

Winter 1980

## The "Plain English" Trust

J. Rodney Johnson

*University of Richmond*, [rjohnson@richmond.edu](mailto:rjohnson@richmond.edu)

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Estates and Trusts Commons](#), and the [Legal Writing and Research Commons](#)

---

### Recommended Citation

J. Rodney Johnson, *The "Plain English" Trust*, Va. B. Ass'n J., Winter 1980, at 11

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## The “Plain English” Trust

THE adjective, “plain English,” has become a buzzword of the consumer movement during the past five years that stands in proud, confident, and sometimes defiant opposition to what its disciples delight in rather scornfully referring to as “gobbledygook,” “mumbo-jumbo,” and/or a variety of other derisive terms, all of which might be summed up generically as “legalese” which, in turn, has been defined as “the language of lawyers that they would not otherwise use in ordinary communications but for the fact that they are lawyers.”<sup>1</sup> The principal offenders or perpetrators of “non-plain” English are regularly identified at all levels of government, institutions in the finance and retail sectors as they deal with the consuming public, and lawyers in general, whose “misguided” efforts to be clear, precise, straightforward, and all inclusive, as manifested by great attention to detail, extensive use of synonymous or near synonymous words, terms, and/or phrases, and the traditional recitation of ancient and/or archaic legal words, terms, and/or phrases, as sanctioned by longstanding custom (though the reason therefore is often unknown and equally as often non-existent), but not serving any generally recognizable purpose from the consumer’s point of view, are seen generally as more nearly calculated to obfuscate rather than to communicate concerning the subject matter under consideration and thus leave the reader in an ultimate state of confusion as opposed to the desired state of elucidation concerning the idea, thought, concept, goal, end, and/or subject, etc., under consideration such as occurs, for example, in the following illustration.

### Making it perfectly clear

*The Federal Register’s*  
horrible example of bureaucratess:

“We respectfully petition, request and entreat that due and adequate provision be made, this day and the date hereinafter subscribed, for the satisfying of these petitioners’ nutritional requirements and for the organizing of such methods of allocation and distribution as may be deemed necessary and proper to assure

the reception by and for said petitioners of such quantities of baked cereal products as shall, in the judgment of the aforesaid petitioners, constitute a sufficient supply thereof.’

—Federal government English

Translation:

‘Give us this day our daily bread’

—King James English

These allegations of confusion and obfuscation can generally be supported by measuring the language in question by one of the standard tests designed to determine the readability of English. One of the simplest of these tests to apply is Gunning’s Fog Index System. The Fog Index is determined by adding (average sentence length per 100 words of text) to (the number of words containing three or more syllables per 100 words of text) and multiplying the resultant sum by 0.4. The following scale is then used to determine readability: 15—easily readable; 17—requires reading skill of college graduate; 20—fairly difficult; 30—difficult; and 40—very difficult.<sup>3</sup> The first paragraph of this article (excluding the illustration) has a Fog Index in excess of 40. It should not be assumed, however, that a sentence will necessarily be readable merely because it has a relatively low Fog Index. The following OSHA definition of “exit,” for example, has a Fog Index of 17.2: “That portion of a means of egress which is separated from all other spaces of the building or structure by construction or equipment as required in this subpart to provide a protected way of travel to the exit discharge.”<sup>4</sup>

For some time the bar and the bench have recognized a degree of uncertainty concerning the use of some of their language and some of their forms. As early as 1458, Sir John Fortescue, Chief Justice of the King’s Bench, remarked as follows:

Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason.<sup>5</sup>

Lawyers, however, allegedly being a conservative group dedicated more to following precedent than making it, have failed to exert the leadership necessary to bring consumer-oriented documents out of what many consider to be a semantic wilderness bristling with unnecessary repetition, reiteration, redundancy and duplication. Instead, the bar is seen as standing in opposition to the plain English movement because, in the words of one of the movement's prophets, lawyers "equate simplified with simpleminded ... (and) ... the American Bar Association and law schools have been totally unresponsive to the logic and need for simplified contracts."<sup>6</sup>

