



DAVID P. MILLER, CFP®, CPA, MANAGING DIRECTOR

## CHANGE MAY BE COMING TO YOUR TRUST

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### THE TRUST ARRANGEMENT

Not a few men have been accused of using too few words when they communicate. Nevertheless, brevity is sufficient in some situations. On November 29, 1965, the Windsor Star newspaper reported that the shortest will in England was from a case in 1906 where the will admitted to probate was the three words: "All for mother."

#### INTERESTING WILLS

Cecil Geo. Harris became trapped under his farm tractor in Saskatchewan in 1948. He inscribed his will on the tractor's fender using his pocketknife. The fender is on display at the Univ. of Saskatchewan College of Law.

The comedian Jack Benny died in 1974. He left a provision in his will that a red rose was to be delivered to his wife, Mary Livingstone, every day for the rest of her life. She died in 1983.

Source: New York Times, July 2, 1983.

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Estate planning documents need only be as long and complex as is required to articulate the intended objectives. However, three words or even three pages will seldom suffice to communicate the writer's intentions and directives in modern estate plans.

The elements of control and time play a large role in determining the length and complexity of planning documents. Where the writer desires to surrender complete control of assets at a single point in time, the document may very well be brief. The will consisting of only three words is an example. The opposite is most likely true when the writer desires to set conditions on the transfer of assets and/or the beneficiaries take enjoyment of those assets over time. A trust agreement is a good example of this latter case.

Adults with the Following Estate Planning Documents	
Will	23.9%
Living Trust	13.0%
Health Care Directive	6.2%

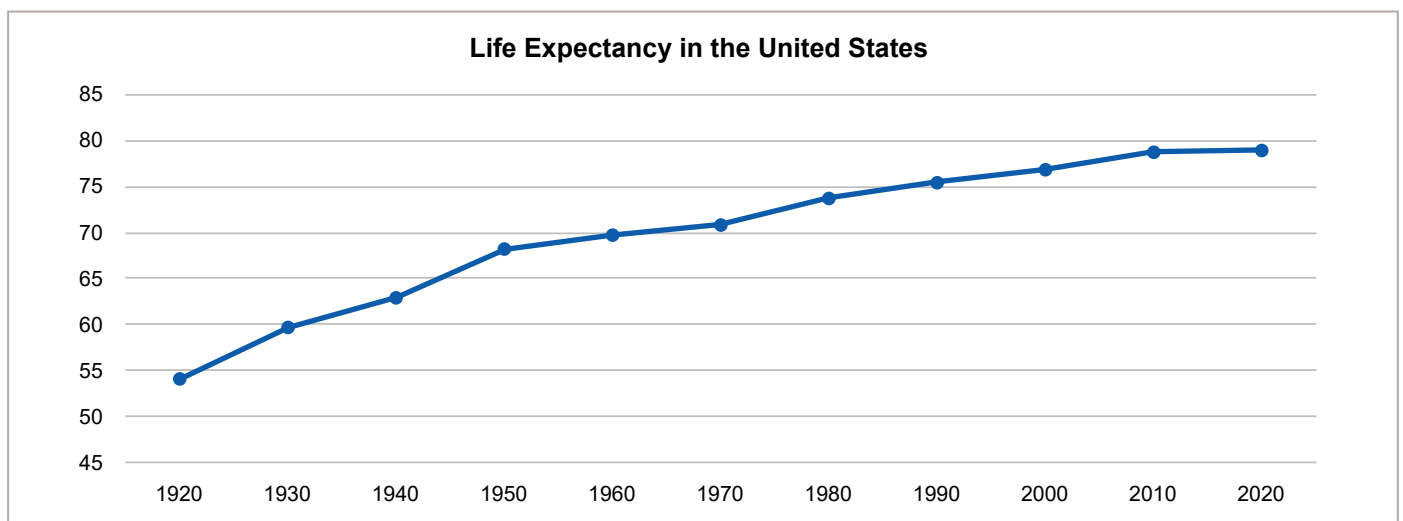
Source: Joint survey by Caring.com and YouGov of 2,400 adults in 2020.

Trust agreements have more than a few moving parts. The players have various rights and responsibilities, and players may very well change over the lifespan of the trust. The primary objective of such an arrangement is to benefit one or more individuals or perhaps a charity. That is a crucial element of trusts to keep in mind as we move through this article. However, as previously stated, the grantor of the assets involved typically also wishes to control when and how those assets are transferred to the beneficiaries. The objective of benefitting others, but with limitations, often results in the necessity for the trust agreement to be lengthy and relatively detailed. The writer needs to articulate these objectives within the trust document as well as attempt to facilitate uncertain or unforeseen circumstances that may occur in the future.

## CHANGES TO TRUST VARIABLES

Things happen. Sometimes suddenly (think Titanic, COVID-19). Sometimes slowly (think waiting for the traffic light at 14<sup>th</sup> Street and Euclid Avenue here in Cleveland to turn green). Change can be expected in trust arrangements. For example, a change in trustees is not uncommon as professional trustees wind down their careers, or relatives serving as trustees can no longer provide the diligence needed to fulfill their duties. Some changes are not anticipated in trust arrangements such as far-sweeping changes in society or tax regulations.

One slow-moving change that is having an ever more frequent impact on trust arrangements is the long-term increase in life expectancy in the United States. The total life expectancy is now nearly 79 years.



Source: Centers for Disease Control and Prevention.

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Life expectancy has become an issue for some trusts that restrict distributions to current beneficiaries during their lives. The current beneficiaries in these cases may not want or need the distributions and wish that distributions could be made to the remainder beneficiaries. The long life of the current beneficiary only delays the point in time when the distribution to the remainders will occur. Interestingly, this phenomenon applies to charitable remainder trusts as well. In those cases, some grantors would like to see at least some of the principal of the trust go out to the charitable organization sooner as opposed to at death, which may be many years in the future.

