

Notre Dame Law School

## NDLScholarship

---

Journal Articles

Publications

---

1966

### Nonestate Planning

Thomas F. Shaffer

*Notre Dame Law School*

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Estates and Trusts Commons](#)

---

#### Recommended Citation

Thomas F. Shaffer, *Nonestate Planning*, 42 Notre Dame Law. 153 (1966)..

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/902](https://scholarship.law.nd.edu/law_faculty_scholarship/902)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## NONESTATE PLANNING

*Thomas L. Shaffer\**

This article proposes and explains a will form for the young and promising, but presently impecunious, Calvin Knox. He is called a "junior executive" by appliance dealers, and his property is called an "estate" by his flatterers. He is really a middle-class, white-collar worker, and what he really has is a non-estate of children and debts.

This article is intended to stimulate argument. Nobody ever argues about Calvin Knox's nonestate. Nobody ever discusses him in public. Practicing lawyers who can afford to write about "estate planning" pay no attention to him. Bar association panels and slick-paper journals leave him to the mutual-fund salesmen. No legal writer has produced a discussion of the nonestate that a teacher can give students with a straight face. (Some teachers grimace and some smile, but none is bland about the situation.)

The reason for the oversight is probably obvious, but is best left unstated. Proposing a will form to practitioners is sufficient arrogance for a law professor. (Academic lawyers full of advice on how to practice law invite the sort of observation E. B. White made about home economists. He said that those he had met had only one thing in common — "none of them was at home.")

Teachers of "estate planning" courses occasionally remember that old generals and captains of ships never ask their men to do anything they would not do themselves. If a teacher asks his students to draft a will for Calvin Knox (as this writer has), and if nothing in print is as intelligent as what the students write, it is time to get a little competition into the journals.

### I. The Client

Calvin John Knox<sup>2</sup> has no estate and, therefore, no need for what lawyers have come to call "estate planning."<sup>3</sup> He is married and the father of two preschool children. Employed as an engineer for an automobile body manufacturer, Mr. Knox earns \$9,200 annually, before taxes, and expects his salary to increase. His employer provides a retirement plan and hospital and life insurance — the latter in the face amount of \$10,000. He also has privately obtained life insurance in additional face amounts totalling \$30,000. He has as much as \$1,800 in his checking account, a disappearing equity in an automobile, some beat-up furniture, and a fishing rod or two. He and his wife and children are

---

\* Member, Indiana Bar; B.A., University of Albuquerque, 1958; LL.B., Notre Dame Law School, 1961; Professor of Law, Notre Dame Law School. Professor Shaffer is the author of numerous articles in varied fields although his specialty is estate planning.

1 E. B. WHITE, *THE SECOND TREE FROM THE CORNER* 112 (1953).

2 Calvin's father, John Calvin Knox, provides a broad, varied, and taxable planning and drafting project for the author's third-year students in Property Settlement. The elder Knox has exotic problems. He is a retired Presbyterian minister — an intentional tribute to the practical consequences of the Puritan ethic. This year the problem has been expanded to include the son who is described here.

3 This is probably with an unseemly and unacknowledged debt to that part of Madison Avenue hired by banks and insurance companies.

in good health. He owns no real property but will probably "buy" a residential site within the next few years.

The only reason Knox even considered a will is that he heard his supervisor talking about getting one. And when he mentions it, if ever, his prime concern is to determine whether he needs one or not.

Distilling what is found in bar-association pamphlets on wills, the writer sees three reasons for Calvin John Knox to have a will. First, the intestacy statute may give some of his property to his children. This reason is the weakest of the three and is inserted mainly to give a cumulative effect to the others. It is true that a good many intestacy statutes would give one-half or more to his children,<sup>4</sup> thus invoking cumbersome, expensive guardianship protection against victimization by their mother. However, Knox has all his cash in a survivorship account, and if he buys residential real estate, it will probably be held by survivorship also. Almost all of the cash available to support his family after his death will be life insurance payable to his wife. What probate property there is will probably be eliminated by the widow's allowance or taken under a small-estate procedure.<sup>5</sup> Knox's children stand to inherit a half interest in his automobile and fishing rods, if he does not make a will.

The second reason for a will assumes that Knox will not predecease his wife, or that they will die at about the same time. If Knox dies intestate, his and his wife's property will be available to their children, but it will undoubtedly be placed in guardianship. Included will be all Knox's life insurance, either by inheritance from Knox's wife or through secondary beneficiary designations on the policies. A guardianship is cumbersome, expensive, inflexible, and unnecessary, whereas a trust arrangement is less expensive, more flexible, and more likely to work if Knox's children are being cared for out of state. It is amendable to the settlor's express restrictions and directions. Knox, therefore, needs a will if he wants to see that his small wealth is used to maximum efficiency for his orphaned children. (The emotional force of this can be enhanced somewhat by recalling that widowed parents are invariably more concerned about wills than parents whose spouses are living.)

The trust arrangement, however, will not entirely eliminate a need for guardianship; it will only confine the guardianship to its proper and necessary ambit—the physical care of the children. If Knox and his wife die at about the same time, somebody will have to take the children, and that somebody will be best advised to do so pursuant to appointment as guardian of their persons. The third reason for a will, then, is that Knox can designate in it who this guardian is to be. The great value of this argument is not that it causes Knox to make a will, but that it causes him to consider who is available to

---

4 See, e.g., VA. CODE ANN. §§ 64-1, -11 (1950) (all real estate to children; two-thirds of personalty to children); N.Y. DECED. EST. LAW § 83 (\$2,000 and one-third to the spouse, the remainder to children or descendants if more than one); MODEL PROBATE CODE § 22 (1946) (one-half to children).

5 Many legislatures have moved to liberalize small-estate statutes which either dispense with administration or significantly simplify it. In 1965 legislative sessions, for example, Colorado, Hawaii, Illinois, Indiana, Kansas, Nevada, New Jersey, New Mexico, and New York increased the minimum amounts for summary administration to figures as high as \$5,000. See also Wrigley, *The Small Estates Act of New York*, 30 BROOKLYN L. REV. 19 (1963).

take care of his children and to discuss it with the persons he and his wife choose to be guardians.

When the first of these three reasons, which is the least potent, is discounted, it is apparent that the reasons for Knox to make a will bear almost no resemblance to the reasons for a person with a quarter of a million dollars to make a will. This project, in other words, is *not* a compact version of a "big" will. Knox is no patriarch dispensing his largesse evenly or capriciously to waiting relatives and friends.<sup>6</sup> Disposition is the least of his problems. After his death, he must provide exactly what he is providing now — bare support for his children. It is not a matter of "estate planning," but a matter of planning without an estate, of doing what he can to relieve a thoroughly horrible situation for his family.

The legal profession and its allies in the business of property settlement have assembled libraries full of material on "estate planning," but almost nothing on nonestate planning. Aside from the life insurance underwriters and bank trust departments, who have worked out plans for Knox to increase insurance coverage and to fund family-support trusts with it, very few of the great minds in this industry — and it is an industry whether it ought to be or not — have considered the demands of nonestate planning. However, as one writer has pointed out,<sup>7</sup> most of the clients seeking a lawyer's help with a will are closer to Knox's situation than they are to "estate planning."

## II. Alternative Devices

Knox will need a will to appoint a guardian for his children,<sup>8</sup> to establish a trust for property management, and to add whatever he leaves in his probate estate to that trust. But he will not necessarily need a will to establish the family-support trust. The growth of the Uniform Testamentary Additions to Trusts Act, its statutory progeny,<sup>9</sup> and its case-law equivalents<sup>10</sup> herald an increased use of inter vivos trusts for this purpose. This new law makes safe the use of unfunded, contingent life-insurance trusts which do not go into operation until the insured dies and the insurance proceeds are collected by the trustee. Bank

6 There is something in our culture that tends to make every father think he is Abraham. But for Knox, who should worry, if at all, about supporting only his children, the aspiration is a mistake. If his lawyer doesn't talk him out of it, no one will.