Notwithstanding this alleged lack of leadership, however, the atmosphere is presently pregnant with potential for reform in both the government and the private sector. During his "fireside chat" in the winter of 1977, President Carter promised the country that "We will cut down on government regulations and we will make sure that those that are written are in plain English for a change."<sup>7</sup> Following this cue, then HEW Secretary Califano initiated "Operation Common Sense, a five-year program to rewrite his department's thousands of rules in a clear and concise manner."<sup>8</sup> At the state level, the legislature of New York amended its General Obligations Law in 1977 by adding a section entitled "Requirements For Use of Plain Language in Consumer Transactions."<sup>9</sup> The leader of the plain English movement in the private sector has been Citibank, N.A. Citibank issued its first plain English form in 1975 and within the next several years it succeeded in translating all of its consumer documents into the new format. Many major national banks, and at least one statewide Virginia bank, have decided to follow Citibank's lead and are in various stages of progress towards their ultimate goal. Thus far in Virginia, the plain English movement in the governmental sector seems to have been restricted to a series of statutes in the insurance area authorizing the State Corporation Commission to establish guidelines for the filing of simplified and readable policy forms for fire insurance,<sup>10</sup> automobile insurance,<sup>11</sup> and accident and sickness insurance.<sup>12</sup> While it is still too early to judge the ultimate success of this Virginia beginning in the insurance area, it is hoped that we might exceed the example of the Delaware Insurance Commissioner in his communication to local homeowner insurance companies concerning a similar project: "Initiation of a readability project affords the insurer a unique opportunity to rearrange the contract into logical thought outline-flow sequence."<sup>13</sup>

Regardless of what might happen elsewhere, it has

always been believed that there was one bastion of the law that was immune to the simplification movement (though vocal critics oft wished aloud that it were not so); a safe haven where not only have the quiddities and quillets developed over centuries been preserved in the forms handed down from senior partner to new associate, but even added to as a result of the verbal convolutions presently required in order to comply with, or avoid the impact of, our increasingly complex tax laws. In what other field, for example, could a state's supreme court find that the words "young men" in a document providing for a fund to "be used to aid and assist worthy and ambitious young men to acquire a legal education" are unclear "in the context of the entire agreement" and go on to hold that, in the absence of express language to that effect, the testator could not be said to have intended to exclude females from the group of prospective beneficiaries.<sup>14</sup> Edward S. Schlesinger, who provides this illustration in his paper, "English As A Second Language For Lawyers," goes on to observe—"One might guess what the testator would have said to the draftsman if, out of a superabundance of caution, the phrase 'and I don't mean young women' had been added to the will before it was executed. We can speculate further on what the court would have done if faced with that apparent surplusage."<sup>15</sup>

But the walls of this citadel have now been breached. Citibank, the same institution that led the simplification movement in the consumer contracts area, has now introduced the "Plain English Trust," a revocable inter-vivos trust the text of which follows the end of this paragraph. Citibank maintains that the settlor of such a trust using its form will have a much better understanding of the trust's operation than he would if the document followed the more traditional form, that this form provides for a high degree of flexibility, and that although the form was designed with small trusts in mind (as low as \$25,000), there is no particular need to restrict it to small trusts.<sup>16</sup> Much can be said in favor of this offering by Citibank insofar as both form and content are concerned. The careful reader will learn valuable lessons in the drafting of trusts, particularly for those cases where a personal as opposed to a corporate fiduciary will be used because, while it is most desirable that the settlor understand a trust agreement, it is imperative that the trustee understand it in order to function effectively. And now, instead of presenting a section by section analysis of this form and dwelling on what in most instances should be obvious, it has been decided to simply reproduce the form in the belief that *res ipsa loquitur*.

## "PLAIN ENGLISH" TRUST

### How This Trust Works

I set up this trust with you as the trustee. It will benefit me for my lifetime. On my death, you will pay the principal to \_\_\_\_\_ and the trust will end. If \_\_\_\_\_ does not survive me, then you will pay to \_\_\_\_\_.

### Setting Up The Trust

I give you \$ \_\_\_\_\_ to invest for the trust.

### Payments During My Lifetime

During my lifetime, you will pay me the net income of the trust. "Net income" is the income earned less your compensation. I'll receive net income payments quarterly.

I can withdraw any part or all of this trust by notifying you in writing. Each withdrawal must be for at least \$1,000. Withdrawals may not be made more often than once each month.

