

SUCCESSFULLY SCRIPTING SETTLOR'S INTENT

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Lora is a founding partner of Davis Stephenson, PLLC. She focuses her practice on providing extensive estate planning services for individuals and multi-generational families of substantial wealth. Ms. Davis assists in implementing strategies that will preserve, protect, and transfer assets consistent with each client's customized plan. While working with clients to create comprehensive legacy plans, her focus is not limited to the tax planning aspects. She addresses family dynamics and core values, charitable legacy planning, and the emotional aspects of estate planning. Her experience includes preparing a wide variety of estate planning documents, handling issues involving the Internal Revenue Service, and assisting clients with charitable planning, probate matters, trust modification and reformation, the creation and administration of business entities, transfer tax planning and marital property issues.

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I. Introduction. You know the old adage, “say what you mean, and mean what you say.” Without a doubt, this sounds much easier than it is, particularly in the context of legal documents. If I had a dime for every time a client asked me why the simple concept they orally conveyed to me in two minutes requires ten written pages to document, I’d be sitting on the beach with my toes in the sand instead of writing this paper. Alas, I do not, so here I am continuing to ponder the difficult task of conveying a client’s wishes and desires in black and white language in their legal documents. With the “good old days” of trusts that terminated during the beneficiary’s life through age-terminating distributions mostly behind us, we are faced with the challenge of successfully scripting our clients’ intentions in a way that fully conveys their hopes and desires while allowing for interpretation in a manner that is consistent with their wishes in the face of unknown circumstances and changes in the law. It is no small task.

And before we get started, a note about terminology. What’s in a name? Settlor, trustor, trustmaker, donor, grantor – what’s the difference? In common practice there is really no difference and those terms are often used interchangeably. It is the name for the person who transfers legal title in assets to a trustee to be held for the benefit of the beneficiary. They are each connected by the actions taken by the donor of the interest. The term “grantor” is tied to the action of granting the property and is most frequently seen in real property transfers although it is also used in the Internal Revenue Code in connection with trusts. The term “trustmaker” or “trustor” is connected with the action of making the trust. If you like alliteration (and who doesn’t?), you might opt to use the term “trustor” to match up with the trustee in your trust documents. The term “settlor” relates to the action of “settling” a trust and is likely the most common term used to describe the person creating a trust. Thus, I have settled on the use of the term “settlor” herein.

II. Legal Analysis of Role of Settlor’s Intent. “The phrase ‘terms of the trust’ means the *manifestation of intention of the settlor* with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings.”¹ Being able to understand (or in some cases to interpret or divine) the intentions of the settlor of a trust is paramount to properly administering a trust. Certainly terms that are clearly written in a trust agreement are generally treated as evidence of settlor’s intent.² In that regard, a close review and analysis of the trust agreement itself is the first step in understanding and interpreting settlor’s intent. When the trust agreement fails to adequately inform regarding settlor’s intent, other sources may provide assistance in its determination. State law statutes provide for certain default terms of trusts and rules of construction. Common law may also provide construction preference and rules and guidance in the interpretation of certain words and phrases. Understanding the parameters of each of these sources of law is helpful in analyzing settlor’s intent.

A. Restatement Third of Trusts. Under the Restatement Third, the terms of the trust and thus the intention of the settlor, is determined by the settlor’s intent at the time the trust is created. It may be determined by the written word, oral communication or conduct, but in any case, only to the extent such intention can be admitted as proof in court.

¹ Prop. Code §111.004(15); Restatement (Third) of Trusts § 4 (emphasis added). This definition is nearly identical to that of the Restatement (Second) of Trusts § 4 and the Uniform Trust Code, Section 103(18) (2010).

² Of course, there is always the possibility of a scrivener’s error that results in unambiguous language improperly conveying settlor’s intent.

The Restatement provides the following factors of importance in interpreting ambiguous terms or supplying missing terms:

- “(1) the situations of the settlor, the beneficiaries, and the trustee, including such factors as age, legal and practical competence, personal and financial circumstances, and the relationships of these persons and these factors to each other;
- (2) the value and character of the trust property;
- (3) the purposes for which the trust is created;
- (4) relevant business and financial practices at the time;
- (5) the circumstances under which the trust is to be administered;
- (6) the formality or informality, the skill or lack of skill, and the care or lack of care with which any instrument containing the manifestation in question was drawn.”³

The intent of the settlor at the time the trust is created is considered when analyzing these factors. However, that intent can be shown by evidence supporting settlor's intent even if the evidence occurred before or after that time if permitted by evidentiary rules.

B. Common Law and Evidentiary Rules. Under Texas law, it is clear that settlor's intent will be enforced if unambiguous. In the recent Texas Supreme Court case of *Rachal v. Reitz*,⁴ the court upheld a mandatory arbitration clause that the trustee sought to enforce with respect to legal claims made by a beneficiary of the trust against the trustee. In doing so, the court confirmed that the settlor's intent, when expressed in an unambiguous trust, will be enforced over the objections of beneficiaries who may disagree with those terms. The “cardinal rule” of common law in Texas is to construe trust agreements in a manner that enforces the intentions of the settlor.⁵ However, when that intent is not clearly expressed in the trust instrument, the court may look to the agreement as a whole and may also consider circumstances connected to its execution.⁶ In addition, in the case of ambiguity, admission of extrinsic evidence is proper to resolve the ambiguity.⁷ In the *Eckels* case, the appellants challenged the trial court's use of extrinsic evidence to resolve what the court determined to be a latent ambiguity. That ambiguity resulted from the change in an account number by a financial institution that affected disposition of the assets of the account under the settlor's revocable living trust agreement. The appellate court held that it was proper to use extrinsic evidence to determine settlor's intent and further stated that a “...court may always receive and consider evidence concerning the circumstances existing when the trust was written that will enable the court to place itself in the settlor's position at the time and thus to determine the sense in which the words were used by the settlor.”⁸ While this statement may be rather broad and not consistent with other rules of construction, there is logic in this result. After all, isn't it the task of the court to determine the true intent of the settlor?

³ Restatement (Third) of Trusts § 4 cmt. a.

⁴ 403 S.W.3d 840 (Tex. 2013) (citing to *Frost Nat'l Bank of San Antonio v. Newton*, 554 S.W.2d 149, 153 (Tex.1977)).

⁵ *Aberg v. First Nat'l Bank in Dallas*, 450 S.W.2d 403, 410 (Tex. Civ. App.—Dallas 1970, writ ref'd, n.r.e.).

⁶ *Id.* (citing *Guilliams v. Koonsman*, 279 S.W.2d 579 (1955)).

⁷ *Eckels v. Davis*, 111 S.W.3d 687, 695 (Tex. App.—Fort Worth 2003).

⁸ *Id.* at 696.

The evidentiary rules that affect what can be admitted in a court proceeding in determining settlor's intent include the following.⁹

1. The Plain Meaning Rule. This rule requires the court to consider the plain meaning of the words without considering any evidence of the settlor's intent. This rule has been enforced in Texas in connection with both wills¹⁰ and trusts.¹¹ In *San Antonio Area Foundation*, the issue at hand was the meaning of the term "real property." The trial court granted summary judgment for the Foundation based on its conclusion that the term is unambiguous and rejected extrinsic evidence offered by the plaintiffs. The court of appeals reversed, holding that it is always proper to consider circumstances surrounding terms used to understand their intended meaning. The Texas Supreme Court, in a unanimous decision, held that extrinsic evidence is not admissible to construe an unambiguous will provision. The court held similarly in construing the revocable living trust in *Soefje*, citing to *San Antonio Area Foundation*. However, there are exceptions to the plain meaning rule in the case of a latent ambiguity, as discussed in *Eckels*.

2. The Dead Man's Statute. This type of statute prevents an interested party to litigation from testifying against a deceased party (the "dead man") about communications he or she had with the deceased. Texas has a very limited application of this rule. Any such testimony is allowed as long as it is independently corroborated.¹²

3. The Hearsay Rule. Hearsay is generally inadmissible in Texas unless specifically allowed under statute or evidentiary rules.¹³ However, "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will" is not excluded as hearsay under the rule.¹⁴ Thus, a third party may testify in connection to a will construction about the testator's intent, including the third party's memory or belief of the testator's intent. Note that the exception to the rule only applies in the case of a will and not a revocable trust used as a will substitute.

C. Uniform Trust Code. The UTC provides for a similar analysis to that of the Restatement Third in determining the terms of the trust, and thus settlor's intent:

"While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the

⁹ For an outstanding article on this subject, see Fred Franke and Anna Katherine Moody, The Terms of the Trust: Extrinsic Evidence of Settlor Intent, 40 ACTEC Law J. 1 (2014).

¹⁰ *San Antonio Area Foundation v. Lang*, 35 S.W.3d 636, 339 (Tex. 2000).

¹¹ *Soefje v. Jones*, 270 S.W.3d 617, 628 (Tex. App. 2008).

¹² Tex. R. Evid. 601(b).

¹³ Tex. R. Evid. 802.