7 Gerhart, *A New Look at Estate Planning: The General Practitioner and Mr. Average*, 50 A.B.A.J. 1043 (1964).

8 Data on this point is drawn from an unpublished paper by Mr. Michael F. Del Fra, a 1966 graduate of the Notre Dame Law School. All American states provide for testamentary guardians — most of them on a pattern based loosely on the English statute, 12 Chas. 2, c. 24 (1660), but usually with diluted power in fathers. The mother now has roughly the same power of designation the father had in England. See, e.g., PA. STAT. ANN. tit. 20, § 211 (1950).

9 The adoption of the statute is discussed and its provisions reviewed and compared with IND. STAT. ANN. § 6-601(j) (Burns 1953), in Shaffer, *Pouring Over in Indiana*, Res Gestae, March, 1965, p. 9, which also cites more complete secondary studies. The status of "pour over" law was surveyed in Schaefer (ed.), *Validity of "Pour Over Trusts,"* (Am. Coll. Prob. Counsel 1963), reprinted at 102 TRUSTS & ESTATES 265 (1963). Since then, several states have adopted the Uniform Act or something very much like it. See, e.g., N.Y. DECED. EST. LAW § 47g, discussed in Barclay, *Legislation in Aid of Administration*, 104 TRUSTS & ESTATES 728 (1965); see also Osgood, *Pour Over Wills*, 104 TRUSTS & ESTATES 768 (1965).

10 See, e.g., *Citizens Nat'l Bank v. Superior Court*, 236 Ind. 135, 138 N.E.2d 900 (1956); *Second Bank-State St. Trust Co. v. Pinion*, 341 Mass. 366, 170 N.E.2d 350 (1960).

trust departments in most communities will accept these trusts without fee during the settlor-insured's life. The wills of both parents can be made to "pour over" into them. They are easily amended<sup>11</sup> and are probably more flexible than testamentary trusts. Moreover, they go into operation immediately, so that insurance and any other funds made payable to them — even survivor benefits under employer-provided retirement plans — are available to the family without the delay and expense of probate. Assuming state law favors this sort of disposition and that the trust and will involved are drawn in reference to the tenor of state law,<sup>12</sup> employing a "pour over insurance trust" is a useful primary device for providing a family-support trust. It does not, of course, eliminate the need for a will.

The payment of life insurance proceeds to testamentary trustees is an even more attractive alternative, eliminating the need for an inter vivos trustee and concentrating all economic resources in the testamentary trust. The insurance proceeds themselves, and the retirement-plan benefits, would not be subject to probate. In most cases, the only delay the device would entail is the delay before testamentary trustees are qualified to serve.

But the payment of insurance to testamentary trustees is a less fully sanctioned and less common alternative, carrying several risks with it. Case law, certainly, has universally condemned the device as an invalid testamentary disposition of insurance proceeds and as payment to a trustee who does not, at the time for payment, exist.<sup>13</sup> Several states have now adopted statutes<sup>14</sup> permitting the payment and protecting insurance companies. But those statutes touch upon only the major problems; they do not reach such considerations as the effect of a will contest on the insurance trust, widow's election, pretermitted-heir claims, pension and profit-sharing payments, and difficult potential conflict of laws issues. They also subject insurance proceeds to probate and quasi-probate expense to which they would not otherwise be subject.<sup>15</sup>

Joint ownership is another alternative, one that probably does not even

---

11 Easy amendment assumes adoption of the Uniform Act or clear recognition in case law of the doctrine of independent significance when applied to an unfunded trust. See Flickinger, *The "Pour-Over" Trust and the Wills Statutes; Uneasy Bedfellows*, 52 Ky. L.J. 731 (1964). If the legal rationale supporting the payment of estate assets to an inter vivos trust is the doctrine of incorporation by reference, the will has to be republished each time the trust is amended.

12 In many states safety still requires that the pour-over will be republished each time the trust is amended, or that the trust be funded, or both. See Shaffer, *supra* note 9.

13 *E.g.*, *Frost v. Frost*, 202 Mass. 100, 88 N.E. 446 (1909); *Prudential Ins. Co. v. Bloomfield Trust Co.*, 104 N.J. Eq. 372, 145 Atl. 735 (1929). The most complete secondary study on the subject is a two-part article, Schipper & Lawthers, *Designating Trustee Under Will*, 94 TRUSTS & ESTATES 819, 826 (1955). No new judicial authorities significantly changing the pessimistic judgments of those authors have been found. See Shaffer, *Life Insurance Proceeds in Trust*, *Res Gestae*, July, 1966, p. 9; *cf.* *Pavy v. People's Bank*, 135 Ind. App. 647, 195 N.E.2d 862 (1964). Existing scholarship has, however, been recently updated by Haskell, *Testamentary Trustee as Insurance Beneficiary: An Estate Planning Gimmick*, 41 N.Y.U.L. Rev. 566 (1966).

14 N.Y. DECED. EST. LAW § 47f (Supp. 1965), is an example. Others are covered in Schelsinger, *Paying Insurance to Testamentary Trustees*, 104 TRUSTS & ESTATES 1095 (1965), and Schelsinger, *Making the Trust Beneficiary*, *Life Ass'n News*, April, 1965, p. 31, reprinted in *Monthly Digest of Tax Articles*, July, 1965, p. 20. The latter includes a very helpful tabular comparison of the advantages of the payment to testamentary trustees pursuant to one of the new statutes and the advantages of payment to the insured's executor on the one hand or to an inter vivos trustee on the other.

15 These are reviewed by Schelsinger, *ibid.*, especially in the second article.

need to be reduced to advice since Knox already holds his cash in survivorship. He may or may not own his automobile that way, but any residential real estate he obtains will probably be held by survivorship. Many of the experts in "estate planning" would apparently urge Knox's lawyer to advise Knox to dissolve these survivorship arrangements in favor of sole ownership or tenancies in common;<sup>16</sup> however, these commentators obviously are not writing for people like Knox.<sup>17</sup> There seems to be no convincing reason against survivorship ownership for two people who are harmoniously married and who have no federal estate-tax problems. The device may even carry with it substantial state death-tax advantages,<sup>18</sup> as well as some amount of immunity from the creditors of either spouse.

Knox should keep his bank account as it is, although a look at the signature card and an inquiry into the circumstances of its execution to make certain that it is what it appears to be is advisable. He should probably buy his residential real estate by the entirety or in joint tenancy, purchase his car in joint tenancy, and hold his securities, if he ever buys any, in joint tenancy.<sup>19</sup>

Survivorship ownership, insurance designations in favor of his wife and contingently to the trust, and the widow's allowance or small-estates statute will probably avoid probate in the traditional sense, if Knox's wife survives him. His will is a formality in that case. If his wife does not survive him, or if they die at about the same time, the will becomes essential—and that reflection implies, of course, that his wife ought to have the same sort of will he has. What is suggested for Knox (and his wife) is a children-centered will. The "poor man's will" of survivorship ownership and life insurance will just about take care of everything else.

### III. Future Operation

If Knox dies before the actuaries predict he should, his children will do well to be supported through their childhood. Although he will probably never belong to the leisure class, Knox may work himself into the problems of the rich. In fact, he will have tax problems long before he is rich.<sup>20</sup>

The present importance of Knox's creeping wealth is that he is unlikely to consult a lawyer about changes in his will. Probably, he will not even count his wealth until he is well past the point at which some tax planning is essential. The will drawn for him now, although it cannot really be tax centered, ought to solve whatever future tax problems it can. There is, for instance, no particular magic in qualifying for the marital deduction, an outright bequest, survivorship transfers, and lump-sum insurance payments to his widow. That

16 See CASNER, *ESTATE PLANNING*, ch. X (1961); Sargent, *Drafting of Wills and Estate Planning*, 43 B.U.L. REV. 179 (1963). Mr. Sargent, one of the most entertaining writers in the field, puts it this way: "Stay away from expensive joints." *Id.* at 184.

