set out above are well established and not in the least revolutionary.[17] It is not always appreciated just how far the most "traditionalist" drafting style has advanced from the last century. For instance, the modern practice of using separate clauses is innovatory: 19th century documents contained no paragraph breaks and different sections were marked only by the use of capitalised words.[18]

Second, many questions of style are merely matters of taste and do not admit of confutation. To punctuate or not; to say "hereinafter called" or to avoid that expression; the use of "witnesseth" or "witnesses"; these and a myriad of like issues are not of fundamental importance.

Third, to subject precedents to critical review is not to disparage them. The old forms offer harmonious cadences which ravish the ear and intellect of the conveyancer; but the most traditional of draftsmen must concede that they make little concession to the natural breaks and lucidities of the English tongue.

Last, the draftsman's aim should be to satisfy his client; and that the general public wish to see plainer English is beyond question. See the diatribe in *The Times'* leader of 30th November 1990:-

> "The Solicitors' word processors spew forth an ever increasing flood of garbage. A clearer case of a profession "conspiring against the public" is hard to imagine."

Beyond simplicity of style is simplicity of *concept*: this calls for the broad structure of a settlement to be simple and comprehensible. Provisions should be set out in a logical sequence. Vastly complicated settlements - especially accumulation and maintenance settlements - should not be employed where simpler provisions would be satisfactory.

Complexity of style or of concept carries a heavier price than may be realised. The more complex a draft, the more professional time must be spent studying it in order to ascertain the meaning, *and* the greater the chance of error escaping observation.

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17 "I have never understood why some conveyancers should regard it as beneath their dignity to employ sub-paragraphs in a clause so as to make their meaning plain;" per Lord Donovan in *Re Gulbenkian* [1970] AC 508 at 526. It is interesting to note that the precedents in the 3rd and 4th Schedules to the Conveyancing and Law of Property Act 1881 are not divided into clauses; whereas by the time of the Law of Property Act 1925, clauses are used: see Schedule 5.

18 In Dickens' words, these offered the reader "a resting place in the immense desert of law hand and parchment, to break the awful monotony and save the traveller from despair."

An Example: Interest in Possession Settlement

The form proposed is straightforward in concept:

(1) Income is paid to the life tenant for life;
(2) Income is then paid to his widow for life;
(3) There is then a discretionary trust over income;
(4) The trustees have the standard overriding powers which may override any of the above;
(5) Lastly, there is a standard default clause.

These five limbs are contained in three clauses. The first deals with trust income. The second contains the overriding powers. The third is the default clause. The whole is rounded with the settlor exclusion clause.

The drafting style adopts the principles set out above.

(Formal parts of the settlement are omitted.)

1 Trust Income

Subject to the overriding powers below:

(1) The Trustees shall pay the income of the Trust Fund to the Principal Beneficiary[19] *during his life.*

(2) Subject to that, if the Principal Beneficiary dies during the Perpetuity Period, the Trustees shall pay the income of the Trust Fund to his widow during her life.

(3) Subject to that, during the Perpetuity Period, the Trustees shall pay or apply the income of the Trust Fund to or for the benefit of any Beneficiaries[20] *as the Trustees think fit.*

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[19] The "Principal Beneficiary" will be defined in the definition clause. Where the Principal Beneficiary is female, it is good practice to replace "his" with "her"; "her" with "his", and "widow" with "widower" as appropriate in clause 1.

[20] On the definition of the term "Beneficiaries", see above.

2 Overriding Powers

The Trustees shall have the following powers during the Perpetuity Period:

(1) Power of appointment[21]

(a) The Trustees may appoint that they shall hold the Trust Fund for the benefit of any Beneficiaries, on such terms as the Trustees think fit.

(b) An appointment may create any provisions and in particular
(i) discretionary trusts
(ii) dispositive or administrative powers

exercisable by the Trustees or any other person.

(c) An appointment may be revocable or irrevocable but shall be made by deed.

(d) No appointment shall affect income payable to the Trustees before the date of that appointment.

(2) Transfer of Trust Property to new settlement[22]

The Trustees may by deed declare that they hold any Trust Property on trust to transfer it to trustees of a Qualifying Settlement, to hold on the terms of that settlement, freed and released from the terms of this Settlement.

"A Qualifying Settlement" here means any settlement, wherever established, under which every Person who may benefit is (or would if living be) a Beneficiary of this Settlement.

(3) Power of advancement

The Trustees may pay or apply any Trust Property for the advancement or benefit of any Beneficiary.

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21 It is extraordinary that all the material in this sub-clause is so often compressed into a single sentence.

22 The main difference between this power and the preceding power is that an exercise of this power may create a separate settlement for CGT purposes: *Bond v Pickford* 57 TC 301.