¹⁴ Tex. R. Evid. 803(3).

settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning."¹⁵

D. Statutory Authority. Last but definitely not least in our analysis is the statutory authority under Texas law. Texas statutes direct that the terms of the trust prevail over any provision of the Texas Trust Code with exceptions relating to illegal terms, exculpation of trustees for certain bad acts, periods of limitations in connection with trust proceedings, certain trustee duties in connection with accountings and the duty to act in good faith, and certain powers of the court.¹⁶

III. Current Methods for Changing a Trust in Texas. Below is a high level overview of methods for changing trusts under the Texas Trust Code.¹⁷

A. Merger. The Texas Trust Code permits a trustee to combine or merge two or more trusts with each other without a judicial proceeding if (i) no rights of a beneficiary of the trusts are impaired and (ii) the merger does not adversely affect the purposes of any of the trusts (i.e., settlor's intent) that are being combined.¹⁸

B. Decanting. The Texas Trust Code permits a trustee to make a distribution of trust principal in further trust, a technique commonly known as "decanting."¹⁹ The scope of the decanting authority depends on the powers of the trustee under the trust agreement. A trustee who has the power to make distributions only under an ascertainable standard (e.g., health, education, maintenance, and support) or who is required to only make mandatory distributions to a beneficiary is treated as having "limited discretion."²⁰ A trustee with other distribution powers is considered to have "full discretion."²¹

A trustee with limited discretion can decant all or part of the original trust into a new trust but that new trust must also be for the benefit of all of the beneficiaries of the original trust, including both current and remainder beneficiaries.²² The new trust must also have the same distribution discretion as the old trust, a class of beneficiaries included in the old trust must be included in the new trust and remain open to members of that class, and powers of appointment in the new trust must mirror any granted in the old trust.²³

A trustee with full discretion has much more discretion to make changes in beneficial interests. The trustee can decant all or part of the original trust into a new trust for the benefit of any one or more of the beneficiaries of the original trust, including both

¹⁵ Uniform Trust Code § 103 cmt. (2010).

¹⁶ Tex. Prop. Code §111.0035(b). All references herein to the Texas Property Code are to such Code as modified through 85th First Special session, with such provisions generally effective as of September 1, 2017.

¹⁷ A detailed discussion of the methods for changing the terms of a trust is outside the scope of this paper. For an excellent article discussing methods for changing a trust in Texas, see Melissa J. Willms, Decanting Trusts: Irrevocable, Not Unchangeable, found on the Davis Willms website at http://www.daviswillms.com/yahoo_site_admin/assets/docs/decanting_final_willms.87155354.pdf.

¹⁸ Tex. Prop. Code §112.0057(c).

¹⁹ Tex. Prop. Code §112.071 *et seq.*

²⁰ Tex. Prop. Code §112.071(6).

²¹ Tex. Prop. Code §112.071(5). Note that prior to the legislative changes made in 2017, a trustee who was limited in any way in connection with distributions, including limitations such as "best interests, welfare, or happiness" was deemed to have limited discretion. This provision was modified to allow greater flexibility under the decanting statute.

²² Tex. Prop. Code §112.073.

²³ *Id.*

current and remainder beneficiaries.²⁴ The trustee may grant a beneficiary currently entitled to principal distributions a power of appointment over the trust, the objects of which may be different than the beneficiaries in the original trust.²⁵ If beneficiaries of the old trust are described as a class, the beneficiaries of the new trust may, but are not required to, include beneficiaries who later become members of the class after the decanting.²⁶

It is important to note, however, that a trustee with either limited or full discretion must not only exercise his or her decanting power in good faith and in the interest of the beneficiaries, but must also exercise the power “in accordance with the terms and purposes of the trust” – meaning consistent with settlor’s intent.²⁷

C. Judicial Modification, Termination or Reformation. The Texas Trust Code permits a trustee or a beneficiary to petition a court to modify or terminate a trust.²⁸ Although there are specific enumerated reasons for doing so, they are very broad and include the following:

- “(1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
- (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;
- (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust’s administration;
- (4) the order is necessary or appropriate to achieve the settlor’s tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor’s intentions; or
- (5) subject to Subsection (d):
 - (A) continuance of the trust is not necessary to achieve any material purpose of the trust; or
 - (B) the order is not inconsistent with a material purpose of the trust.”²⁹

It is important to note that the focus of each of these reasons for modification is on either the settlor’s intent or the purposes of the trust, which is tantamount to settlor’s intent.

Under the UTC, a court is directed, to the extent practicable, to make any trust modifications in accordance with the settlor’s “probable intention.”³⁰ The comments to this provision indicate that modifications of this nature are equitable deviations that are not intended to disregard the settlor’s intent, but rather, are intended to “modify inopportune details to effectuate better the settlor’s broader purposes.”³¹ Examples include changes to

²⁴ Tex. Prop. Code §112.072(a).

²⁵ Tex. Prop. Code §112.072(b) and (c).

²⁶ Tex. Prop. Code §112.072(d).

²⁷ Tex. Prop. Code §§112.072(e), 112.073(f) (emphasis added).

²⁸ Tex. Prop. Code §112.054(a).

²⁹ *Id.*

³⁰ Uniform Trust Code § 412(a) (2010).

³¹ Uniform Trust Code § 412(a) cmt. (2010).

address a beneficiary's economic situation or incapacity that was not anticipated by the settlor.³²

The Texas Trust Code also permits a trustee or a beneficiary to petition a court to reform a trust under the following circumstances:

- “(1) reformation of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration;
- (2) reformation is necessary or appropriate to achieve the settlor's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the settlor's intentions; or
- (3) reformation is necessary to correct a scrivener's error in the governing document, even if unambiguous, to conform the terms to the settlor's intent.”³³

As with the modification and reformation provisions, the focus is on the settlor's intent. In addition, the court is specifically directed to ensure that any modification, termination, or reformation of a trust be done in a “...manner that conforms as nearly as possible to the probable intention of the settlor.”³⁴ Further, any reformation of a trust to correct a scrivener's error may be granted “...only if the settlor's intent is established by clear and convincing evidence.”³⁵

D. Modification Pursuant to the Trust Agreement. The Texas Trust Code provides that if a trust agreement includes provisions for a trust protector, that person will have all of the powers granted to the trust protector under the agreement.³⁶ A nonexclusive list of powers that may be given to the trust protector include the power to modify trust terms to achieve favorable tax status or to facilitate trust administration and the power to modify a beneficiary's powers of appointment.³⁷ As discussed above, a trust agreement can override almost any default provision of the Texas Trust Code.³⁸ Thus, the settlor can provide for a trust protector, special trustee, trust advisor, or a fiduciary called by any other name and can give that fiduciary the ability to make modifications to the trust agreement without the need to go to court. Aside from tax limitations, the sky is the limit as to the powers that such a trust protector may possess. However, as a practical matter, the settlor of the trust will have specific intentions with regard to the creation of the trust and will most likely include provisions for a trust protector to ensure that those intentions continue to be met for as long as the trust is in existence in spite of changes in circumstances or the law. The difficulty is in drafting the trust in a manner that clearly describes the settlor's intent to the trust protector so that any modifications can be made consistent with that intent.

IV. Why Does it Matter? As drafting attorneys, we may sometime wonder what our role is. Can't we simply draft a trust that allows for HEMS (health, education, maintenance and support) distributions to the beneficiary, along with a few powers of appointment, and call it a

³² *Id.*

³³ Tex. Prop. Code §112.054(b-1).

³⁴ Tex. Prop. Code §112.054(b).

³⁵ Tex. Prop. Code §112.054(e). See also Uniform Trust Code § 415 (2010).

³⁶ Tex. Prop. Code §114.0031(d).

³⁷ *Id.*

³⁸ See fn 11 *supra*.

day? After all, won't the money be distributed out of the trust and wasted away by the third generation? Alternatively, if the money is still in the trust and changes need to be made, can't those be made via decanting, merger or trust modification?

As discussed above, changes may be made later via the various statutory and judicial avenues. However, laying the groundwork to ensure they are made in a manner that is consistent with settlor's intent is more important than ever now that long-term trusts are routinely created for purposes other than tax avoidance. This is particularly true given that the UTC has influenced the overall analysis of valid trust purposes by adding a provision requiring that a trust be for the benefit of its beneficiaries.³⁹ Although Texas has not adopted the UTC, it does inform Texas courts when the law is unclear. What is not clear is whether this "benefit of the beneficiaries" rule is a restraint upon or might even take precedence over the settlor's intent.⁴⁰

V. Scripting Settlor's Intent for Long Term Trusts. The foreword in the Restatement (Third) of Trusts describes a trust as follows, "A trust normally has three actors: the settlor, who may have spoken in language now unclear or archaic; the beneficiary, who expects to benefit; and the trustee, who must balance responsibilities to settlor, beneficiary, and public policy." While we all desire to avoid the use of unclear "archaic" terms, is it clear that we always avoid being unclear? Are there cases in which we want to intentionally be unclear or vague? Are there circumstances in which we believe that we are being clear but there is ambiguity in the application of the language in real life? Can two people read the same provision and have a different interpretation? The answer is an absolute YES to all of those questions!

A. Narrowly and Specifically Defining Settlor's Intent. One approach considered in drafting long term trusts is to be very explicit in the distributions and investments permitted. This is sometimes an appealing approach in that it provides certainty to the settlor that his or her purposes in connection with the trust will be accomplished. For example, providing that a beneficiary is entitled to only the income from the trust and that the trustee is allowed to invest in only bank certificates of deposit would be permissible limitations that express the settlor's desire to limit those terms of the trust. However, this approach often fails to take into account changes in circumstances that would make those restrictions inconsistent with the settlor's true intent. If the above restrictions were included in a trust established at a time when certificates of deposit yielded 10% and the interest rate later dropped to 1%, clearly it could at least be argued that the settlor never intended that distributions to the beneficiary to be so restricted.

Nonetheless, including enforceable strict provisions can be accomplished in Texas given that, as discussed above, the settlor has broad powers to override most provisions of the Texas Trust Code.⁴¹ The UTC, however, provides that "an owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others."⁴² Thus, any unreasonable restrictions on trust

³⁹ Uniform Trust Code § 404 (2010).

⁴⁰ See Jeffrey A. Cooper, Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law, 88 B.U. L. Rev. 1165 (2008) for an inspiring article on the topic of settlor's intent.