17 SHATTUCK & FARR, *AN ESTATE PLANNER'S HANDBOOK*, § 2 (2d ed. 1953), appears to recognize the advantages of survivorship ownership for a client in Knox's situation.

18 IND. STAT. ANN. § 7-2401 (Burns 1953), for example, exempts entireties real estate from a general provision taxing survivorship transfers in the same manner as the federal statute taxes them.

19 This advice assumes a harmonious marriage. See note 25 *infra*.

20 Gerhart, *supra* note 7, at 1045, believes that most clients who consult general practitioners about wills have estates which "may run as high as \$60,000 but not above \$100,000."

important tax saver will almost take care of itself. With the specific exemption<sup>21</sup> and deductions for administrative expenses and debts,<sup>22</sup> about \$130,000 will be free from federal estate taxation. State marital allowances will doubtless be available to reduce state death taxes.<sup>23</sup>

If the contingent trust provisions<sup>24</sup> are supplemented with directions for distribution outright to children who are of age, after all minor children are reared, the will serves as a sensible plan for distribution to his family when it is a couple of decades older. None of the exotic garnish is likely to be there — no two-trust scheme for the marital deduction, and no special powers of appointment — but those things can be added when they are needed. The future tax operation of Knox's will is not going to be disastrous if they are not added.<sup>25</sup>

21 INT. REV. CODE OF 1954, § 2052.

22 INT. REV. CODE OF 1954, § 2053. This, of course, will include "loss" deductions under § 2054 in appropriate cases.

23 See, e.g., IND. STAT. ANN. § 7-2403 (Burns 1966 Supp.).

24 Crane, *Estate Planning for the Young Family*, Law Notes; American Bar Ass'n, Oct. 6, 1964 (Probate Section), suggests the contingent trust only for estates between \$50,000 and \$100,000. His suggestion to use a contingent trust for larger small estates refers to some of the traditional disadvantages of guardianship — narrow investment discretion, out-of-state administration, etc. It is difficult to understand why it is all right to leave \$30,000 or \$40,000 in a cumbersome, inefficient guardianship, but wiser to leave \$50,000 in a trust. The apparent basis for the distinction is that professional trustees, such as bank trust departments, often will not accept trusts under \$50,000. Mr. Crane does not make that argument, but presumably he might. In any case, the argument is deceptive, because family-member trustees will accept small trusts, as will many fairly efficient trust departments. The overall policy answer to the difference might be to amend our medieval law of guardianship. See Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1966).

25 Gerhart, *supra* note 7, asks several key questions he thinks might incline the general practitioner to seek expert assistance in "estate planning," even for a man in Knox's position. Some of these contemplate clients who, while still of modest wealth, are older or richer than Knox. Some of them are relevant here, however, and will serve to illustrate that not even the owners of nonstates are necessarily free from exotic problems. Three of Mr. Gerhart's questions are:

(1) Is there a reasonable expectation of a large inheritance by Mr. Average or any member of his family?

(2) Is there marital difficulty or is Mr. Average a two-family man as the result of a divorce?

(3) Is remarriage of a young widow likely to deprive Mr. Average's children of their inheritance? *Id.* at 1047.

Certainly if the answer to (1) or (2) is positive, special care would be indicated. A positive answer to the first question might raise interesting problems if Knox holds or will hold a power of appointment over his father's property. See note 15 *infra*. The third question appears to be a red herring. What possible meaning does "inheritance" have in Knox's circumstances? He is not King Lear. He should regard any material resources he has now only in terms of supporting his children. The question should be whether his widow will see to that support; if she will, her remarriage is irrelevant. The additional resources of a second husband will probably outweigh whatever drain he puts on the "inheritance" of Knox's children. This point is an important one because it betrays, at least in cases like Knox's, a bad starting point — and a starting point that is probably more deeply imbedded in the client's attitudes than in the lawyer's. Knox should be made to see that petty worries about his wife's remarriage are much less important than adequate life insurance and an adequate device for making maximum use of it. The most difficult part of the task may be convincing Knox that his circumstances are as modest as they are. There is no hope a lawyer will have the necessary tact if he is not himself convinced that Knox's worries about his children's "inheritance" are about as significant as his worries about the national debt.

One question worth emphasis is whether Knox's marriage is harmonious. Knox is best advised to avoid a trust for his wife, and he certainly should avoid binding settlement options on his life insurance. However, this suggestion — and many others in this article — assumes that Knox's marriage is harmonious and that he has confidence in his wife's judgment.

## IV. The Will Form

The will for Knox, like the knight-errant's horse, is the most important part of this scheme—and the most sensitive.<sup>26</sup> What follows is as simple, clear, and short as adequate provision allows. Nevertheless, it is probably longer by half a dozen typewritten pages than most wills drawn for men in Knox's circumstances. Brevity is not necessarily a virtue in drafting. At least it is not a virtue if the price paid for it is unreadable English and muddled direction. The advice of Dean Casner, who is both an accomplished draftsman and a practiced opponent of brevity, is appropriate:

The hue and cry has frequently been raised for simplicity in legal documents. Evidently many have interpreted this request for simplicity as synonymous with a request for brevity. Frequently, however, property dispositions cannot be made short and simple without inviting litigation and trouble. Real simplicity always comes through completeness of statement. If draftsmen of instruments would bear this in mind we might be able to say of more testators "he did not die in vain."<sup>27</sup>

For a complete understanding of the provisions of this will form, the commentary in the footnotes should be read along with the form.

WILL OF CALVIN JOHN KNOX<sup>1</sup>


---

1 The executor of this will and the trustee of the trust it may establish is a cigar salesman. The persons immediately concerned in the distribution it makes are a housewife and two minor children. None of the persons concerned is a lawyer and none is devoted to obscure English or medieval locution. It is important that the fiduciary, the testator (an engineer), and the objects of his bounty be able to understand what this document does to their lives. This form aspires to the objective stated in the introduction to *Will and Trust Forms* (1964), distributed by the Continental Illinois National Bank and Trust Company: "The forms are an attempt to express legal concepts in as simple, modern language as precise draftsmanship permits." As to the other kind of drafting, what Fowler says about hackneyed phrases seems somehow applicable.

The purpose with which these phrases are introduced is for the most part that of giving a fillip to a passage that might be humdrum without them. They do serve this purpose with some readers—the less discerning—though with the other kind they more effectually disserve it. But their true use when they come into the writer's mind is as danger-signals; he should take warning that when they suggest themselves it is because what he is writing is bad stuff, or it would not need such help. Let him see to the substance of his cake instead of decorating with sugarplums. FOWLER, *MODERN ENGLISH USAGE* 235 (2d ed. 1965).

---

<sup>26</sup> Giraudoux, *Ondine*, in GASSNER (ed.), *TWENTY BEST EUROPEAN PLAYS ON THE AMERICAN STAGE* 202 (1957).

<sup>27</sup> Casner, *Construction of Gifts to "Heirs" and the Like*, 53 HARV. L. REV. 207, 250 (1939). Dean Casner, in his *Estate Planning* (1961), includes four will forms, running from three to twenty-two printed pages each.



I, Calvin John Knox, of Marion City, Rollison County, Hoynes,<sup>2</sup> declare that this is my will and revoke all other wills I have made.

### *I. Identifications and Definitions<sup>3</sup>*

A. I am married to the former Cathleen McGee ("my Wife").<sup>4</sup> We have two children, John Calvin Knox II and Elizabeth Knox, both of whom are minors at the time this will is written. References in this will to "my Children" include these two children and any other lawful<sup>5</sup> children born to or adopted by me. References in this will to "my Minor Children" include all of my Children who are, at the time stated in the reference to them,<sup>6</sup> under the age of twenty-one years.

