MODIFYING AND TERMINATING IRREVOCABLE TRUSTS

By:

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"Multi-Party Accounts in Texas," University of Texas School of Law Intermediate Estate Planning, Guardianship and Elder Law Conference (2000).

"Modifying and Terminating Irrevocable Trusts," State Bar of Texas Advanced Estate Planning and Probate Law Course (1999).

"Protecting the Surviving Spouse," Southwestern Legal Foundation Wills and Probate Institute (1999).

"Sleeping With the Enemy: How to Sleep At Night While Making a Living With an Estate Planning Practice," Travis County Bar Association Estate Planning and Probate Seminar (1998).

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MODIFYING AND TERMINATING IRREVOCABLE TRUSTS

I. INTRODUCTION

Trusts, being creatures of equity, are subject to the equitable powers of the courts even when they are irrevocable and unamendable by their own terms. This paper examines the ways in which irrevocable trusts can be modified or terminated, whether judicially or nonjudicially, whether according to the trusts' express terms or otherwise.

The paper is divided into two parts. First, the paper examines the law regarding modifying and terminating trusts and the methods available for such action. Second, it examines some of the practical problems attorneys face when seeking to modify or terminate a trust, including the problems typically faced by the trustee, the income beneficiary and the remainder beneficiary.

While this paper primarily deals with modifying or terminating trusts which already are in existence, it includes drafting suggestions where appropriate. Attached to the paper are several appendices containing forms related to modifying and terminating trusts, including some of these drafting suggestions.

This paper primarily focuses on Texas's laws regarding modification and termination of trusts, together with relevant provisions of the Internal Revenue Code.

An excellent source of information on this subject is Darlene Payne Smith's paper entitled "Reformation and Construction Suits" presented to the 1994 Advanced Estate Planning and Probate Law Course. Ms. Smith's work has been very helpful to the author in preparing this paper.

In its first incarnation, this paper was co-authored by Glenn M. Karisch and John R. Ott and presented to the State Bar of Texas's Advanced Estate Planning and Probate Law Course in June 1999. John Ott now practices law at Clark, Thomas & Winters in Austin.

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II. JUDICIAL MODIFICATION OR TERMINATION

Any analysis of the modification or termination of irrevocable trusts must begin with the law applicable to such actions.

A. Common Law

Prior to the enactment of the Texas Trust Code in 1983, there was no specific statutory authorization for modifying or terminating trusts outside of the trusts' terms. The only statutory authority in the Texas Trust Act (predecessor to the Code) was Section 46(c):

> Nothing contained in this Section of this Act shall be construed as restricting the power of a court of competent jurisdiction to permit and authorize the trustee to deviate and vary from the terms of any will, agreement, or other trust instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, supervision or management of trust property.

V. A. T. S. art. 7425b-46 C, repealed effective January 1, 1984.

That oblique reference is consistent with the common law doctrine of deviation. It was this doctrine which gave courts the authority to modify or terminate trusts other than in accordance with their terms prior to the adoption of the Texas Trust Code. This doctrine was expressed by the Dallas Court of Civil Appeals as follows:

> A court of equity is possessed of authority to apply the rule or doctrine of deviation implicit in the law of trusts. Thus a court of equity will order a deviation from the terms of the trust if it appears to the court ***that compliance with the terms of the trust is impossible, illegal, impractical or inexpedient***, or ***that owing to circumstances not known to the settlor and not anticipated by him, compliance would defeat or substantially impair the accomplishment of the purpose of the trust***. [citation omitted] In ordering a deviation a court of equity is merely exercising its general power over the

> administration of trust; it is an essential element of equity jurisdiction.

Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Board, 430 S. W. 2d 107, 117 (Tex. Civ. App. — Dallas 1968, writ ref'd), cert. denied, 396 U. S. 838 (1969) [emphasis added]. *See also* Restatement of Law of Trusts, 2nd Edition, §167.

If this part of the *Amalgamated Transit Union* opinion has a certain ring to it, it is because the same terminology is used in Section 112.054 of the Texas Trust Code, discussed below.

Are there limits on the court's equitable powers to deviate from the trust instrument? Bogert and Bogert, in their treatise on trusts and trustees, draw a distinction between the dispositive provisions and the administrative provisions of a trust. While the court clearly has the power to deviate from the administrative provisions of the trust instrument in order to give full effect to the dispositive or beneficial provisions, it must proceed more carefully when deviating from the dispositive or beneficial scheme. *See* Bogert, Trusts and Trustees (2nd Ed. Rev.), §561. This does not mean that a court has no power to alter the settlor's dispositive scheme, rather it means the court must exercise more care. Examples in Bogert where the dispositive scheme may be altered are cases where a statute (such as Tex. Trust Code §112.054, discussed below) supports the court action or cases where the parties to litigation enter into a compromise agreement altering trust terms which the court finds to be fair and reasonable. *See* Bogert, Trusts and Trustees (2nd Ed. Rev.), §994.