⁴¹ Note however, that not all trust restrictions must be honored by a trustee, particularly when the restriction is against public policy. See *Coffee v. William Marsh Rice University*, 408 S.W.2d 269, 284 (Tex. Civ. App. – Houston 1966, writ ref'd n.r.e.) (trustees could ignore requirement that University only benefit white residents of Houston as settlor's intent could be accomplished without honoring this restriction).

⁴² Uniform Trust Code § 412(a) cmt. (2010).

property use may be invalid. Although the UTC has not been adopted by Texas, it can be instructive to courts in interpreting trusts. The likelihood of any strict provisions being determined to be enforceable in a challenge by beneficiaries or a fiduciary will clearly depend on the facts and circumstances of each case. If strict provisions are desired, the terms of the trust should be as clear as possible and avoid any appearance of being against public policy.

B. Settlor's Intent Undefined. An approach on the other extreme would be to give broad discretion to the trustee in connection with trust management, including with respect to distributions and investments. For additional flexibility, the trust could provide for a trust protector who has the power to make any modifications desired by the trust protector, presumably most often at the request of the trustee or the beneficiaries of the trust. When including a trust protector, concerns may arise in connection with the scope of the trust protector's seemingly unlimited powers. This can be of particular concern in trusts that purport to relieve the trust protector of all fiduciary duties. As drafters, we are often quick to insert exculpatory clauses and to eliminate duties with respect to the role of the trust protector in order to give some comfort to the person serving in that role that he or she can perform the requested duties without liability. However, careful consideration must be given to this approach so as not to create a situation in which the trust protector is acting in a nonfiduciary capacity in a manner that ultimately frustrates settlor's intent rather than furthering it.

C. Hybrid Approach. The middle ground to the two above approaches would be to provide the trustee with some guidance within the four corners of the document. The guidance could address broad concepts and the settlor's general feelings about those concept – e.g., “Death is certain, but taxes don't have to be, so avoid them when it is possible and prudent to do so.” Does this mean that the trustee should always make distributions to a beneficiary of taxable income if it would result in lower overall taxes because the beneficiary is in a lower tax bracket? Does it mean that the trustee can only hold non-taxable income earning assets such as cash and municipal bonds to avoid taxable income? That is likely not what was intended, so maybe the provision would be improved by adding, “...but don't let taxes be the only factor in making decisions regarding trust investments and distributions.” This basic example highlights the challenge in stating settlor's intent in a manner that clearly communicates that intent without creating ambiguity, conflicting provisions, or the need for 20 pages of settlor's intent.

One approach would be to focus on the primary purposes of the trust and describe those as succinctly as possible so that they can later be interpreted in the context of the unknown circumstances that will inevitably arise. In order to accomplish this, the settlor needs to be able to verbalize the reasons for the trust. Is it solely for tax savings? Or is it for creditor protection? Or merely because the attorney recommended it? All of the above?

Another approach would be to include more specific terms to the extent those are applicable in any given scenario. For example, many settlors feel strongly about ensuring that trust assets don't end up with a divorcing spouse. If this is a specific concern, it should be included as a key purpose of the settlor in creating the trust.

In addition to the above, the inclusion of a trust protector in the trust with power to make changes to the trust to adapt to changes in the circumstances surrounding the trust or

the beneficiaries or changes in the law. To be successful, the trust protector should be given concrete parameters for acting. Those could be loosely described around concepts of importance, such as tax minimization and creditor protection generally. Alternatively, those could be described in greater detail as a whole or only with respect to certain areas of highest concern (e.g., protecting assets from a beneficiary's spouse or from the beneficiary himself or herself in connection with a beneficiary's dependence or addiction to drugs or alcohol).

D. Customizing the Provisions.

The idea of expressing settlor's intent has taken hold with professional fiduciaries, with varying approaches. Some corporate fiduciaries suggest a nonbinding "Letter of Wishes" to give guidance to the trustee and inform the beneficiaries without making these terms part of the document itself.⁴³ The idea surrounding this type of document is that it can be updated frequently to address changes in thinking with respect to the trust and the beneficiaries. It will be nonbinding in nature and thus will not generally be as helpful in the management of the trust over time. However, it has the benefit of being a living document that can be revised to address issues that arise over time that were not initially contemplated, making it ideal for situations in which the clients like having the ability to express themselves in this manner. The challenge with this form of document is that the settlor's intent at the time of creation of the trust is what matters. Also, this form of statement would be extrinsic evidence at best, so there is no guarantee it could be used if needed to resolve a dispute over trust management or distributions.

Another corporate fiduciary suggests creating very detailed "statement of wealth transfer intent," known by the catchy acronym, SOWTI,⁴⁴ and including it directly in the document.⁴⁵ This approach requires very careful consideration at the front end given that it is "baked into" the document and generally cannot be later changed. However, this also provides the trustee and the beneficiaries with the strongest and best evidence of the settlor's intent. This could be a very long statement or could be a more focused statement that establishes the key parameters of importance to the settlor while leaving significant provisions open for interpretation. Many practitioners are hesitant to include long statements of intent in legal documents and have been trained to avoid doing so. One reason could be that including personal reasons for disinheriting family members or otherwise including specific restrictions in a will that becomes publicly available on death is not highly desirable or conducive to avoiding a will contest. Another reason may be based on the fear that the intention expressed will later be determined to be based on a false fact that, if it had been known to the settlor to be false, would have changed the ultimate disposition of the assets. An example might as follows: settlor includes a statement in the trust agreement that says he is not providing for his daughter in the trust because she is living "in sin" with her boyfriend. If the daughter later proves that this was a completely

⁴³ See JPMorgan, Is a Letter of Wishes right for your trust? at <https://am.jpmorgan.com/private-bank/public/gl/en/is-a-letter-of-wishes-right-for-your-trust>. See also general advice from US Trust encouraging clients to prepare a nonbinding "legacy letter" at <http://www.ustrust.com/ust/pages/aging-and-your-wealth.aspx>.

⁴⁴ Statement of Settlor's Intent, or "SOSI" may be another optional acronym for this document, or just "SI" (Statement of Intent) which does have a positive spin to it!

⁴⁵ See The Northern Trust Company's article by Raymond C. Odom, The "Goal Standard" of Estate Planning at <https://m.northerntrust.com/documents/white-papers/wealth-management/the-goal-standard-of-estate-planning.pdf>.

inaccurate fact or an “insane delusion” of the settlor, then she may be able to successfully challenge her exclusion from the trust. With so much of current estate planning being accomplished through revocable trusts in lieu of wills, the privacy concerns have been addressed. In addition, the idea of providing a fairly detailed reason for disinheriting a natural heir or otherwise including specific restrictions in the trust agreement can certainly provide a deterrent to an unwanted challenge of the estate plan. The facts will need to be confirmed, and the client’s description of the situation in connection with the disinheritance or restrictions should be reviewed by his or her advisors. Once that is done, this may be the best defense against an unwarranted challenge by the disfavored heirs.⁴⁶

Of course, both forms of documenting settlor’s intent can be used together if they are carefully crafted not to create confusion or conflicting direction.⁴⁷ This may be the best approach to take if you have clients with sufficient energy to devote to the process. Given the large amounts of wealth passing into trust every day, it would be a worthwhile endeavor for most clients and as advisors we should be steering clients towards this approach.

Distributions - General:

- Specific Distribution Provisions:

- [Sole Beneficiary] “So long as the beneficiary is living, the trustee [*may/shall*] pay such part or all of the net income or corpus, or both, of the trust as the trustee deems proper for the *health, education, maintenance, and support* of the beneficiary. In addition, so long as the beneficiary is living, the independent trustee [*may/shall*] (or a related trustee shall, if directed by the special trustee) pay such part or all of the net income or corpus, or both, of the trust as the independent trustee (or the special trustee, as the case may be) deems proper for [*the benefit, comfort and happiness of the beneficiary/any reason consistent with the material purposes of the trust to or for the benefit of the beneficiary*].”

The option of “*may vs. shall*” in the distribution standard for a trust is the first threshold question regarding intent. Opting for the “may” standard in trusts with independent trustees will give the trustee the most discretion in making distributions and will also afford the best creditor protection. The “shall” standard may be preferred for a beneficiary who is serving as his or her own trustee in order to avoid estate inclusion questions with regard to too much discretion or may be preferred by the settlor to ensure that the beneficiary will receive distributions for the stated purposes.

The *health, education, maintenance, and support* standard is typically relied upon to eliminate tax inclusion concerns for related trustees. However, it is often times the only standard in the document. Thought should be given as to whether the client really desires this limitation or if it exists merely due to the attorney’s drafting preferences.

The “*benefit, comfort and happiness of the beneficiary vs. any reason consistent with the material purposes of the trust to or for the benefit of the beneficiary*”

⁴⁶ See *id.*, Addendum One for a compelling statement that includes detailed reasons for the disinheritance of a child.

⁴⁷ See Pamela Lucina and John T. Welsh, “That’s Not What Mom or Dad Wanted,” https://www.bnymellonwealth.com/assets/pdfs-strategy/pam_lucina_trusts_estates.pdf.

options will vary depending on if there are material purposes actually included in the trust agreement. To the extent they are included, it would be beneficial to give the trustee the ability to make distributions within that standard rather than a vague “happiness” standard.