---

For specific strictures against legalese, see Rossman, *Better English for Lawyers as Draftsmen and Advocates*, 48 A.B.A.J. 1048 (1962); Trachtman, *Maxims for Estate Planners*, 1963 U. ILL. L.F. 123; Shaffer, Book Review, 39 NOTRE DAME LAWYER 356 (1964).

2 The will assumes a geographical situs in the mythical state students and teachers at the Notre Dame Law School use, named for the late Colonel William James Hoynes, dean of the Law School from 1883 until 1918. The mythical county is named for Professor of Law Emeritus William D. Rollison, who taught the courses in wills, trusts and future interests at the Law School until his retirement in 1963.

3 A clear statement of the testator's family situation has a number of advantages:

- (1) It provides immediate acquaintance with the persons involved;
- (2) It avoids claims of pretermission;
- (3) It gives opportunity for the definition of shorthand phrases which avoid repetition of names and descriptions later in the will, something statutory draftsmen do all the time, commercial draftsmen do occasionally, and will draftsmen rarely do;
- (4) It defines terms which but for definition would be unclear.

4 The use of capitalized definitions reminds the reader that he is dealing with a specially defined term. With this one exception, what the journalists call a "down style" is more readable than the curious and common capitalization of every other noun. (The fact that rampant capitalization survives in legal drafting is almost as remarkable as the fact that lawyers still write on paper that won't fit into anything not specially made to hold it.)

5 Confining benefits to "lawful" children of a male discourages claims of illegitimate parentage because it disinherits "unlawful" children. The use of the adjective assumes, of course, that the drafter is fairly certain there aren't any children who are not "lawful," and is as confident as professional cynicism allows that there won't be any.

6 Benefits for minor children are keyed to their minority at the time for distribution. A child of twenty-one should no longer be treated as a minor child, whether he was of age when the will took effect or comes of age afterwards.

B. My Wife's father is deceased. Her mother is Pauline Carlson McGee ("my Wife's Mother"). My Wife has no living brothers or sisters. My parents are John Calvin Knox and Priscilla McGregor Knox ("my Parents"). I have one living brother, Cotton Mather Knox ("my Brother"), and one living sister, Jane Alice Knox ("my Sister"). I have four living nephews and one living niece; none of my nephews and nieces is intended to be a beneficiary under this will.

C. The following definitions obtain in any use of the terms in this will:

1. "Descendants"<sup>7</sup> means the immediate and remote lawful, lineal descendants of the person referred to, and it means those descendants in being at the time they must be ascertained in order to give effect to the reference to them, whether they are born before or after my death or the death of any other person. The persons who take under this will as Descendants shall take by right of representation, in accordance

---

This definition means that all children who are of age will be treated alike, *i.e.*, they will receive income and principal distributions only when the care of minor children leaves funds available, and they will receive terminal distributions only when all children are either of age or dead. See comment 19 *infra*.

7 "Descendants" is not clear unless it is defined. See *King v. King*, 218 Ga. 534, 129 S.E.2d 147 (1962). Nor is "issue." *Continental Ill. Nat'l Bank & Trust Co. v. Llewellyn*, 214 N.E.2d 471 (Ill. App. 1966); *Matter of Park*, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965), 51 CORNELL L.Q. 875 (1966); *In re Rockefeller's Trust*, 12 N.Y.2d 124, 187 N.E.2d 764 (1962). Defining descendants in this fashion aims at clarity five ways: (1) It includes all lineal "issue" — the likely ones (children and grandchildren) and the unlikely ones (great-grandchildren and more remote lineal descendants). (2) It excludes collaterals. (3) It clarifies the time of determination and the exclusion and inclusion of class membership, and defines the shares of class members. Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership*, 51 HARV. L. REV. 254 (1937). (4) It should avoid the appalling hassle one finds in recent cases on adopted relatives. See *Goulart Estate*, 35 Cal. Rptr. 465 (1964); *In re Baker's Estate*, 172 So. 2d 268 (Fla. App. 1966); *Doughty v. Futch*, 219 Ga. 677, 135 S.E.2d 286 (1964); *Neissl v. Hartman*, 44 Ill. App. 2d 412, 194 N.E.2d 658 (1963); *Earle v. Indiana Nat'l Bank*, 204 N.E.2d 652 (Ind. 1965); *Ogborne v. Ogborne*, 135 Ind. App. 615, 193 N.E.2d 914 (1963); *Arciero v. Hager*, 397 S.W.2d 50 (Ky. 1965); *Estate of Graham*, 1 Mich. App. 624, 137 N.W.2d 764 (1965); *In re Johnson's Will*, 17 N.Y.2d 448, 213 N.E.2d 889 (1965); *In re Park's Estate*, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965); *Rick's Will*, 45 Misc. 2d 919, 258 N.Y.S.2d 171 (Surr. Ct. 1965), *aff'd*, 267 N.Y.S.2d 894 (App. Div. 1966); *Wachovia Bank & Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E.2d 182 (1965); *Saintignon v. Saintignon*, 5 Ohio App. 2d 133, 214 N.E.2d 124 (1966); *Tower Estate*, 410 Pa. 389, 189 A.2d 870 (1963); *Cutrer v. Cutrer*, 345 S.W.2d 513 (Tex. Civ. App. 1961). (5) It avoids the less common but more appalling hassle over illegitimate children. See *Vallin v. Bondeson*, 346 Mass. 748, 196 N.E.2d 191 (1964).

with the rule of *per stirpes* distribution and not in accordance with the rule of *per capita* distribution. Persons legally adopted when under the age of fourteen years shall not be differentiated from blood descendants for any purpose.<sup>8</sup>

2. "Survive me" is to be construed to mean that the person referred to must survive me by thirty days. If the person referred to dies within thirty days of my death, the reference to him shall be construed as if he had failed to survive me.<sup>9</sup>

## II. Appointment of Fiduciaries

I appoint my Brother executor of this will and trustee of the trust under this will, if one is established. If my Brother is unable or unwilling to serve in either or both of these capacities, I appoint the Old Solid National Bank and Trust Company, of Marion City, Rollison County, Hoynes, to serve instead in either or both capacities. I request that neither my executor nor my trustee, if appointed in this will,<sup>10</sup> be required to furnish bond or sureties.

## III. Payment of Debts and Taxes

A. I direct my executor to pay the following before any division or distribution under the following articles:

1. all of the expenses of my last illness, funeral and burial and of the administration of my estate;<sup>11</sup>

---

8 The age limitation eliminates any doubt as to adopted adult heirs. *Wilson v. Johnson*, 389 S.W.2d 634 (Ky. 1965). The use of "fourteen" is, of course, arbitrary. The fact that it is fairly common probably derives from feudal guardianship in socage, which was not applicable to wards fourteen or older. *Del Fra, op. cit. supra* note 8.

9 This is a general survivorship clause, covering every beneficiary. It will avoid double administration within unlikely and narrow limits. The time period could be made longer, but that might interfere with the distribution of estate assets for the support of the widow and children during administration. No simultaneous-death clause is necessary. Use of this clause will result in the loss of the federal estate-tax marital deduction if Mrs. Knox dies within thirty days of her husband, but that result is no disadvantage in the present circumstances of the Knox family. It is, however, one of several reasons for the review of this will when Knox assembles an estate of much more than \$100,000, if he ever does. Even with the marital-deduction disadvantage, this clause seems preferable to the usual simultaneous-death clause because it eliminates a difficult factual determination on the order of deaths.

10 Many lawyers are too casual about waiving bond and surety requirements. It is assumed that Mr. Knox thinks his brother's honor is sufficient protection for his beneficiaries, but a similar assumption about strangers who may be appointed administrators or successor trustees is one he should be allowed to make for himself.

