



HIGGS & JOHNSON

That's  
**ONE FINE MESS**

You've  
Got Me Into  
Stanley!

The Use And  
Abuse Of  
Precedents





HIGGS & JOHNSON

Heather L Thompson  
Partner, Private Client &  
Wealth Management Group

27 September 2007



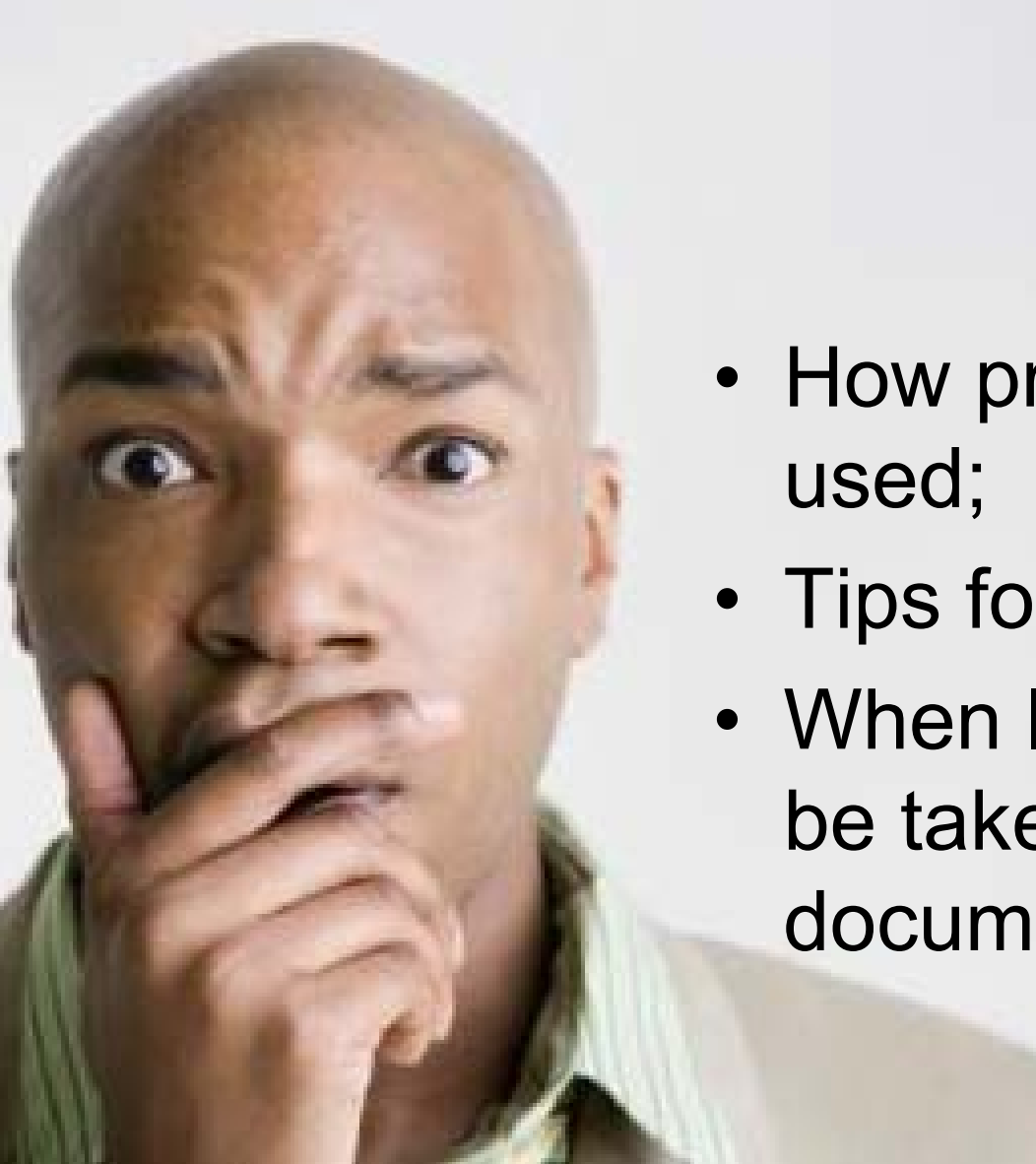
STEP  
Society of Trust and  
Estate Practitioners



# THE USE AND ABUSE OF PRECEDENTS

“Here is good counsell and advice given, to set down in conveyances every thing in certaintie and particiularitie, for certaintie is the mother of quietnesse and repose, and incertaintie to cause a variance and contentions; and for obtaining of the one, and avoyding of the other, the best meane is, in all assurances, to take counsel of learned and well experienced men, and not to trust only without advice to a precedent.”  
Coke, upon Littleton 212a (1628)





# OVERVIEW

- How precedents should be used;
- Tips for adaptation; and
- When legal advice should be taken on "boiler plate" documents.