- [Multiple Beneficiaries] “So long as the Beneficiary is living, the trustee [may/shall] pay such part or all of the net income or corpus, or both, of the trust as the trustee deems proper for the *health, education, maintenance, and support* of the Beneficiary and the [children/descendants] of the Beneficiary who are living from time to time. In addition, so long as the Beneficiary is living, the independent trustee [may/shall] (or a related trustee shall, if directed by the special trustee) pay such part or all of the income or corpus, or both, of the trust as the independent trustee (or the special trustee, as the case may be) deems proper for [the benefit, comfort and happiness of the beneficiaries/any reason consistent with the material purposes of the trust to or for the benefit of the beneficiaries]. ***The trustee shall consider the Beneficiary to be the preferred beneficiary of the trust, and shall resolve uncertainties concerning income and principal distributions in favor of the Beneficiary. Any distributions made in accordance with the preceding need not be equal among the beneficiaries, and any distributions to the Beneficiary’s [children/descendants] shall not be charged against the shares of the trust allocated to such beneficiaries on the termination of the trust.***”

The same questions arise with respect to the issues described above for a single beneficiary trust. In addition, allowing distributions to “*children or descendants*” creates a pot trust. This gives multiple beneficiaries currently enforceable rights to receive distributions from the same trust assets. Often this provision is included when the settlor desires to benefit multiple generations from the same trust, particularly where there are sufficient funds available for all beneficiaries and there is no anticipated animosity among them. However, careful consideration should be given to this approach. Most litigators would warn clients away from using this type of trust, as it could end up pitting children against parents in a dispute over trust distributions. Obviously, the more directions with respect to settlor’s intent when providing for multiple beneficiaries of a trust, the better. Clarifying the pecking order of the beneficiaries with respect to distributions is helpful. One additional direction would be to include the additional statement, “***The trustee shall consider the Beneficiary to be the preferred beneficiary of the trust, and shall resolve uncertainties concerning income and principal distributions in favor of the Beneficiary.***”

Alternatively, in the case of unequal distributions to beneficiaries during the term on the pot trust, distributions could be charged against the shares of the trust ultimately allocated to the beneficiaries on the termination of the trust. Careful consideration should be given to the best method for allocating remaining funds, whether by reconstituting the trust for each distribution or using another method that takes into not only prior distributions but also the time value of money in connection with each of those distributions.

○ Additional Provisions:

- Further directions on distribution standards. The settlor can include additional limitations or directions relating to distributions, either in the distribution provisions or in connection with a separate settlor's intent statement. Below are some examples.

“In making decisions regarding distributions from a trust created hereunder, the trustee [shall/may] take into account the following factors: [*Note: the following factors may not all be consistent with each other but are included here to give examples of various provisions*]

- The respective needs of each beneficiary.
- Settlor's intent that the trust funds enable or assist each beneficiary in his or her pursuit of education pursued to the beneficiary's advantage, whether such education is at any one or more of the following levels: preschool, primary, secondary, vocational, college, graduate, or professional education, and may include, in addition to tuition, fees, room and board, books and supplies, school uniforms, and travel and living expenses connected to education as deemed reasonably appropriate by the trustee, in trustee's sole and absolute discretion.
- Settlor's intent that the trust distributions not serve as a disincentive to a beneficiary's motivation to provide for the beneficiary's own needs in life, and settlor's desire and instruction to the trustee to reduce or terminate distributions to a beneficiary if that objective, in the sole and absolute judgment of the trustee, would be served by doing so.

Additional restrictions may be desired in the case of a pot trust. Following is an example of a pot trust that divides when youngest beneficiary is age 22.

“Beneficiaries who at any time have not attained age twenty-two (22) shall be the primary beneficiaries of such trust who are entitled to distributions, provided that distributions to a beneficiary who has attained age twenty-two (22) may be made in the event of an Emergency Need, as determined in the Trustee's discretion sole and absolute discretion; and for purposes of this Agreement, an “Emergency Need” means a financial need arising as a result of (i) any treatment, service, or procedure that is necessary or desirable to maintain, diagnose, or treat the beneficiary due to the beneficiary's illness, accident, or impairment; or, (ii) any other situation, provided such situation (x) was not caused by irresponsible behavior on the part of the beneficiary and (y) trustee, in trustee's sole and absolute discretion, determines that a distribution of net income or principal, or both, as a result of such situation is desirable to enable the beneficiary to meet a need in a responsible manner [(by way of illustration, in the event a beneficiary loses his or her job other than as a result of irresponsible behavior, trustee may, in trustee's sole and absolute discretion, distribute net income or principal, or both, of the trust to the beneficiary, to the extent necessary to provide the beneficiary with a reasonable opportunity to find employment in a comparable position)].”

- Charitable Beneficiaries. Many long-term trusts now include charitable organizations as permitted beneficiaries. This can provide many benefits, especially for families that are very charitably inclined and that don't regularly require the use of trust income. Including a charitable beneficiary allows the trust to distribute funds to the charity and receive a charitable income tax deduction. This can result in significant tax savings. However, as discussed above with respect to multiple beneficiaries, including charity as a beneficiary will give certain rights to the named charitable beneficiaries (or to the attorney general on behalf of unnamed charitable beneficiaries). Guidance to the trustee as to the desired distributions among charitable and noncharitable beneficiaries is strongly recommended. Distribution provisions similar to those discussed above with respect to the may vs. shall standard can be used with respect to charitable beneficiary distribution provisions.
- Specifically allowing exhaustion of the trust through distributions. It may be helpful to include a provisions that permits distributions to the primary beneficiary to the exclusion of the other beneficiaries, such as, ***“Distributions from any trust created hereunder may be made in accordance with the terms and provisions of such trust even though such distribution results in the exhaustion and termination of such trust.”*** In this instance, noting the settlor's intent as to who should benefit the most from the trust will be helpful. For example, the following could be added to the sentence above, ***“..., it being settlor's intent that the needs [and desires] of the [Beneficiary/current beneficiaries] be completely satisfied without regard to the remainder interest of any other beneficiary.”***
- Coordinating distributions from multiple trusts. When a beneficiary has multiple trusts created for his or her benefit, coordination of distributions from the various trusts may be desired. For example, there may be differing trustees or differing classes of beneficiaries of each trust. Allowing or requiring this coordination will ensure that a beneficiary is not receiving excessive or duplicative distributions or is not depleting a pot trust to the detriment of other beneficiaries of that trust while preserving the trust funds of the trust solely for his or her benefit. Below is a sample provision.

“If the beneficiary of a trust being administered hereunder (a “primary trust”) is also a beneficiary of one or more other trusts (each an “other trust”), whether administered under this instrument or otherwise, the trustee [shall have the discretion/shall be required] to consult with the trustee of each of the other trusts in determining whether to distribute net income or principal of the primary trust to such beneficiary, and the amount of any such distribution.”
- Standard for making distributions. The standard often used for making distributions to a beneficiary is either the settlor's or the beneficiary's “accustomed standard of living.” However, in reality that is not a very helpful standard. It, in essence, tasks the trustee with determining that baseline standard and in some circumstances monitoring that standard throughout the term of the trust. If the measurement is the settlor's standard of living, presumably it is

measured at the time the trust is created (i.e., immediately for an inter vivos trust and at the settlor's death for a testamentary trust). If the measurement is the beneficiary's standard of living, it would seem prudent to constantly monitor it. What if a beneficiary is monetarily successful independent of the trust assets and maintains a very robust lifestyle? Would the settlor desire that larger distributions be provided to that beneficiary than to another beneficiary who is a stay-at-home parent who actually could use the larger distributions? Under this standard, could a beneficiary ratchet their way into a better lifestyle through the trust distributions alone? For example, could the beneficiary buy the largest house he or she is able to qualify for and then ask the trust to make the house payments on his or her behalf as a HEMS distribution, thereby freeing up other income for discretionary spending which in turn increases the standard of living of the beneficiary? Clearly this is an area that could use some clarity! A statement of settlor's intent as to the standard used to base any required or permitted distributions on is extremely helpful to both the trustee and the beneficiary.

The intention of the settlor in this regard can vary widely. The often cited "give them enough to do something but not enough to do nothing" is a common theme. Other examples include the following:

"In making decisions regarding distributions from a trust created hereunder, the trustee shall consider settlor's intent that the trust assets supplement and not supplant a beneficiary's own earnings."

"In making decisions regarding distributions from a trust created hereunder, the trustee shall consider settlor's intent that the trust assets be available to the beneficiary of the trust primarily for health and education purposes until the beneficiary reaches age [thirty (30)] and that distributions after reaching such age be limited to those needed for basic needs of the beneficiary and not for extravagant or reckless purposes or behavior."

"In making decisions regarding distributions from a trust created hereunder, the trustee shall consider settlor's intent that the trust assets be fully available to the beneficiary of the trust for any purpose."

- Considering other resources. In connection with the standard of distribution, it is advisable to include directions as to whether other resources of the beneficiary should be considered in making distributions decisions. As a general rule under Texas law, a beneficiary's income (but not their assets) will be considered if there is no direction given in the trust agreement. Options to more appropriately express settlor's intent include the following:

"In making decisions regarding distributions from a trust created hereunder, the trustee shall not consider any income or other resources of the beneficiary, it being settlor's intent that the trust be an absolute gift to the beneficiary thereof regardless of other income or resources available to the beneficiary."

“In making decisions regarding distributions from a trust created hereunder, the trustee [may/shall] consider the income and other resources reasonably available to the beneficiary, but the trustee need not require such other income or resources to be used before making such distributions.” *Note, as a practical matter including “may” or “shall” in the provisions will likely have the same outcome as any prudent trustee would likely gather the information to avoid liability to remainder beneficiaries.*

“In making decisions regarding distributions from a trust created hereunder, the trustee shall consider the income and other resources reasonably available to the beneficiary, and shall require that all available liquid assets be used before distributions may be made to the beneficiary.” *This type of provision may be useful in the case of principal distributions from a marital trust when there are children from a prior marriage who are remainder beneficiaries or where the settlor truly wants to restrict distributions to a beneficiary.*

In connection with this analysis, it will also be important to give direction to the trustee on how to best gather any necessary information from the beneficiary. For example:

“The trustee may, but need not, rely on a statement of any beneficiary’s income and resources, signed by such beneficiary or any Legal Representative of such beneficiary.”