11 A specific direction to pay funeral expenses and expenses of last illness

2. all inheritance, transfer, estate and similar taxes (including interest and penalties) assessed or payable by reason of my death, on any property or interest in property which is included in my estate for the purpose of computing taxes. My executor shall not require any beneficiary under this will to reimburse my estate for taxes paid on property passing under the terms of this will.<sup>12</sup>

B. I direct my executor, before any division or distribution under the following articles, to pay any mortgage debt on residential real estate passing to my Wife under this will or by right of survivorship, or not to do so, as my Wife may elect. I direct my executor not to pay mortgage debts on real estate<sup>13</sup> distributed to devisees or cotenants other than my Wife.<sup>14</sup>

#### IV. Residuary Estate

A. I define "my Residuary Estate" as all of my property after the payment of debts and taxes under Article III, above, including real and personal property,

is probably not necessary, except in the case of married women whose estate might not otherwise be liable for them. Beyond that, the only justification for the clause is that it is conventional and that it directs payment of these expenses before any allocation of shares among the beneficiaries. See Sargent, *Sins of Oversight in Wills and Trusts*, 30 B.U.L. REV. 301, 307 (1950).

A specific direction to pay debts is omitted here. Although the dangers in using that clause have been somewhat exaggerated, see the Report of the Subcommittee of the Real Property, Probate and Trust Section of the American Bar Association, 100 TRUSTS & ESTATES 915-16 (1961), the clause seems at best simply unnecessary.

12 This clause should be narrow enough that it leaves intact the liability to contribute to taxes of (1) appointees or takers in default under powers of appointment, (2) life insurance and retirement-plan beneficiaries, (3) inter vivos trust beneficiaries, (4) surviving cotenants with right of survivorship, (5) donees of gifts in contemplation of deaths, and (6) others whose nontestamentary property acquisition from Knox will result in death taxes. See, e.g., INT. REV. CODE OF 1954, §§ 2206, 2207. The same result on contribution to state inheritance taxes may also require this sort of specific provision. Cf. *Babcock v. Commissioner*, 234 F.2d 837 (3d Cir. 1956).

13 This solves the problem of exoneration. Note, *Exoneration of Specific Property From Incumbrances Existing at the Death of the Testator or Ancestor*, 40 HARV. L. REV. 630 (1927).

14 A number of common clauses are not in this will because clients in Knox's situation rarely have use for them, e.g., demonstrative, specific, and general cash legacies to relatives and to charity; specific disposition of real estate and tangible personal property. If Knox owned real estate, it would probably be held in survivorship with his wife, and disposition here would depend upon her prior death. The trustee would obviously be obliged to use this important asset for the benefit of the children; one way to facilitate such utilization is to give him adequate power to sell, lease, partition or mortgage the realty. Bank-distributed forms typically contain a detailed disposition of tangible personal property at

whenever acquired by me, property as to which effective disposition is not otherwise made in this will, and property as to which I have an option to purchase or a reversionary interest, but excluding property as to which I have no interest other than a power of appointment.<sup>15</sup>

B. I give my Residuary Estate to my Wife if she survives me.<sup>16</sup>

C. If my Wife does not survive me and I am survived by one or more Minor Children, I give my Residuary Estate to my trustee, in trust, for the

this point, but that apparently traces to the difficulty trust officers have had in dealing with personal property. Perhaps the testator's best interest, however, requires that a trust officer shoulder that difficulty, especially where all beneficiaries are minors. This will gives all tangible personalty to the widow and, if she does not survive, to the trustee. In the latter event, the trustee will be able to realize whatever economic value the property has for addition to the trust corpus and to distribute other items of personalty to the children.

15 This is the conventional manner for dealing with hidden powers. See CASNER, ESTATE PLANNING 1279 (3d ed. 1961); LEACH & LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 960 (1961). Professor Rabin battered the convention efficiently in Rabin, *Blind Exercises of Powers of Appointment*, 51 CORNELL L.Q. 1 (1965). If the Rabin argument is accepted, this clause should exercise powers; his suggestion is:

I appoint all property . . . over which I have a power of appointment at the time of my death (hereinafter known as "appointive property") to A.B. If A.B. cannot take for any reason other than his renunciation of this appointment I intend such property to be used to satisfy all my devises and bequests to which it may lawfully be applied and to the extent not so used it should be captured for the benefit of my estate. Notwithstanding the foregoing, I direct that if any appointive property would be taxed under § 2041 of the Internal Revenue Code of 1954 (as it or its successor provision exists at the time of my death) if the power relating thereto were exercised, but not taxed if said power were not exercised, such power shall not be exercised.

Federal or state death taxes attributable to appointive property dealt with in this Article shall be apportioned pursuant to applicable law notwithstanding anything contained in Article .... hereof. *Id.* at 20. (Footnotes omitted.)

In any case where the client is aware of the existence of powers, the will should deal with them specifically. A clause such as the one in the form should be worded so that property in which the testator has both a power of appointment and some other interest is included in the residuary estate.

16 If Mrs. Knox does not survive for thirty days, this clause will result in the loss of the federal estate-tax marital deduction and corresponding state deductions. In Knox's circumstances, that will be less costly than double administration would be. However, as soon as his wealth approaches \$100,000, advertent use of the maximum marital deduction should be considered. The task then is to minimize double administration, especially where the widow dies at the same time as the testator. The usual device — a formula clause that does

benefit of Minor Children, according to the directions stated in Article V, below.

D. If my Wife does not survive me and I am not survived by any Minor Children, I direct my executor to divide my Residuary Estate into equal shares and to distribute those shares as follows:

1. one share to each of my Children who survives me;
2. one share to the surviving spouse of each of my Children who fails to survive me but who leaves a spouse who survives me;<sup>17</sup>
3. one share to the Descendants of each of my Children who neither survives me nor leaves a spouse who survives me.

E. If my Wife does not survive me and none of my Children survives me, and none of the persons described in paragraph "D" of this article survives me, I direct my executor to divide my Residuary Estate into two equal shares and to distribute those shares as follows:<sup>18</sup>

1. one share to my Wife's Mother, if she survives me; if my Wife's Mother

---

not consider the size of the wife's separate estate — is imprecise. Mr. Wentz, of the North Dakota Bar, has fashioned a precise clause that would "shift gears" where the widow dies within the statutory six months. (INT. REV. CODE OF 1954, § 2056(b)(3).) It calls for the marital gift to be reduced by one-half of the widow's adjusted gross estate, without consideration of assets received from the husband's estate. Wentz, *Planning for a North Dakota Estate*, 39 N.D.L. REV. 395, 418-19 (1963).

17 Clients have to decide, of course, whether or not to include spouses of deceased children. The lawyer's duty is to see that the client thinks about it. This may be an almost ridiculous decision when made with reference to the widowed spouse of a child who has not even started kindergarten. However, one important thing this will should do is survive — both as a sufficient expression of intention a generation into the future, and as a better-than-nothing will in case Knox fails to change it when he should.

18 There are two ways to go about this. The one included in the form attempts to survey all of the possibilities and provide for them. Its principal virtue is the exercise in rhetoric it gives to lawyers who might otherwise never leave their somnolent nirvana of whereases. It requires careful review with the client. The other alternative is a punt into the intestacy statute. Careful attention to the ambiguities involved in using statutory distributees is required. See Casner, *Construction of Gifts to "Heirs" and the Like*, 53 HARV. L. REV. 207 (especially 249-50) (1939). Its virtue — or vice — is that it requires less review with the client. One of its persistent dangers is that the state may be an unintended beneficiary. An attempt at the alternative follows:

1. one share to those persons who would have taken my estate, and in the proportions in which they would have taken it, under the law of Hoynes effective at my death pertaining to the intestate distribution of personal property, if I had died without a will; and
2. one share to those persons who would have taken my Wife's estate, and in the proportions in which they would have taken it, under the law

does not survive me, my executor shall distribute her share under subparagraph "2" of this paragraph; and

2. one-half share to each of my Parents, or all of one share to the survivor of my Parents, if they or either of them survive me; if neither of my Parents survives me, my executor shall distribute their share:
  - a) one-half share to my Brother and one-half share to my Sister, or all of one share to the survivor of my Brother and my Sister, if they or either of them survives me;
  - b) and if none of the persons described in this subparagraph "2" survives me, my executor shall distribute this share under subparagraph "1" of this paragraph.