3 Default Trusts

Subject to that, the Trust Fund shall be held on trust for the Principal Beneficiary absolutely.

Commentary

(1) Income to the Principal Beneficiary for his life

The Settlor may prefer that the beneficiary should become absolutely entitled to the trust property on attaining the age of (say) 25, 30, 40; as to which, see above.

(2) Subject to that ... to his widow during her life

What should happen after the Principal Beneficiary dies? It is best to give a life interest to his widow. Whatever the settlor thinks of his son or daughter-in-law relations, it is rarely sensible to exclude them. If the life tenant relies on the income from the trust for his living expenditure, or resides in trust property, then his widow must usually have a similar interest after his death; otherwise she will face some financial difficulty. Second, this allows inheritance tax to be deferred until her death, and possibly avoided.

There is an alternative course which is quite common in practice. This is to give the Principal Beneficiary a power to appoint a life interest to his widow. This is well enough in theory. The Principal Beneficiary can review the position and give the interest, or refrain from doing so, as he thinks best. In practice this solution unsatisfactory. The power is as likely as not to be overlooked. Assuming it is not overlooked, an additional deed will in most cases be necessary, with concomitant expense.

If desired, the widow can disclaim her interest.[23]

Perpetuity Problems

One cannot simply say:-

> "[Subject to A's life interest], the Trustees shall pay the income to A's widow during her life."

If A dies after the expiry of the perpetuity period, then the gift to his widow will breach the rule against perpetuities.

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[23] This would allow use to be made of the principal beneficiary's nil-rate band: see s.93 IHTA 1984.

Where A is married at the time the settlement is made, one could avoid this difficulty by naming his wife expressly:

> "Subject to A's life interest, the Trustees shall pay the income to Mrs A during her life..."

That would be unsatisfactory if A were to divorce.

What can be done? The best solution is to say:

> "...If A dies *during the trust period* the Trustees shall pay the income of the trust fund to the widow of A during her life."

The usual 80 year trust period can then be chosen. Alternatively one could select a different perpetuity period. It would be permissible to have a perpetuity period of the lifetime of the principal beneficiary, A, and 21 years. This solves the problem: the widow's interest must vest in time. On balance this is less satisfactory: it introduces some artificiality and uncertainty into the settlement.

(3) Subject to that ... the Trustees shall pay the income to any Beneficiaries...

The draftsman must now make appropriate provision for the time after the death of the principal beneficiary and spouse. This is to look far into the future; it is difficult to decide what form the settlement should best take.

It might be desirable to create accumulation and maintenance trusts for the children (or grandchildren) of the life tenant, but the variety of potential circumstances is so wide that it is impossible to cater for them all. The attempt to do so leads to endless complexity, from which the draftsman rarely emerges completely satisfied. This route is rarely taken in practice.

A traditional solution is to direct the trust property to pass absolutely to the children of the principal beneficiary who attain 21. That course is too inflexible; it should be rejected out of hand. An alternative solution, which allows some flexibility, is to give the principal beneficiary power, during his lifetime, to appoint appropriate trusts for his children and remoter issue. But this course would vest an important power in the beneficiary which is considered undesirable: what happens if the power is overlooked?

A discretionary trust over income offers the best solution by far. This - combined with the overriding powers in the settlement - allows the trustees to do whatever seems best at the time. The drafting is simple.

The tax consequences of the discretionary settlement under current law are satisfactory. The death of the spouse of the principal beneficiary will give rise to an IHT charge on trust property in which she has an interest in possession. No

additional charge is caused by creating a discretionary trust. To avoid a succession of 10 year charges, the trustees may wish to convert the settlement into interest in possession form or accumulation and maintenance form: the overriding powers allow them to do this.

Just how the discretionary trust regime (sections 64 to 69 IHTA 1984) will operate in these circumstances is a very interesting question. Where the settlement is more than 10 years old at the time of the exit charge (as will usually be the case), it is thought that no exit charge arises. For the exit charge is a fraction of the previous 10 year charge, and there has been none.[24]

The Default Clause

The default clause specifies who should become entitled to the trust property, should all other beneficiaries die.

The common practice is to direct that the property should pass to named children or grandchildren of the settlor. If these have died, the trust property will then pass according to the terms of their wills or intestacies.[25]

The default clause has an important tax function. In the absence of a default clause, the death of all the beneficiaries would cause the trust fund to revert to the settlor. It is usually desired to exclude the settlor from all benefit under the settlement. The draftsman must ensure that the trust property will have a clear destination in all circumstances.