“The trustee [may/shall] require substantiation of a beneficiary’s income and resources by obtaining copies of the beneficiary’s income tax returns, financial statements signed by such beneficiary or any Legal Representative of such beneficiary, and third-party sourced documentation of other income and assets that sufficiently describes the beneficiary’s income and resources so that the trustee can determine if a distribution is appropriate based on such information and the standards provided herein.”

- Additional directions to the trustee in connection with settlor’s intent. To the extent that settlor’s intent is specifically described in a section of the trust, it may be helpful to include directions regarding interpretation of that intent. One example is as follows:

“In making or withholding distributions to a beneficiary of a trust created hereunder, to ensure that trustee [strictly apply/liberally interpret] the guidelines set forth herein with respect to the circumstances in which distributions [shall/may] be made.”

The alternatives here set the tone for the trustee in applying settlor’s intent. If strict application is expected, then the guidelines in the document should be sufficiently clear with respect to the anticipated application.

Distribution Limitations – More Specific:

- Limiting Distributions for specific purposes. Examples of more restrictive language regarding distributions could include the following.

“It is settlor’s intent that the beneficiary’s standard of living be supplemented and enhanced, but only if and to the extent that the beneficiary remains a productive member of society for as long as he or she is able to do so. To that end, settlor intends that the trust distributions from the trust not serve as a disincentive to the beneficiary’s motivation to provide for his or her own needs in life. To accomplish this, settlor instructs the trustee to terminate or lessen distributions to a beneficiary of the trust to meet that objective in the circumstance so require. Bearing in mind settlor’s overriding intent, settlor requests that the trustee also consider the following factors when exercising the discretion hereunder: (i) each beneficiary shall be entitled to obtain and receive any medical treatment and care necessary for his or her health and to have private health insurance; (ii) each beneficiary who is a parent to one or more minor children shall have the means to raise any such child or children in a household with a full-time stay-at-home parent, if he or she so desires; (iii) each beneficiary shall have the means to retire at a reasonable age without concern for being able to live in reasonable comfort and to have sufficient resources to provide for his or her long-term care needs.”

“In making any distribution from a trust created hereunder, the trustee may increase, decrease, or eliminate distributions taking into account the beneficiary’s compliance or noncompliance with following minimum standards of behavior that settlor deems appropriate for any beneficiary of a trust hereunder: (i) the beneficiary is expected to embrace hard work, be it at home, in school, in the community, or in business, and to lead a productive life; (ii) the beneficiary is expected to not abuse drugs or alcohol; and (iii) the purpose of the trust is generally not to be the sole source of support for a beneficiary, unless he or she is disabled or is involved in full-time volunteer work, artistic endeavors that are pursued with an intent to be profitable, or being a stay-at-home parent. In order to encourage hard work, the trustee is specifically permitted to interpret the foregoing distribution standards broadly for a beneficiary whose life reflects the values set forth above. Conversely, the trustee is directed to very narrowly construe the foregoing distribution standards for a beneficiary whose lifestyle is unproductive, who abuses drugs or alcohol, or who otherwise does not meet the minimum standards of behavior.”

- Substance Abuse Provisions. For some who have a history of substance abuse in their family, including a specific provision to address this issue is very important. Below are examples of both a short and a very detailed provision.

“Notwithstanding any of the foregoing distribution provisions to the contrary, if the trustee believes that a beneficiary may have a substance abuse problem, the trustee shall discontinue all distributions to such beneficiary, provided that the trustee may continue to make distributions for the benefit of the beneficiary in connection with the beneficiary’s basic living and health requirements, and for any and all treatments for such problems, as determined appropriate by the trustee, in the trustee’s sole and absolute discretion.”

A more detailed provision is as follows:

“Notwithstanding any of the foregoing distribution provisions to the contrary, the trustee shall withhold any distributions of income or principal to, or for the benefit of the beneficiary of a trust administered hereunder if such beneficiary has an active chemical dependency (including the abuse of alcohol and all legal and illegal drugs). Distributions shall continue to be withheld until the beneficiary has successfully been in recovery (as defined below) for a minimum of twelve (12) months. In the event of each and every relapse, all distributions shall be withheld until the primary beneficiary has successfully been in recovery for a minimum of thirty-six (36) months. For the purposes of this section, the following shall apply:

“If the trustee has cause to believe that a beneficiary may have an active chemical dependency, and the beneficiary disputes the same, the trustee may utilize the services of a reliable and licensed drug testing company of the trustee's choosing for resolving the dispute. If the trustee determines that drug testing is appropriate, the trustee shall provide written notice to inform the beneficiary that he or she is required to take a drug test with the selected drug testing company within eighteen (18) hours of the beneficiary's receipt of the notice. A primary beneficiary's refusal or failure to get tested within such time period or two (2) failed drug tests shall automatically trigger a suspension of trust distributions as described in this section.

“As used herein, “recovery” is defined as continuous sobriety (including abstention from addictive prescription medicine, drugs, and alcohol), and on-going participation in activities addressing issues related to addiction including, but not limited to, regularly attending meetings of a twelve-step or other self-help group, therapy, case management meetings, avoiding high-risk relapse environments, and adhering to recovery plans, recommendations or agreements.

“The commencement of any time period of recovery does not begin until after the beneficiary has successfully completed a chemical dependency in-patient primary treatment program and if necessary, any subsequent long-term, sober living house. In making determinations as to whether the beneficiary has successfully completed an approved and applicable treatment program and is engaged in an active recovery program, the trustee may rely on reports from counselors and staff from treatment programs of any kind, sponsors, and other related health care professionals. In addition, the beneficiary must fully comply with all recommendations of any treatment center and related health care professionals. The beneficiary must sign consents for full release of information to the trustee in order to be in compliance with this section. Failure to sign all requested authorizations means the beneficiary is not in “recovery” as that term is used herein.

“Notwithstanding the foregoing, the trustee is authorized, but not required, to distribute net income or principal for the benefit of any beneficiary who has an active chemical dependency for such beneficiary's treatment, post-treatment

recovery programs, and related costs, as long as such distributions are made directly to the provider of such services.”

- The Big “D” (and I don’t mean Dallas) - Divorce Provisions. Below is a provision that could be added to distribution provisions in the event of a pending divorce of a beneficiary.

“If the beneficiary is in a divorce proceeding at a time when any distribution from the trust is contemplated and such distribution could result in the divorcing spouse of the beneficiary receiving assets from the trust, trustee [may/shall] withhold such distributions for as long as such divorce proceeding is pending or until the risk of such diversion of trust assets is eliminated.”

- Other “Bad Actor” Provisions. Below is a provision that could be added to distribution provisions in the event of other bad acts of a beneficiary.

“If the beneficiary has engaged in beneficiary misconduct (as herein defined), trustee [may/shall] withhold distributions for as long as the beneficiary is engaged in beneficiary misconduct and until trustee determines that making such distributions will not contribute to or facilitate further beneficiary misconduct. “Beneficiary misconduct” includes incarceration, a felony conviction within the past three (3) years, being under probation for a felony conviction, engaging in the purchase or sale of any illegal drugs or other illegal substance, abuse of alcohol or drugs of any kind, and habitual and continual pattern of financial irresponsibility (e.g., bankruptcy, significant debts in excess of assets, or incurring significant monthly expenses in excess of monthly income). Nothing in this section shall prevent trustee from making distributions for financial management education, medical treatment or other program of recovery or a stay in a recovery house, plus all costs incident thereto. Trustee shall not have any duty to investigate any beneficiary misconduct and shall not be liable to anyone for failing to do so. However, trustee may, in trustee’s sole and absolute discretion, investigate, employ private investigators and take such other actions as trustee determines appropriate, at the expense of the trust, to determine whether any beneficiary misconduct exists. Trustee shall not incur any liability to persons whose interest may have been affected by disbursements made or not made in good faith by trustee without actual knowledge.

“Notwithstanding the foregoing provisions to the contrary, the trustee shall withhold any distributions of income or principal to, or for the benefit of the beneficiary of a trust administered hereunder if such beneficiary is convicted of a violent crime or felony under either state or federal law. The trustee shall withhold all such distributions during any period of incarceration following such a conviction, and for a first offense, distributions shall continue to be withheld for a period of thirty-six (36) months following either the date of release from incarceration or the date of conviction, whichever is later. Following a second offense, the primary beneficiary shall be treated as if he or she had died on the date of such conviction for all purposes of this will (including fiduciary appointments). If a beneficiary is convicted of a violent crime or a felony under either state or federal law that results in either (i) a life sentence, or (ii) a sentence of a period of

incarceration that is equal to or exceeds fifty (50) years, the beneficiary shall be treated as if he or she had died on the date of such conviction for all purposes hereof (including fiduciary appointments), even if such conviction is a first offense. For the purposes of this section, a “violent crime” is any offense that involves force or the threat of force, including, but not limited to, murder, non-negligent manslaughter, forcible rape, robbery, kidnapping, domestic violence, and aggravated and simple assault.”

- Fixed dollar limitation on distributions. Sometimes a cap on distributions is desired. If a dollar limitation is included as described below, serious consideration should be given to incorporating inflation adjustment provisions.

“In no event shall the distributions to a beneficiary of a trust created hereunder in any calendar year exceed the lowest of the following amounts: (i) five percent (5%) of the value of the trust at the beginning of the calendar year; (ii) the net trust accounting income of the trust for such year; and (iii) \$ _____ Dollars (\$ _____).”