If neither share can be distributed because none of the persons benefitting under this paragraph survives me, I give my Residuary Estate to the University of Notre Dame du Lac, Notre Dame, Indiana, to be used as part of its Law Scholarship Fund.

#### *V. Administration of Trust<sup>19</sup>*

A. The primary purpose of the trust established in the event that I am not survived by my Wife but am survived by Minor Children, is the support, maintenance, welfare and education of Minor Children. To that end, the trustee may accumulate and add to principal the income from principal to the extent

---

of Hoynes effective at my death pertaining to the intestate distribution of personal property, as if she had died without a will, possessed of this share, on the date of my death.

3. I do not intend that the State of Hoynes be a beneficiary under either of the preceding two subparagraphs. If it is impossible to distribute under either subparagraph without distributing to the State of Hoynes, I direct that the share to which that subparagraph pertains be distributed under the other subparagraph.

Since it is possible that when Knox dies none of his statutory heirs and none of his wife's will survive, it is probably best to include the terminal gift to charity in either case.

19 A contingent trust for children is probably the most convincing reason for Knox to have a will. The trust is the heart of this scheme, and the directions on administration are the heart of the trust. Contingent trusts for children should direct *all* resources to the rearing of minor children. They should direct *no* resources to such middle-class frills as graduate education, nice weddings, and starts in business, until the minor children are as secure as they would be if Knox survives their minorities. There is nothing modest about the undertaking. Any paterfamilias under the age of forty can understand its imposing dimensions if he compares his gross life-insurance coverage with (1) the current annual interest rate at savings and loan associations, and (2) the poverty standards of the Office of Economic Opportunity. (One hundred thousand dollars in insurance is probably more than Knox can afford, and even that would only produce \$5,000 a year for the support of his children.) A contingent trust confined to minor support is not conservative at all, but it is realistic. The rigid-

permitted by law. He shall pay or apply such income as he elects not to accumulate to or for the use of Minor Children until the termination of the trust.

B. If the income and other funds available to Minor Children are insufficient for the support, maintenance, welfare and education of any one or more of them, my Trustee may pay to or apply for the benefit of one or more Minor Children so much of the principal of the trust as he considers necessary for the purposes of the trust. The trustee need not distribute either income or principal

shares alternative to this, see, *e.g.*, WILLS AND TRUSTS FORMS, *op. cit. supra* comment 1, at 37, is as pretentious for Knox as a new Cadillac or a vacation in Europe would be. Not a cent of Knox's money should be distributed to adults until the minor children are certain of food, shelter, medicine, and education. His lawyer ought to tell him that; his lawyer ought, at least, to prevent his having the pretentious alternative without the opportunity to decide on it for himself. The rigid-shares alternative is dynastic, and Knox cannot afford to be dynastic. A lawyer who routinely puts Knox's estate into a dynastic arrangement, in which a 25-year-old is treated exactly as a five-year-old is treated, is only doing what a primitive computer could do better.

It may be that the resources available to the trustee will be more than enough to provide for minor children. This will become more likely as Knox's children mature and his affluence increases. This article is drafted so that the trustee can then use income and principal for the education and other expenses of children who are of age, for grandchildren, and for surviving spouses of deceased children.

There are two common alternatives to the contingent trust for minor children. One is the rigid-shares alternative discussed above. For people who have enough wealth to be able to hand it out with sweeping equality this method would suffice. It is so inappropriate for a young man who has children to support that the writer avoids even putting it in a footnote. An example (drafted, evidently for more pecunious clients), is in SHATTUCK & FARR, *op. cit. supra* note 17, at 388.

The second alternative is a trust that leaves distinctions between minor children and children over twenty-one, spouses and children of deceased children, to fiduciary discretion. The writer prefers the minor-children trust because it focuses fiduciary discretion on the overriding responsibility of seeing to the maintenance of children who cannot care for themselves — to act, in other words, as Knox would act if he were living. But the "one big trust for everybody" alternative is capable of producing the same result. WILL AND TRUST FORMS, *op. cit. supra* note 1, at 43, contains a well-drafted example, which will have to be modified if surviving spouses of deceased children are to be included as beneficiaries:

If my wife does not survive me, to . . . as trustee. The trustee may in its discretion pay to or use for the benefit of my descendants so much of the income and principal as the trustee from time to time determines to be required, in addition to their respective incomes from all other sources known to the trustee, for their reasonable support, comfort and education, adding any excess income to principal at the discretion of the trustee. The trustee may pay the same to or use it for the benefit of one or more of them to the exclusion of one or more of them, and may completely exhaust the principal, my concern being primarily for the support, comfort and educa-



from the trust in equal shares. He may exhaust the entire income and principal of the trust for the benefit of one or more beneficiaries, to the exclusion of the others, subject only to the primary purpose stated in Paragraph "A" of this Article.

C. If the primary purpose of the trust is not impaired by doing so, the trustee may also apply income and invade principal for the support, maintenance, welfare and education of any one or more of the following:

1. those of my Children who are not Minor Children (either because they were not Minor Children at my death or because they attain the age of twenty-one years after my death but before the termination of the trust);<sup>20</sup>
2. the surviving spouse<sup>21</sup> of each of my Children who either fails to survive me or dies during administration of the trust; or
3. the Descendants of any of my Children.

Applications of income and principal under this paragraph need not be made equally. The trustee may distribute to any one or more of the persons described in this paragraph to the exclusion of the others, subject only to the standards stated in this paragraph and to the primary purpose of the trust stated in paragraph "A" of this article.<sup>22</sup>

D. The trustee shall have the power to apply income and principal payable to any beneficiary who is under legal disability or who is, in the opinion of the trustee, incapable of managing his affairs. In carrying out this power, the trustee may distribute income or principal directly to the beneficiary, or to the guardian or parent of the beneficiary, or to a person with whom the beneficiary resides. The receipt of the beneficiary, guardian, parent or person shall discharge

---

tion of my descendants rather than the preservation of principal for distribution upon termination of the trust. After there is no living child of mine under the age of twenty-five [twenty-one] years, the trustee shall distribute the principal, as then constituted, and any undistributed income, to my then living descendants, *per stirpes*.

20 See comments 6 and 19 *supra*.

21 See comment 17 *supra*.

22 At about this point, many draftsmen would add a definition of "education," a word that appears in paragraphs A, B and C of this article. A recently recommended example is:

The term "education" in this article includes advanced, college or post-college education, as well as commercial, technical or art education.

The *ejusdem generis* ghost raises one argument against this sort of enumeration. The writer would, in any event, make it clear that the definition did not fetter fiduciary discretion in preferring college education for one child over "post-college" education for another or over "commercial, technical or art education" for a third.

the trustee from his responsibility for the proper expenditure of income or principal so applied. The trustee may also accumulate income and withhold distributions of principal, in carrying out this power, to the extent permitted by law, until the beneficiary's legal disability is removed or until the beneficiary dies or becomes capable of managing his affairs, at which time all amounts payable to the beneficiary shall be paid to the beneficiary or to his estate.<sup>23</sup> The power conferred in this paragraph shall terminate no later than twenty-one years after the death of the last to die of me, my Wife, and those of my Descendants who are living at my death.<sup>24</sup>

23 This discretion, coupled with the broad discretion the trustee has over any distributions except terminal ones, makes a spendthrift clause unnecessary. Spendthrift clauses should be employed with caution even where their necessity is clearer. In several states their legality has not been established, and in some it has been recently disestablished. *Sherrow v. Brookover*, 174 Ohio St. 310, 189 N.E.2d 90 (1963), 62 MICH. L. REV. 542 (1964), 15 WEST. RES. L. REV. 227 (1963), may have surprised a few Ohio lawyers on that point. If restraint on alienation is essential, the *Sherrow* result is avoidable if the drafter uses enough escape hatches. An omnibus clause that couples spendthrift language with reemphasis of the trustee's discretion and "gear shifting" directions in the English protective-trust tradition is one way to do it:

No interest of any beneficiary of the trust shall be subject or liable in any manner to or for the beneficiary's anticipation, assignment, sale, pledge, debt, contract, engagement or liability or sequestration under any legal, equitable or other process. The trustee is empowered and directed to disregard and defeat any such anticipation, assignment, sale, pledge or other act or attempt in contravention of this provision by (a) accumulation of income to the extent permitted by law, (b) direct payment for the benefit of the beneficiary, or (c) payments of all or any part of the beneficiary's share of income or principal to his or her spouse or children, all as the trustee, in his discretion, may determine.