You may use all or part of the principal in any way you believe will benefit me. Any decision you make in good faith will fully protect you and will bind everyone with an interest in this trust.

### Your Investment Powers As Trustee

You may invest the funds from this trust in any assets you deem appropriate including any of the Collective Investment funds which you maintain.

I am aware that you are not allowed to use investment information known to Citibank but not generally available to the public. So, you won't be responsible for not using such information even though it might affect the value of certain investments.

### Your Compensation

Your only compensation for acting as trustee will be 1% of the total value of the principal of the trust charged annually with a minimum of \$250 for each full year or any part of a full year.

### Adding To The Trust

I may increase the principal of this trust by delivering cash to you.

### Ending The Trust

I may end this trust and withdraw all of its assets by writing to you.

### Changing My Beneficiaries

I may change my beneficiaries by writing to you.

### Payments To Incapable Persons

You needn't pay principal or net income to anyone who in your judgment is incapable of managing his own affairs. Instead, you may



**J. Rodney Johnson** is a professor of law at the University of Richmond Law School. He received a J.D. from William and Mary School of Law and an LL.M. from New York University School of Law. He is the editor of Virginia Trust and Will Manual and the author of a number of articles in the fields of estate planning and fiduciary administration.

pay the person having care or control of the incapable person, whether court appointed or not, or you may use it in any other way you believe will benefit the incapable person. You will add to principal any income payment you don't make.

### Payments to Persons Under The Age of 21

You needn't pay the principal or net income to any person under the age of 21. Instead, you may pay in any way you believe will benefit such person. You will add to the principal any income payment you don't make. When such person reaches the age of 21, you will pay him his remaining principal. If he dies before, you will pay his estate.

### Resigning

You may resign as trustee anytime by notifying in writing me or the person then having care and control of any incapable person.

### No Other Changes

I cannot make any other changes in this trust by my Will or otherwise.

**Law That Governs**

This trust will be governed by New York State law.

**Date Of This Agreement**

This agreement will begin on the date you and I both sign it. I may, however, cancel it by writing to you within 10 days of this agreement. If I do, I won't incur any charges or fees, except for out-of-pocket expenses you may have had before my written cancellation reaches you.

Signature	Date
Trustee	Date <sup>17</sup>

**FOOTNOTES**

1. Robinson, "Drafting—Its Substance and Teaching," 25 Journal of Legal Education 514 (1973).
2. "Turning Federalesse Into 'Plain English'," Business Week, May 9, 1977, p. 58.
3. Ironman, "Writing the Executive Report," Funk & Wagnalls (1966) p. 41, as explained in Schlesinger, "English As A Second Language For Lawyers," 12 Miami Institute on Estate Planning 7-31 (1978).

4. Sidey, "Trying to Regulate the Regulators," Time, December 5, 1977, p. 33.
5. "Translating Legalese Into English," Business Week, October 25, 1976, p. 94.
6. Alan Siegel in People, May 22, 1978, p. 93 and p. 94.
7. "Waging War on Legalese," Time, January 16, 1978, p. 60.
8. "Government, Business Try Plain English For a Change," U.S. News and World Report, November 7, 1977, p. 46.
9. Section 5-702.
  - a. Every written agreement entered into after November first nineteen hundred seventy-eight, for the lease of space to be occupied for residential purposes, or to which a consumer is a party and the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes must be:
    1. Written in a clear and coherent manner using words with common and everyday meanings;
    2. Appropriately divided and captioned by its various sections . . . .
10. Code of Virginia § 38.1-367.1 (1977).
11. Code of Virginia § 38.1-387.1 (1977).
12. Code of Virginia § 38.1-354.1 (1979).
13. Nader, "Gobbledygook," Ladies Home Journal, September, 1977, p. 68.
14. *Ebitz v. Pioneer National Bank*, 361 N.E.2d 225 (Mass. 1977).
15. 12 Miami Institute on Estate Planning 7-8 (1978).
16. Perhaps of even more interest to some than the language being used is the fee structure employed by Citibank in plain English trusts—an annual principal fee of 1% and no income fee (minimum annual fee is \$250). To the best of the author's knowledge, this is a lower fee for small trusts than is available at any of the state-wide Virginia banks.
17. Reproduced with the permission of Citibank, N.A.