- Income matching provisions. While it sounds like a great idea to match a beneficiary’s earnings with trust distributions to incentivize the beneficiary to work harder, this type of provision often results in an undesired outcome. Surely the settlor would not want to make no distributions to a child who stayed at home to care for an ill child or who, consistent with the settlor’s own actions, volunteered for worthy causes supported by the family instead of having a paying job. Nonetheless, clients often want some form of this provision. Below is an example.

“The trustee shall limit any distributions of net income or principal to or for the benefit of the beneficiary of a trust administered hereunder to an amount equal to the beneficiary’s income earned through his or her own efforts and not through passive investments. Such amount shall be determined by the trustee from information provided by the beneficiary, such as pay stubs, tax forms, or any other means determined appropriate by the trustee in his or her sole and absolute discretion. The trustee may, but is not required to, make interim distributions to the beneficiary prior to final determination of the beneficiary’s earned income based upon such documentation. Should any such interim distributions exceed the amount ultimately permitted to be distributed hereunder, the trustees [may/shall] reduce future distributions to the beneficiary to reflect such overpayment.”

Below is a suggestion to address concerns where the beneficiary is under circumstances that may make the above inappropriate.

“Notwithstanding the above, the settlor directs the trustee to use discretion in using the resources of the trust to assist the beneficiary in becoming and remaining productive members of society in the event that the beneficiary is not successfully or fully employed. Although it is the settlor’s desire to help provide for the beneficiary, the trust is generally intended to supplement the beneficiary’s earnings, as opposed to take the place of earnings, except in the cases described below. The trustee may make distributions in excess of the permitted matching distributions to encourage, assist and enable a beneficiary to work with and for non-profit and community organizations, such as charities or school organizations. Those

distributions may serve as a substitute for the income that a beneficiary might have otherwise earned, if any, while working for an organization or, may be, in effect, a substitute for a salary for serving in that role. The purpose of the trust is also, generally, not to provide the sole support of the beneficiary except in the case of disability or medical need. Although the trustee shall have broad discretion to strictly apply the earning-matching provisions above with respect to a beneficiary not reasonably working to the best of his or her ability, it is not necessary for a beneficiary to be working in a profession or other employment to generate the greatest income to be working to the best of his or her ability. For example, if a beneficiary has the ability to work as an attorney or a physician, but instead elects to be a teacher or social worker, he or she should be supported and assisted by the trust beyond such earning-matching if he or she is working to the best of his or her ability in his or her chosen field of productive work. In addition, if a beneficiary has children and is not employed outside of the home, the trustee should support and assist him or her under the standard provided without respect to the earning-matching provisions, particularly if the beneficiary had a successful work history before having children. However, if a beneficiary is capable of working and is not staying at home with his or her children, but simply elects not to work or collects unemployment benefits, the trustee shall not make any distributions to such beneficiary except in the case of a critical or emergency health need.”

- Distributions to assist in starting a business. Many clients earned their wealth through their own entrepreneurial efforts and often have a strong desire to encourage their own descendants to do the same. Below is a sample provision in this regard.

“In making distribution decisions, the trustee [may/shall] make distributions to the beneficiary to enable or assist the beneficiary in purchasing, starting, or maintaining a business. It is the settlor’s belief that entrepreneurial efforts of a beneficiary are desirable towards the goal of being a productive citizen. The settlor has been an active, entrepreneurial business person who has benefitted from and prospered under the free-market system, and settlor directs the trustees to foster sound business ventures and activity by the beneficiary. In that regard, the trustee [may/shall] request sufficient information regarding any proposed business venture of the beneficiary prior to any such distribution to ensure that (i) the beneficiary will become financially self-supporting through the proposed business, (ii) the distribution requested is appropriate based on the proposed business plan, and (iii) such distribution is reasonable in light of the risk of failure of the proposed business, the assets held in the trust at such time, and any other factors that the trustee deems reasonable in the trustee’s sole and absolute discretion.

A similar provision could be included in the investment provisions of the trust that would direct the trustee to loan trust funds to the beneficiary to start a business in lieu of or in addition to a distribution for such purpose.

- Encouraging Marriage or Premarital Agreements. If a dollar amount is included as described below, serious consideration should be given to incorporating inflation adjustment provisions.

“It is settlor’s desire to encourage the beneficiaries hereunder to consider the benefits of getting and remaining married. Therefore, on the date that a beneficiary who is not yet married gets married in a formal legal ceremony, the trustee shall distribute \$ _____ Dollars (\$ _____). In addition, on the Tenth (10th) anniversary of the marriage of a beneficiary, and on each succeeding Fifth (5th) year following such anniversary date thereafter, the trustee shall distribute to the beneficiary an amount not to exceed the lesser of (i) ____ Percent of (____%) of the value of the trust at the beginning of the calendar year and (ii) \$ _____ Dollars (\$ _____).”

“At any time a beneficiary is married and does not have a Marital Property Agreement in place when that a distribution is to be made to him or her, the trustee’s distribution powers described herein are limited so that trustee is prohibited from making any outright distributions to such beneficiary for any purpose other than for amounts required for the beneficiary’s immediate and direct needs for his or her personal health or basic support needs for food, clothing, and shelter, after taking into account all other available income and resources known by the trustee to be reasonably available to the beneficiary for those purposes. It is the settlor’s intention by this provision to prohibit distributions that would allow a beneficiary to accumulate funds to preserve or increase his or her personal net worth or enhance his or her marital lifestyle, whether directly or indirectly, by allowing the beneficiary to rely on trust distributions instead and thus preserve his or her own assets and resources. The provisions of this section will apply at all times while the beneficiary is married, whether he or she was married upon the creation of the trust or becomes married after the creation of the trust. For purposes herein, a “Marital Property Agreement” shall mean a binding agreement signed by a married beneficiary and his or her spouse that provides: (i) that all distributions (whether principal or income) to such beneficiary from any trust or trusts created hereunder constitute the separate property of such beneficiary; (ii) that any beneficial interests in any trust or trusts created hereunder, or any property originating from the estate of settlor, acquired by the beneficiary prior to or during the marriage is, and shall remain, the separate property of such beneficiary; and (iii) that all income generated by, proceeds from the sale or disposition of, and mutations in the form of the separate property of the beneficiary is, and shall remain, the separate property of such beneficiary.”

- Specifically encouraging travel. Travel is a tricky expenditure to place in a category. A trip to Washington D.C. to visit the Smithsonian museums may be able to be categorized as an educational expense appropriate under a HEMS standard. It is not clear if a trip to the Galapagos Islands with several stops along the way to visit tropical beaches would be fall into the HEMS category. Sometimes a settlor will want to clarify that travel is an endeavor to be encouraged and covered under the HEMS standard.

“Settlor believes that travel, even if in appearance it is for entertainment or relaxation purposes only, is a unique form of education that should be pursued by the beneficiary to the extent desired. In addition, settlor believes strongly in the benefit of settlor’s descendants maintaining relationships with their extended families. Accordingly, settlor requests that the trustee generously apply trust funds

to encourage and foster such educational travel and family relationships. For this purpose, trustee [may/shall] make distributions in an amount sufficient to pay for such travel not only for the beneficiary but also for the reasonable travels costs of the beneficiary's companion, guardian, spouse, children or more remote descendants, and may also pay for the occasional travel by extended family members to visit the beneficiary and his or her family, each as a distribution for the benefit of the beneficiary.”

- Specifically describing allowable health distributions. Typically the settlor may take the term “health” at its face value to cover reasonable medical expenses. Although there is no clear answer from a state law perspective, there is a presumption with respect to court created trusts that any treatment or medicine approved by a licensed physician are appropriate health expenditures that can be paid from the trust.⁴⁸ In some situations, a settlor may desire to limit or expand what is included in this category of permitted distributions that is frequently used.

“Distributions for the health of a beneficiary shall include all common forms of medical treatments and medicines that would generally be covered in whole or in part by medical insurance and shall also include any and all alternative treatments requested by a beneficiary, including but not limited to (i) elective procedures and tests, whether performed by a medical doctor, a doctor of osteopathy, a chiropractor, an acupuncturist, a homeopath, a naturopathic doctor, or any other alternative medical provider, (ii) any types of legal medication, including nonprescription treatments and therapies, and (iii) payments for concierge medical services.”

“Distributions for the health of a beneficiary shall include all common forms of medical treatments and medicines that would generally be covered in whole or in part by medical insurance. However, distributions for health shall not include (i) any costs associated with the elective surgery or procedures solely for the purposes of appearance, including but not limited to, plastic surgery, cosmetic treatments, tattoos and tattoo removal, and concierge medical services, and (ii) any services in connection with the termination of a pregnancy unless necessary to preserve the life of the beneficiary.”

- Specifically providing for guardians of minor children. Although it is likely that any guardian of a minor child of a deceased settlor will have sufficient funds to provide for the child, this is often a concern for clients with young children.

“The settlor desires to make financial provision for each guardian of the person of a minor child of settlor. It is the settlor's intent that no such guardian will be burdened by additional expenses and unwarranted financial inconveniences because of the assumption of the position as guardian of the person of such minor child, and that such guardian shall receive reasonable reimbursement for additional expenses occasioned by such guardianship duties in providing for the health, education, maintenance, support and happiness of each of the settlor's minor children. Settlor directs the trustee of each trust created for the benefit of any such

⁴⁸ Tex. Prop. Code §142.005(b)(2).

minor child to make such reimbursements or direct payments to providers as appropriate and consistent with settlors intent expressed herein.”