Another way is to omit the spendthrift language and use only a discretionary or protective trust. This second alternative will probably operate about the same as the first, but it is conceptually much different because it contains no express restraint on alienation. That difference may be important, as the *Sherrow* opinion indicates. See the cases collected at 2 ROLLISON, CASES ON ESTATE PLANNING 627-87 (1959).

The practice in some law offices of routinely using spendthrift clauses is too casual, because it is risky and because there has never been any overpowering logic in their use by American lawyers or their approval by American courts. See Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964).

24 Knox's circumstances so effectively discourage dynasty that there are no perpetuities problems in this will except this one. It is probably the only circumstance in which property could conceivably vest beyond the limits of the Rule Against Perpetuities. Even so, a construction that would regard interests held under this paragraph as nonvested would deserve a stanza of appended infamy in the "Nutshell" series.

## VI. Termination of Trust

When there are no Minor Children living, the trustee shall distribute the remainder of the principal and accumulated income of the trust as follows:

1. one share to each of my Children then living;
2. one share to the then living surviving spouse of each of my Children who is not then living; and
3. one share to the then living Descendants of each of my Children who is not then living and whose surviving spouse is not then living.

If distribution cannot be made under this paragraph because none of the beneficiaries described here is living at the time for distribution, my trustee shall distribute the principal and accumulated income of the trust to the persons described, and in the shares described, in paragraph "E" of Article IV, above, applying that paragraph as of the time for trust distribution and not as of the time of my death.

## VII. Powers of Fiduciaries

My executor and trustee shall have the following fiduciary powers, which are to be construed in the broadest manner consistent with the validity of this will and with their duties as fiduciaries. The powers stated here are not intended to be exclusive, but shall be in addition to those granted by law<sup>25</sup> and shall also pertain to any administrators or trustees<sup>26</sup> who succeed the fiduciaries I have appointed in Article II, above.<sup>27</sup> These powers are:

---

25 In some states, notably New York and the few states that have adopted the Uniform Trustees Powers Act, the rhetoric of expansion contained in powers articles in wills is inappropriate. The statutes contain more breadth than the will is likely to contain. Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627 (1962). If "boilerplate" powers are still used, this part of the article becomes more necessary than ever before. The draftsman may, in fact, want to consider the possibility of *reducing* statutory powers, and to do that he will probably have to be very specific. See Hendrickson, *The New Fiduciaries' Powers Act*, 37 N.Y.S.B.J. 338 (1965). The new statutes are surveyed in Shaffer, *Fiduciary Power To Compromise Claims*, 41 N.Y.U.L. REV. 528 (1966). In the three states, Arkansas, North Carolina and Tennessee, that have adopted incorporation by reference statutes, this article can be shortened into a general incorporation, plus a "no" on each subdivision of the statute that is undesirable.

26 A decision to confine administrators and successor trustees to a narrower, more statutory sort of fiduciary power would be defensible, in line with the decision to leave bond requirements intact as to them. See comment 10 *supra*.

27 Knox has no investments in corporate securities, no investment real estate, and no small-business interests. All three of these assets would impose a requirement of more elaborate powers drafting. Corporate securities are a possible

1. to take possession of property, to keep it safely, and to segregate it from other property owned or held by the fiduciary;<sup>28</sup>
2. to retain and to invest in property, or an undivided interest in property, including residential real estate, for any period, whether or not the

future asset, though, and perhaps broad power to deal with them should be stated here, for instance:

to engage in the powers necessary to the effective administration of corporate securities, including, without limiting the generality of this power:

- i) power to vote in person or by proxy upon all securities held by the fiduciary;
- ii) power to engage in a voting trust or voting agreement with respect to securities;
- iii) power to consent or become a party to, or participate in, mergers, consolidations, sales of assets, recapitalizations, reorganizations, dissolutions or other alterations of corporate structure, including adjustments in capital structure affecting securities held by the fiduciary, whether or not these adjustments involve payments by or to the fiduciary; and
- iv) power to hold securities in unregistered form or in the name of a nominee.

If the trustee is likely to hold any real estate other than residential he needs broader powers to deal with it than those stated in subparagraph 3. The following, from Nicholson, Elliott, Shenck & Wick, *Trust Powers, I TRUSTS, WILLS, ESTATE ADMINISTRATION AND TAXES* 204 (Ind. State Bar Ass'n 1963), is worthy of consideration:

- a) Leasing. Power to let as lessor any real property for such periods as the Trustee may deem appropriate, including periods extending beyond the term of the trust created herein, and upon such terms as [he] shall deem proper, and, in connection therewith, to execute leases containing covenants, including covenants of renewal, as may be desirable to effect such leasing.
- b) Maintenance. Power to erect, alter, improve, repair, maintain and demolish buildings and other improvements to any real property, to grant and obtain easements and charges, make party wall contracts, and to improve and maintain any real property.
- c) Partition and Subdivide. Power to partition or divide, in such manner as the Trustee shall deem appropriate, any real property owned jointly or in common with others, and to plat and subdivide any real property. *Id.* at 214.

Small-business interests are so diverse and specialized that a good lawyer should draft provisions for them from scratch.

See, for other powers drafting, LEACH & LOGAN, *op. cit. supra* note 15, at 994-1004; CASNER, *op. cit. supra* note 16, at 1231, 1261-62 (inter vivos trusts), and 1283-85, 1297-1300 (testamentary trusts).

28 This subparagraph, and some of the others, are not necessary. They are included to remind this layman-fiduciary, not of his powers, but of his *duties*.

property be of the character permissible for investment by fiduciaries;<sup>29</sup>

3. to sell, transfer, exchange, lease, rent, mortgage, pledge, give options upon, partition and otherwise dispose of real or personal property, at private or public sale, for cash or upon whatever terms the fiduciary deems advisable, without notice or order of court;
4. to render liquid my estate, in whole or in part, and to hold cash or readily marketable securities of little or no yield for such period as my fiduciary deems advisable;
5. to borrow in the name of my estate or of the trust, upon whatever terms and conditions and for whatever periods my fiduciary deems advisable for the purpose of preserving, protecting or improving property held by him;
6. to pay, compromise, adjust, settle, compound, renew or abandon claims held by my fiduciary and claims asserted against my fiduciary, on whatever terms he deems advisable, without prior court authority;<sup>30</sup>
7. to distribute in cash or in kind, or partly in cash and partly in kind, in divided or undivided interests, notwithstanding the fact that distributive shares may as a result be composed differently;<sup>31</sup>
8. to employ attorneys, accountants, investment advisors and other pro-

---

29 These powers of retention and investment obviously rely on investment statutes, most of which are in the "prudent man" rubric. One clause that many lawyers would recommend here authorizes specific power to retain and invest in mutual-fund securities. That decision is defensible when the trustee is going to be an individual. It is not defensible for corporate trustees. In any event, it is a decision the testator should make, and in making it, he should probably consider whether he would invest in mutual-fund securities himself. See Rosenfeld, *Investing in Mutual Funds*, The New Republic, July 2, 1966, p. 13.