To an opposite point, there may be a desire to extend the duration of a trust in cases where its terms included a final termination date. The trust may be an older one, the drafters of which did not anticipate that the initial beneficiary would outlive a fixed termination date included in the terms of the trust.

The changes in the lifetime estate tax and GST tax exemption amounts over the last twenty years have been nothing short of dramatic. The most radical change occurred in 2018 when the exemption amount more than doubled from \$5.5 million to \$11.18 million. The change has forced estate planners to either find ways to take advantage of the increased amount or to even limit the amount of exemption utilized at the first death of spouses.

These are just two examples of global variables that impact trusts. Each trust has its own set of variables specific to that trust that will also impact its operation. These variables include the state of situs, age and health of the beneficiaries, experience and diligence level of the trustee, size of the trust, etc.

Year	Estate Tax Exemption
2000	\$675,000
2010	\$5,000,000
2015	\$5,430,000
2016	\$5,450,000
2017	\$5,500,000
2018	\$11,180,000
2019	\$11,400,000
2020	\$11,580,000

Source: IRS.gov.

## HOW TRUST ARRANGEMENTS ARE BEING ALTERED

As previously stated, trusts have a lot of moving parts. Therefore, some changes are made to the arrangement during the lifespan of the trust that are not at all uncommon. Some of these common changes include:

- Change in investment advisor or tax return preparer
- Resignation of trustee
- Change in trustee as desired by beneficiaries
- Classification of trust receipts as income or principal
- Termination of a trust that is no longer needed

Some of the nontypical changes to trust arrangements include:

- Disclaimers by beneficiaries to various rights in the trust
- Adding beneficiaries to the arrangement
- Accelerating distributions to current beneficiaries
- Deferring scheduled distributions of principal to beneficiaries
- Extending the term of the trust
- Splitting the trust to get income or principal to other beneficiaries
- Actions to take advantage of increased tax exemption amounts
- Removal of a trustee in cases where the trust document limits such an action

The first consideration in altering a trust arrangement is whether the trust agreement permits the revision. If so, the proper parties to the arrangement can implement the change. Basic legal documents are typically employed in these cases. Paperwork signed by departing and accepting trustees is a good example. Another simple example is the case of a revocable trust where the grantor is alive and able to freely amend the agreement. All is not lost, however, if the trust agreement does not explicitly permit the desired change or if the trust agreement's terms are unclear on the matter.

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## SPECIAL CHANGES

It is possible in some situations to revise a trust arrangement when the terms of the trust agreement do not seem to permit such a change. The controlling state will determine whether revisions are possible and the appropriate mechanism to employ to secure the change. Methods typically available include:

- Non-judicial settlement agreements
- Court reformation
- Trust Protector provisions
- Decanting
- Moving situs of the trust to a state that does permit these special change types

The first method, as its name implies, is a written agreement between the interested parties. Those parties may include the trustee, the beneficiaries, and the grantor, if alive. A trust arrangement can be substantially modified in some states so long as the grantor and all relevant beneficiaries can agree upon the desired terms. Court reformation may be pursued in those cases where a non-judicial settlement agreement cannot be reached or is not permitted. The change process is more challenging if the grantor is not available to sign off on the desired change. In those situations, the court will seek to determine whether:

- The desired change frustrates a material purpose of the trust.
- The reason for the desired change substantially outweighs accomplishment of the material purpose in those cases where a material purpose of the trust would be frustrated.

This second element is sometimes coined “For the benefit of the beneficiary.” As stated at the beginning of this article, a primary objective for establishing a trust is to provide benefit to others. Therefore, what seems to be an irrevocable trust whose terms cannot be modified, may undergo modification if providing benefit to the beneficiary is more important than respecting a material purpose of the trust.

For example, in the case of a trust that calls for distributions to a beneficiary at age 18 for education purposes, seeking a revision so that the beneficiary can receive a distribution at age 16 in order to buy a motorcycle would frustrate a material purpose of the trust. Since the revision would not provide substantial benefit to the beneficiary, the revision request would be denied. However, a distribution to that same beneficiary at age 16 to cover costs associated with a life-threatening illness may very well be permitted even though the revision would violate a material purpose of the trust. This is because the reason for the distribution, to substantially benefit the beneficiary, outweighs the importance of the intended purpose of the trust.

Competent advisors are crucial in administering trusts both during their routine operation and in those cases where modification may be desired. Clearstead is fortunate to have professionals with financial planning, investment management, and tax management skills available to assist with the ever-changing dynamics of trust arrangements.

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## MARKET BENCHMARK RETURNS

May 31, 2020		1M	3M	12M	YTD
US Large Cap	S&P 500	4.8%	3.6%	12.8%	-5.0%
US Small Cap	Russell 2000	6.5%	-5.2%	-3.4%	-15.9%
Developed Intl	MSCI EAFE	4.4%	-3.7%	-2.8%	-14.3%
Emerging Intl	MSCI Em Mkt	0.8%	-6.9%	-4.4%	-16.0%
Real Estate	NAREIT	1.7%	-12.2%	-9.3%	-17.3%
Core Fixed	BarCap Agg	0.5%	1.6%	9.4%	5.5%
Short Fixed	BarCap 1-3Yr	0.3%	1.3%	4.6%	2.7%
Long Fixed	BarCap LT G/C	0.1%	1.5%	20.3%	11.1%
Corp Debt	BarCap Corp	1.6%	-0.8%	9.5%	2.9%

Source: Bloomberg

The performance data shown represent past performance. Past performance is not indicative of future results. Current performance data may be lower or higher than the performance data presented.