- Investments and diversification. Texas has adopted the Texas Uniform Prudent Investor and Uniform Principal and Income Acts (the “UPIAs”), although they are not actually identical to the uniform acts in spite of their names.⁴⁹ As with most of the Trust Code, the provisions of these acts will only apply to the extent they are not overridden in the trust agreement. In connection with distributions from a trust, to the extent those distributions are described as distributions of “income” from the trust and the Texas Uniform Principal and Income Act applies to the trust, the trustee will likely have a power to adjust the trust’s income, including the power to allocate capital gains to trust income or to otherwise make appropriate adjustments.⁵⁰ This power to adjust can only be limited in the agreement by a clear provision in the agreement that denies the trustee of the ability to so adjust.⁵¹

Often the trustee will want to waive the application of the UPIAs, as compliance with them in normal trust administration can be burdensome. However, that is not always the case and any waiver of these provisions should be carefully considered. If waiver is desired, then a specific reference to this waiver should be included in the trust agreement, such as the following:

“Notwithstanding any provision of this Agreement to the contrary, to the full extent permitted by the Texas Trust Code, settlor hereby relieves the trustee from the provisions of Chapter 116 and Chapter 117 of the Texas Trust Code, it being settlor’s express desire and direction that the trustee of any trust created hereunder be given the broadest discretion legally permissible in the investment and management of the assets of such trust consistent with the limitations on such discretion expressly set forth herein and not be bound to such statutory provisions.”

In addition to the general waiver of the application of the UPIAs, it may be prudent to include a more specific waiver of diversification if the trust is intended to hold a specific asset, such as a business interest or an insurance policy. Below is a sample provision that can be used for this purpose.

“No Duty to Diversify; Specific Authorization for Retention of Interest in [Entity].

“1. Generally. The trustee may retain, without regard to diversification of investments and without liability for any depreciation or loss resulting from the retention, any property that constitutes the initial trust estate of any trust created hereunder or that is added to such trust.

“2. Specific Authorization to Retain Interest in [Entity]. Specifically, settlor intends to fund one or more trusts created hereunder with an interest in [Entity], which is a [type of entity] created and [owned/owned in part] by settlor engaged in [business type]. As [Entity]’s [position held by settlor], settlor is well positioned to evaluate [Entity]’s long-term profitability and strength. Based upon knowledge acquired in settlor’s position as [position held by settlor], settlor is firmly convinced

⁴⁹ Tex. Prop. Code §§116 and 117.

⁵⁰ Tex. Prop. Code §116.005.

⁵¹ Tex. Prop. Code §116.005(f).

that [Entity] is a prudent long-term investment for each such trust and any successor trust created hereunder therefrom and based upon such belief and to the greatest extent permitted by law authorizes the trustee of each such trust to retain such trust's investment in [Entity] for the duration of such trust's existence (the "Retention Goal") and correspondingly waives any duty the trustee would otherwise have to diversify the trust's investment in [Entity] pursuant to Texas Trust Code Section 117.005. This provision does not prohibit the trustee from selling the trust's investment in [Entity] if and when an appropriate opportunity arises to do so, however it does expressly provide for such investment to be retained by trustee consistent with settlor's intent as expressed herein.

"3. Releases. If the trustee of a trust created hereunder reasonably believes that in furtherance of the Retention Goal he or she should seek from the beneficiaries thereof releases of a nature described in Texas Trust Code Section 114.005, settlor expressly authorizes the trustee to prepare and present such releases to such beneficiaries for their execution, at such time or times as the trustee shall reasonably determine to be necessary to accommodate such retention, but no more frequently than annually. All expenses incurred by the trustee pursuant to the negotiation, preparation, and execution of any such release (including any attorneys' fees incurred by the trustee) shall be reimbursed by the trust as an expense of administration. The trustee may also reimburse any reasonable expenses (including attorneys' fees) incurred by a beneficiary in conjunction with the negotiation, preparation, and execution of such release.

"4. Specific Exculpation. Notwithstanding the provisions of this section to the contrary, to the extent settlor cannot waive a duty otherwise imposed on the trustee to diversify the assets of a trust created hereunder and accordingly cannot excuse the trustee from a duty to sell part or all of such trust's investment in [Entity], then settlor relieves such trustee from any liability resulting from the retention of such investment to the greatest extent permitted by law and in no event shall such trustee ever be liable for any punitive or exemplary damages for retaining such trust's investment in [Entity]."

In addition to the above, it may be prudent to add an indemnification of the trustee for not diversifying the assets. This will likely be desired by any corporate fiduciary who is serving as trustee of a trust of this nature.

"5. Indemnification. In keeping with the Retention Goal, the trustee shall be indemnified with respect to trustee's defense in any threatened, pending, or completed judicial, administrative, arbitral, or investigative proceeding (or any appeal in such an action, suit, or proceeding, and any inquiry or investigation that could lead to such an action, suit, or proceeding) arising out of such trustee's retention of such trust's investment in [Entity] against all expenses (including attorneys' fees, court costs, judgments and settlement expenditures), provided that (i) such expenses are reasonably incurred by such trustee in connection with such proceeding, and (ii) such trustee conducted himself or herself in good faith. Such trustee may purchase insurance on behalf of such trust to make or to reimburse such trust for an indemnification payment allowed pursuant to this section. The termination of a proceeding by judgment, order, or settlement is not of itself

determinative that the trustee did not meet the requirements set forth in this section for indemnification. Reasonable expenses incurred by such trustee in a proceeding shall be paid or reimbursed by such trust in advance of the final disposition of the proceeding, provided that the trustee provides a written affirmation of trustee's good faith belief that the trustee has met the standard of conduct necessary for indemnification under this section and a written binding commitment to repay the amount paid or reimbursed if it is ultimately determined that the trustee has not met those requirements. Such written commitment must be an unlimited general obligation of the trustee, need not be secured, and may be accepted without reference to financial ability to make repayment."

Exhibits. Attached is Exhibit A with a sample basic statement of settlor's intent; Exhibit B with a template of possible discussion points for a letter of wishes; Exhibit C with a sample statement of wealth transfer intent.

VI. Conclusion. In light of the trend of states enacting extended perpetuities periods and the continued accumulation of wealth by the wealthiest Americans, long-term trusts appear to be here for the long term. Although absolute customization of wills and trust agreements to include extensive statements of settlor's intent does not make sense for every client, it should be an issue discussed in every instance where a trust will be created. A simple letter of wishes might be more appropriate for smaller trusts that are intended to solely benefit the initially named beneficiary, while a more elaborate statement of the settlor's intent in connection with a letter of wishes may be more appropriate for very large trusts that are intended to last for many generations. While some clients will embrace the opportunity to tell their story and their goals for the use of trust funds passed to future generations, others may have no interest at all. This is clearly one area of the trusts and estates practice that relies on our ability to be creative in ensuring that our client's goals are accomplished by successfully scripting the settlor's intent.

Exhibit A - Basic Statement of Settlor's Intent

This statement broadly defines general tax, investment, and creditor protections goals but does not include any specific, personalized directions.

The "Material Purposes" set forth below reflect the settlor's objectives in establishing each trust created under this Agreement:

A. To protect trust property from the creditors of the beneficiaries of such trust until trust property is distributed to a beneficiary;

B. To ensure the assets of the trust inure only to the benefit of the specified beneficiaries thereof in accordance with the applicable distribution standard and remain free from the control of the spouse of a married beneficiary, except to the extent any such spouse is expressly designated as [*include only those applicable for maximum divorce protection*] (i) a beneficiary thereof possessing a vested right with regard to the assets thereof, (ii) a permitted object of a power of appointment irrevocably exercised with regard thereto, or (iii) a trustee of such trust (in which event such spouse will only have the discretions afforded hereunder to such position);

C. To ensure (i) settlor maximizes the use of settlor's generation-skipping transfer (GST) tax exemption and (ii) any property to which such GST tax exemption is allocated remains exempt from transfer taxes so long as retained in the trust and may therefore grow without being depleted by transfer taxes until distributed to a beneficiary or expressly made subject to a general power of appointment exercisable by a beneficiary;

D. To ensure that in making a discretionary distribution to an individual who is a beneficiary of both a GST tax exempt trust and a GST tax non-exempt trust in accordance with the terms of such trusts, trustee has the authority to make such distribution either all from one trust, all from the other trust, or part from one trust and part from the other trust, in trustee's sole and absolute discretion; provided, however, that settlor hereby recommends, but does not require, that trustee make discretionary distributions in accordance with the terms of such trusts (i) from the trust that is exempt or excluded from GST tax, to the extent possible, if the beneficiary to whom such distribution is to be made is a skip person (as defined in section 2613 of the Internal Revenue Code) and (ii) from the trust that is not exempt or excluded from GST tax, to the extent possible, if the beneficiary to whom such distribution is to be made is a non-skip person (as defined in section 2613 of the Internal Revenue Code);

E. To ensure the assets thereof, to the extent not distributed, will be invested and managed in a manner designed to enable the trust estate to grow, provided that the settlor intends and desires that the trustee of such trust have the ultimate discretion to determine how such growth is to be best achieved and, consequently, to determine what portion of the assets thereof is to be invested for capital appreciation and what portion of the assets thereof is to be invested for the generation of income;

F. To ensure the assets of the trust will be excluded from inclusion in the gross estate for federal estate tax purposes of any beneficiary until distributed thereto; provided, however, that this paragraph will not apply with regard to [*include only those applicable*] (i) the portion of a trust expressly made subject to a general power of appointment, or (ii) [*any trust subject to estate tax inclusion such as a marital trust or the assets in a revocable trust*];

G. To ensure each [Retirement Trust] will be treated as a "see-through trust" (as such term is described in the Treasury Regulations under Section 401 of the Internal Revenue Code) so that

its beneficiary will be treated as having been designated as a beneficiary with respect to the [Retirement Benefit] payable to such trust (or with regard to the [Retirement Benefit] from which the Separate Account held by or payable to such trust was derived, as applicable) for purposes of determining the distribution period under Code Section 401(a)(9); and

H. To ensure that the gifts to [Charitable Organizations] provided herein or permitted to be made from any trust created hereunder will be eligible in full for the income, gift or estate tax charitable deduction for Federal tax purposes, as the case may be.