If this will is modified to include a trust for the widow, this power may have to specify that the trustee may not hold unproductive property without her consent. See Treas. Reg. § 20.2056(b)-5(f)(3).

30 This express power will probably supersede statutory procedures for submitting proposed compromises for prior judicial approval. *Edelstein v. Old Colony Trust Co.*, 336 Mass. 659, 147 N.E.2d 193 (1958). It has the additional advantage of protecting third persons who deal with the trustee from any defect except their own bad faith and of protecting the fiduciary from surcharge for imprudent compromises. Shaffer, *supra* comment 25.

31 Power in the executor to distribute in kind carries none of the problems of the wealthy imposed by similar language in a will with a formula marital-deduction clause, Rev. Proc. 64-19, 1964 I.R.B. 682, because the widow here takes the entire estate if she survives.

This might be an appropriate place for the addition of a power in the trustee to purchase insurance. Such a power carries income-tax advantages, of little importance to these children, and a certain practical utility. An example of a clause authorizing this power is the following:

fessional assistants, including depositaries, proxies, agents and appraisers;<sup>32</sup>

9. to enter into transactions with other fiduciaries including executors or trustees of estates and trusts in which my beneficiaries have an interest, and including himself as fiduciary for other estates and trusts;
10. to pay himself reasonable compensation for his services.

### VIII. Guardian

If it is necessary to appoint a guardian for any one or more of my Children, I nominate my Parents, or the survivor of them, as guardians or guardian of the person of each of my Children who requires a guardian of the person. If my Parents, or the survivor of them, are unable or unwilling to serve as guardians, I nominate my Wife's Mother to serve instead. I nominate my Brother as guardian of the estate of any of my Children who requires a guardian of his estate. I request that no sureties be required on the bond of a guardian appointed under this article.<sup>33</sup>

---

to insure the property he holds as fiduciary against the risks, and in the amounts he, in his discretion, deems expedient, and to obtain and pay for life, health, liability and other forms of insurance for the beneficiaries of the trust, in his discretion.

32 An individual fiduciary is in peculiarly great need of professional assistance, especially investment advice, for which an express clause may be necessary. Note, *Trust Advisers*, 78 HARV. L. REV. 1230 (1965).

33 Minor guardianship in its present statutory form in most states is archaic, inefficient, and expensive; most drafters avoid it on principle. Fratcher, *supra* note 24, gives them authority for the avoidance, if they need it, and some promise of relief if the revised part IV of the Model Probate Code obtains wide adoption. This form adheres to principle. There should be no need for guardianship management of property for Knox's children — beyond possibly the approval of trust accounts, which should be done informally under paragraph C of the following article. The important function that this article serves is the designation of personal guardians; the greatest obstacle to designation appears when the guardians are nonresidents, which is often the case with mobile young families whose breadwinner works in an ubiquitous industry. Where the statute requires that nonresidents may not be guardians without the appointment of resident coguardians, the writer recommends minimum compliance, with the express hope that the law will change before the testator dies, for example:

B. I recognize that the law of Hoynes requires that resident coguardians be appointed when a nonresident is appointed guardian for a minor child. If, at the time of my death, the appointment of a resident coguardian is required, I nominate Charles J. Jones of Marion City, Rollison County, Hoynes, as resident coguardian of the person and estate of any of my Children who requires a guardian in either capacity. However, it is my desire that the custody of my Children and the management of their estates be committed to the care of the guardians of the persons

### IX. Other Provisions

A. My trustee may resign by giving written notice, specifying the effective date of the resignation, to the then current income beneficiaries of the trust, or, as to any beneficiaries under legal disability, to their guardians or to the persons with whom they are residing.

B. In the event the trustee resigns, I request that those of my Children who are then living and who are not then under legal disability nominate a successor trustee and that the nominee they choose be appointed to succeed the trustee. The successor trustee, whether appointed pursuant to their nomination or not, may accept the administration of the trust without examination or review, without liability for doing so, and may act without the necessity of conveyance or transfer.<sup>34</sup>

C. To the extent that it is possible for me to waive such requirements, I request that the trustee not be required to qualify before or be appointed by any court, nor, in the absence of breach of trust, to account to any court,<sup>35</sup> nor to obtain the approval of any court in exercising his power and discretion under this will. No person dealing with the trustee in good faith need see to the proper application of money or property given to the trustee.

---

and estates nominated in paragraph "A" of this Article, and I direct that my executor, my trustee and the resident coguardian exercise whatever authority I am able to give them to that end.

One can hope for a change in the law. See MINN. LAWS 1965, ch. 25. One can also hope that an alert relative will get the children to the place where the deceased parent wanted them to be before an appointment in the state of the parent's domicile is made, but that is not always a safe form of evasion either. See *Winslow v. Lewis*, 15 Ill. App. 2d 65, 144 N.E.2d 782 (1957); *In re Fore*, 168 Ohio St. 363, 155 N.E.2d 194 (1958), *cert. denied*, 359 U.S. 313 (1959); *cf. Symposium — Appointment of a Guardian in the Conflict of Laws*, 45 IOWA L. REV. 212 (1959).

34 The purpose here is not to protect the stranger who may become successor trustee; it is to make it possible to obtain a competent successor, especially in case Knox's brother proves inefficient or worse, and leaves the trust in an unattractive condition.

35 Some draftsmen insert a specific requirement of nonjudicial accounting at this point. Professor Westfall quotes a sample clause, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40, 41 (1957), which has been tailored somewhat to fit this trust:

The trustee shall render annually, to each beneficiary who is not under legal disability and to the guardian of the person of each beneficiary under legal disability an account of income and principal. The written approval of a beneficiary or guardian shall, as to all matters and transactions covered by the account, be binding on the beneficiary who approves the account or whose guardian approves it and all beneficiaries who become thereafter entitled to the income or principal.

D. At approximately the same time, my Wife and I are executing similar wills in which each of us is the recipient of the other's bounty. However, the wills are not the result of any contract or agreement between us, and either will may be revoked at the discretion of its testator.<sup>36</sup>

IN TESTIMONY OF WHICH I now sign this will, in the presence of the witnesses whose names appear below, and request that they witness my signature and attest to the execution of this will, this.....day of....., 19..., at Marion City, Rollison County, Hoynes.

.....

Calvin John Knox

CALVIN JOHN KNOX, in our presence, signed this instrument. Before he signed it, he declared to us that it was his will and requested that we act as witnesses to its execution. We now, in his presence and in the presence of each other, sign below as witnesses, all of this.....day of....., 19..., at Marion City, Rollison County, Hoynes.<sup>37</sup>

signatures

addresses

.....

.....

.....

.....

.....

.....

.....

<sup>36</sup> The possibility of family quibbles on this point may seem remote, but several recent cases suggest that the clause is a useful precaution. *Helms v. Darmstatter*, 215 N.E.2d 245 (Ill. 1966); *Rifkin v. Lipton*, 20 App. Div. 2d 851, 247 N.Y.S.2d 996, *stay granted pending appeal*, 14 N.Y.2d 725, 199 N.E.2d 168, 250 N.Y.S.2d 71 (1964); *Hagen v. Schluchter*, 126 N.W.2d 899 (N.D. 1964); *Fahringer v. Strine*, 420 Pa. 48, 216 A.2d 82 (1966); *Bicknell v. Guenther*, 65 Wash. 2d 726, 399 P.2d 598 (1965); see also Note, *Contracts To Make a Will*, 12 KAN. L. REV. 448 (1964).

<sup>37</sup> At least one state requires that the attestation clause recite the witnesses' belief that the testator is of sound mind — ILL. ANN. STAT. ch. 3, § 69(c) (Supp. 1965). Outside Illinois professional opinion apparently is that the use of the language might encourage a contest suit.