An inadequate default clause is one of the two most common drafting errors.[26] The following clauses fail to satisfy the tax requirement:

> "Subject as aforesaid the trust property shall be held on trust for X if he is then living."

X may not then be "then" living; so the trust fund may revert to the settlor.

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[24] If this is not correct, the effect of s.69(4) is to reduce any exit charge very substantially, so long as the trustees act promptly after the death of the survivor of the principal beneficiary and his spouse. Note that s.144 IHTA 1984 (discretionary will trusts) does not apply: that only applies to short term discretionary will trusts.

[25] It is then possible that the property will revert to the settlor, under the child's intestacy. That does not matter for tax purposes. This has never been judicially decided, but only because it has never been challenged. See *Barr's Trustees v IRC* 25 TC 72 (where this was assumed without argument) and see the dicta of Singleton J in *Glyn v IRC* 30 TC 321 at 329.

[26] The other is a failure to comply with the rule against accumulations.

> "Subject to that, the Trust Fund shall be held upon trust absolutely for such of them the Beneficiaries as shall then be living"

This is no better. It is generally possible that none of the "Beneficiaries" may then be living.

> "Subject as aforesaid the trust property shall be held on the trusts of [another] settlement."

This is only satisfactory if the second settlement has an adequate default clause, and entirely excludes the settlor and spouse. Where the second settlement is made later than the first, care must be taken that the arrangement does not breach the rules against accumulation or perpetuity.

Settlor Exclusion Clause

To wind up the settlement, the draftsman's oldest friend:

> *Notwithstanding anything else in this settlement, no power conferred by this settlement shall be exercisable, and no provision shall operate so as to allow Trust Property or its income to become payable to or applicable for the benefit of the Settlor or the spouse of the Settlor in any circumstances whatsoever.*

The purpose of this clause is to prevent any powers of the Trustees being exercised so as to benefit the Settlor or his spouse. A settlor exclusion clause is of course unnecessary in a will trust.

The draft echoes the relevant statutory provisions of Part XV Taxes Act 1988. The words "notwithstanding anything else in this settlement" are traditional, though unnecessary. It is necessary to say "spouse of the Settlor" rather than to name him or her; the Settlor may divorce and remarry.

Extension of Settlor Exclusion Clause?

Some draftsmen add that "there should be no resulting trust to the Settlor". This does not achieve its object. Under English law a person cannot dispose of property without specifying to whom the property should belong[27]. The proper way to avoid a resulting trust is to use a default clause.

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[27] *Vandervell v IRC* 43 TC at 558: "A man does not cease to own property simply by saying 'I don't want it'. If he tries to give it away the question must always be, has he succeeded in doing so or not?"

For the purposes of the income tax and capital gains tax anti-avoidance provision, any person who provides funds for the purposes of the settlement is a "Settlor". To avoid the provisions fully, every "Settlor" must be excluded from benefit under the settlement. Some draftsmen therefore extend the settlor exclusion clause so as to exclude not only the Settlor named in the settlement, but also any other persons who provide funds, directly or indirectly, and their spouses. This has the attraction of defeating possible Revenue attack in certain circumstances.

The drawbacks, however, are considerable. There may be uncertainty as to whether a beneficiary has "provided funds" for the purposes of the settlement. The concept of "providing funds" is a vague one. Perhaps it is reasonable for the Parliamentary draftsman to use vague language in anti-avoidance provisions; that may be disputed. The trust draftsman should hesitate before following his lead.

There are other, perhaps theoretical, difficulties. There may be substantial tax charges and disastrous practical consequences if any funds were inadvertently "provided" by a beneficiary or spouse. Suppose the default beneficiary provides funds for the settlement. Is there a resulting trust to the settlor? In the author's view, therefore, a clause of this kind should not be employed.

Conclusion: Does Drafting Matter? Is Drafting Easy?

Does drafting matter? It has been said that the courts do not penalise the client for his lawyer's slovenly drafting[28]. This is a half truth. When a draftsman used the word "assent" when he means "convey" or says "Bishop of Westminster" instead of "Archbishop" the intended meaning will be understood. But to ascertain the meaning of a badly drafted document can be a matter of great difficulty. Some apparently trivial drafting errors may have disastrous tax consequences[29]. Drafting does matter.

Is drafting easy? It is certainly more than a mechanical skill. Precedent books help, but they do not solve all the problems. Let Professor Farrand have the last word: "The moral simply is that one must know precisely what one is doing when following precedents whether old or new."[30]

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[28] *Re Gulbenkian* [1970] AC 508.

[29] A classic example is the *Vandervell* litigation [1971] AC 912. A modern example would be the inclusion of a power which might destroy an interest in possession.

[30] *Contract & Conveyance*, 4th Ed, page 230.