**HOW PRECEDENTS  
SHOULD BE  
USED**

# HOW PRECEDENTS SHOULD BE USED

1. Often a starting point is needed.
2. Guide only – be cognizant of the particular circumstances:
  - Remember the person e.g. corporate person vs individual
  - Declaration of Trust with important powers to the Settlor e.g. notice of retirement and power to appoint a new trustee



# HOW PRECEDENTS SHOULD BE USED

- Nominee Settlor, default provisions mention Settlor's issue but reference intended to be to the issue of the donor
- “The Settlor” means the Original Settlor and any person who shall make any addition to the trust fund – who has the powers given to the Settlor?
- Joint Settlers you refer to children of the Settlor, X is child of one Settlor and not the other, what is his status as a beneficiary?



# HOW PRECEDENTS SHOULD BE USED

3. Notes can be important eg. difference between mutual wills and wills on similar terms.







# TIPS FOR ADAPTATION

# TIPS FOR ADAPTATION

- Always remember the jurisdiction with which you are dealing (take local advice from specialist) e.g.:
  - What constitutes a deed in The Bahamas
  - The concept of a trust as a legal entity does not work in a common law jurisdiction
  - Perpetuity periods



# TIPS FOR ADAPTATION

- Accumulation of income
  - E.g. accumulation of income allowed only for a limited period of time, differs in various jurisdictions
- Definition of children (whether or not to include illegitimate children)
- Make document as user friendly as possible
  - E.g. Definitions at the front rather than the back of the trust instrument



# TIPS FOR ADAPTATION

- Avoid sloppiness
  - Over reliance on word processor (“Replace All” function does not always work);
  - Consistent use of defined terms and singular and plural;
  - Renumbering and its consequences;



# TIPS FOR ADAPTATION

- Avoid sloppiness
  - Completion e.g. schedules and vesting ages;
  - Logical placement of trustee powers e.g. administrative and dispositive;
  - Make sure beneficiaries mentioned in letter of wishes are beneficiaries in trust deed, maybe an amendment is required?





WHEN LEGAL  
ADVICE  
SHOULD BE  
TAKEN ON  
***BOILER PLATE***  
DOCUMENTS

# WHEN LEGAL ADVICE SHOULD BE TAKEN ON ***BOILER PLATE DOCUMENTS***

- Change of governing law;
- Chains of indemnity;
- Special exclusion clauses e.g. two contradictory clauses, court will construe against person seeking to rely on exclusion clause;



# WHEN LEGAL ADVICE SHOULD BE TAKEN ON ***BOILER PLATE*** DOCUMENTS

- Complex structures;
- Complicated dispositive provisions e.g. joint settlors, continuing trusts;
- Asset protection trusts, Islamic trusts, forced-heirship trusts;





# WHEN LEGAL ADVICE SHOULD BE TAKEN ON ***BOILER PLATE*** DOCUMENTS

- New developments in society e.g. civil partnerships, total return trusts, cryonic preservation trusts.





**CONCLUSION**

# CONCLUSION

- The fast pace of today's world means that you do not have the luxury of time to review. Human error will creep in; however, one can avoid costly mistakes by remembering the following tips:
  - i. four eyes principle; and
  - ii. if you can leave it a day, do.



# CONCLUSION

*“Whoever thinks a  
faultless piece to see  
Thinks what ne'er was,  
nor is, nor e'er shall be”*

*Alexander Pope*



# ***QUESTIONS?***

**Heather L Thompson, Partner**  
Private Client & Wealth Management Group

**[hthompson@higgsjohnson.com](mailto:hthompson@higgsjohnson.com)**