Exhibit B – Template for Nonbinding Letter of Wishes

The letter of wishes is just that, a personalized letter that describes the settlor's wishes with respect to the use of the trust assets over the term of the trust. It can and should be highly personalized, however a template similar to the below may be helpful in instructing clients on how to begin their personalized letter.

- Background on family and creation of wealth.
- How wealth was invested and spent during settlor's lifetime.
- Desire of settlor in connection with the investment and expenditure of trust funds.
- Description of particular goals and limitations in connection with the trust funds.

Exhibit C – Sample Statement of Wealth Transfer Intent

Where did the assets in this trust come from? They did not just happen, by luck or by chance. Nor did they come from society or through government programs or political favors. They were not taken from others by force, fraud, theft, or exploitation. They were created, by Redd Raider and his parents, through their own intelligence, imagination, resourcefulness, and hard work, in the process of earning their own livings. They thought and acted independently, using their own judgment and risking their own money. They had no sense of entitlement to anything they had not earned.

By pursuing their own rational self-interest, they created enough wealth not only to make themselves financially independent, but also to enable them to make substantial gifts to their descendants and to charity. The trust was created as a vehicle for those gifts, but it does not create a moral entitlement to them. On the contrary, the trust's assets are a gift from Redd, which he was under no obligation to make. Redd's gift is made freely and gladly to those who embrace the responsibility of earning their own livings, just as the creators of the trust's assets earned the wealth that made this gift possible. They do not want their descendants to be dependents relying on their charity, but rather their equals in independence and self-reliance. It is their intention that the trust shall be a blessing and not a curse.

The beneficiaries are expected to follow their benefactors' example in supporting themselves through productive work. The trust is not intended to support those who avoid the challenges and rewards of earning their own livings. It is the responsibility of the beneficiaries to make themselves worthy of their inheritance, bearing in mind that only those who do not need it are truly fit to inherit wealth. The guilt that is felt by many who inherit wealth does not result from the mere possession of wealth, but from the fact that they did not earn it. They were deprived of the opportunity to prove that they were capable of providing for themselves, as the creators of their inheritance did.

Because good character is essential to happiness, as well as to the preservation of the individual freedoms the United States was founded to protect, and because unearned wealth too often militates against the development of character traits such as industriousness, self-discipline, self-reliance, and self-responsibility, distributions to beneficiaries are to be limited, as described below, before the age of fifty (50). The reasons for this limitation are:

- A. To enable the beneficiaries to earn the self-esteem that comes only from providing for oneself, without appropriating or depending upon the earnings of others;
- B. To provide the beneficiaries with direct experience of the essential connection between productivity and reward, and the fact that money must be earned before it can be spent or given away;
- C. To enable the beneficiaries to set an example for their children, and give their children the advantage of growing up in a family that is productive and self-supporting;
- D. To enable the beneficiaries to make choices about how to spend their own earnings according to what they determine is of greatest value to them;

E. To enable the beneficiaries to learn the character-building value of delaying gratification;

F. To enable the beneficiaries better to understand, from their own experience, and to be sensitive to the situation of the vast majority of their fellow men and women, who must live entirely upon their own earnings with none of the advantages provided for the trust's beneficiaries;

G. To provide the beneficiaries with protection from unscrupulous suitors who may be attracted to the beneficiaries because of their family's wealth; and

H. To enable the beneficiaries to develop the wisdom and maturity that come only from long experience, in preparation for the heavy responsibilities that will accompany the benefits of their inheritance after the age of fifty (50). Given the trend in the late twentieth and early twenty-first centuries for young Americans to leave the parental home and become self-supporting at a considerably older age than ever before, this period of development is likely to extend well into middle age.

Because good character is of vastly higher value than material possessions, too much unearned wealth poses a far greater threat to the beneficiaries' long-term well-being than the necessity of living within their earned incomes. For these reasons, distributions are to be made solely for health, education, and tax return preparation expenses, and not for maintenance and support except as in guideline (2) below, to beneficiaries under the age of fifty (50). Distributions may also be made to cover any taxes that a beneficiary incurs because of any distributions described above. Any exception to this rule (i.e., a distribution to a beneficiary under the age of fifty (50) for maintenance and support purposes) is to be made only at the trustee's discretion, only in extremely exceptional circumstances of an emergency (and hence temporary) nature, and only if the trustee is confident, after serious deliberation and due diligence, that such an exception will not encourage the recipient to regard the trust as a remedy for failure to keep living expenses within the limits of his or her earned income. After the age of fifty (50), if a beneficiary has conducted himself or herself up to that age in accordance with the guidelines stated below, distributions may be increased to provide for maintenance and support as well. If the beneficiary does not so conduct himself or herself, at any age, distributions of all kinds are to be withheld.

The trustee shall make or withhold distributions based upon the following guidelines:

1. The beneficiaries are expected to embrace diligent productive work, be it at home or in school, in business, or in paid employment, at least to the age of fifty (50), and at all ages to lead principled, purposeful lives conducted responsibly and honorably.

2. The purpose of the trust is not to support beneficiaries whose sole or primary support is the trust, unless they are genuinely disabled, or are the primary care-giver of one or more family members who are genuinely disabled.

3. Beneficiaries with children are expected to give priority to the long-term emotional well-being and character development of their children, and to provide an example to their children of productivity, self-reliance, self-responsibility, and the necessity for the family to live within the limits of its earned income. Toward this end each beneficiary with a child or children is expected to create a stable family in which one parent works as the family breadwinner and the other stays at home taking care of the child or children, and in which both parents live together with the child or children in the family home.

Any exception is to be made only at the trustee's discretion, only if the trustee determines, after serious deliberation and due diligence, that the circumstances genuinely warrant an exception to be made, and only if the trustee is confident, after serious deliberation and due diligence, that such an exception will not encourage the recipient to regard the trust as a remedy for failure to keep living expenses within the limits of his or her earned income, or for failure to fulfill his or her personal and/or parental responsibilities.

In making any exceptions, the trustee may interpret the foregoing distribution standards more broadly for beneficiaries whose lives and whose parenting reflect the values of self-reliance, self-responsibility, and productivity. Conversely, the trustee is directed to construe the foregoing distribution standards very narrowly, or to eliminate distributions altogether, to beneficiaries whose lives are unproductive or irresponsible. If in doubt, the trustee is specifically directed to construe the distribution standards narrowly rather than broadly. At all times the trustee is to give primary consideration to the long-term emotional well-being and character development of the child or children in a beneficiary's family, after serious deliberation and due diligence.

Because government entitlements tend to erode the moral character of their recipients, as well as eroding the freedoms which made the creation of the trust's assets possible, distributions from the Trust may not be received by any beneficiary who accepts any payment or subsidy from government entitlement programs, including but not limited to Social Security, Medicare or any of its subsidiary programs, Medicaid, Aid to Families with Dependent Children or its successor programs (including but not limited to Temporary Assistance for Needy Families), federal housing subsidies, government-issued, government-subsidized, or government-guaranteed student loans, food stamps, or any other entitlement or wealth-redistribution programs created by subsequent legislation. Notwithstanding the foregoing, these provisions shall not be interpreted to reduce or eliminate distributions a beneficiary would otherwise receive solely because the beneficiary is receiving non-waivable public benefits. For this purpose, non-waivable public benefits could include public roads and transportation and socialized medical care where private medical care is outlawed or unavailable.

Distributions from the trust for health care shall be used in the first instance to buy private health insurance, with preference given to tax-advantaged options like Health Savings Accounts, and private disability insurance. Education expenses in addition to tuition and fees may include room and board, books and supplies, school uniforms, and travel and living expenses connected to education as deemed by the trustee to be necessary and compatible with the settlor's values as set forth herein. Before a beneficiary becomes self-supporting, or if a beneficiary returns to full-time education in preparation for a career change, any kind of serious education may be supported as long as the student works toward a degree or other qualification that will enable him or her to earn a living, and receives this degree or qualification in a reasonable time. The trust is not intended to support "perpetual students" or dilettantes whose aim is to avoid becoming self-supporting. Once a beneficiary becomes and remains self-supporting, any kind of serious learning may be supported by the trust. Distributions shall be made for tax return preparation, which is to be directed and overseen by the trustee as an aid in monitoring the beneficiaries' compliance with the distribution provisions and the settlor's intentions. Notwithstanding the foregoing, all distributions shall be withheld from any beneficiary who does not cooperate with the trustee's efforts to ensure that tax returns are properly filed.

The settlor has provided the beneficiaries with the ability to benefit legitimate and accountable charitable organizations (the "Charitable Organizations") with distributions from

trusts created hereunder. These Charitable Organizations may include (i) public and private charities, (ii) private foundations, (iii) research and educational institutions, and (iv) nonprofit organizations, such as those described in Code Section 501(c)(3), Code Section 501(h), and Code Section 527, provided that the following organizations shall be excluded: (A) organizations that promote or advocate the involuntary redistribution of wealth, or that promote or advocate legislation intended to redistribute wealth involuntarily, (B) organizations that seek to create, impose, or increase restrictions on individual liberty or private property, or that promote or advocate legislation intended to create, impose, or increase such restrictions, and (C) organizations that promote or advocate equality of condition or outcome rather than equality of opportunity, or that promote or advocate legislation intended to produce or increase equality of condition or outcome rather than equality of opportunity.