Some Texas courts were reluctant to apply these equitable principles (or at least to extend them to their possible ends) prior to the adoption of the Texas Trust Code. For example, in *Frost National Bank of San Antonio v. Newton*, 554 S. W. 2d 149 (Tex. 1977), the Texas Supreme Court held that a trust could not be terminated on the basis that its principal purposes had been satisfied because the court could not substitute its judgment for the settlor in determining which purposes she considered "principal" and which were merely "incidental." 554 S. W. 2d at 154.

Because of this inconsistency and because of the uncertainty surrounding application of these equitable principles, Section 112.054 was a welcome addition to Texas's statutes in 1984.

The principles permitting modification or termination of trusts were significantly broadened by the 2005 amendments to Section 112.054 (discussed below). The author sees this as part of a general trend toward greater and greater power of courts to tinker with trusts. The increased flexibility of trust administration (of which the Uniform Prudent Investor Act and the Uniform Principal and Income Act, enacted in Texas in 2003, are examples) increases the need for – or, at least, the willingness of – courts to place themselves in the settlor's shoes in dealing with changing circumstances.

Because of this trend, the common law rules regarding trust modification and termination remain important. Section 111.005 of the Texas Trust Code provides that common law rules will prevail except as the Trust Code changes such rules. Thus, even after the enactment of the Trust Code, Section 112.054 may not be the exclusive basis for modifying or terminating a trust. In an appropriate case, a court of competent jurisdiction could modify or terminate a trust for other reasons or on another basis using its general equity powers.

B. Tex. Trust Code §112.054

The enactment of Section 112.054 of the Texas Trust Code in 1984 not only solidified the power of courts to modify or terminate trusts, it also provided a framework for such proceedings. It was based on the doctrine of deviation as stated in Section 167 of the Restatement of the Law of Trusts, Second Edition, and in *Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Board*, 430 S. W. 2d 107, 117 (Tex. Civ. App. — Dallas 1968, writ ref'd), cert. denied, 396 U. S. 838 (1969). *See* Guide to the Texas Trust Code, 3rd Edition (1996), p.10.

In 2005, legislation sponsored by the Real Estate, Probate and Trust Law Section of the State Bar of Texas sought to pick out the best parts of the Uniform Trust Code (which was not adopted as a whole in Texas) for addition to the Texas Trust Code. Most of the trust modification and termination provisions of the Uniform Trust Code were imported into Section 112.054. These changes generally expand the bases for judicial modification or termination of irrevocable trusts, making it easier to meet the statutory standard.

Since this statute forms the basis for virtually all suits to modify or terminate a trust in Texas, this paper will examine each of its elements in detail.

1. Trustee or Beneficiary May Bring Suit

Section 112.054(a) provides that a trustee or a beneficiary may petition the court. A "beneficiary" is a person "for whose benefit property is held in trust, regardless of the nature of the interest." Tex. Trust Code §111.004(2). Thus, any beneficiary — income, remainder, contingent remainder — has standing to bring a modification or termination suit.

Section 112.054 does not authorize a *settlor* to bring a suit. A settlor may be an "interested person" for purposes of Section 115.011 (the "parties" section) and by such section be authorized to initiate a proceeding under Section 115.001 (the jurisdiction section). *See* Tex. Trust Code §§ 111.004(7), 115.001 and 115.011(a). It is unclear, however, if this general authority to commence an action regarding a trust would be sufficient for a settlor to survive a standing challenge if the settlor sought to initiate a Section 112.054 action.

2. Actions the Court is Authorized to Take

Section 112.054 is entitled "Judicial Modification or Termination of Trusts." Nonetheless, it authorizes the court to do more than modify or terminate a trust. Under Section 112.054(a), the court is authorized to:

- Change the trustee;
- Modify the terms of the trust;
- Direct or permit the trustee to do acts that are not authorized or that are forbidden by the terms of the trust;
- Prohibit the trustee from performing acts required by the terms of the trust; or
- Terminate the trust in whole or in part.

One can imagine the meeting of the committee which drafted the Trust Code when this list was developed — a bunch of trust lawyers thinking of all of the things they had ever tried to do and been frustrated in doing. The list is fairly all-encompassing, but it is interesting to compare it with the list of things a court is authorized to do under the "jurisdiction" section of the code (Section 115.001). The following chart compares the two lists:

Section 112.054(a)	***Section 115.001(a)***
Change the trustee	(3) Appoint or remove a trustee
Modify the terms of the trust	(4) Determine the powers, responsibilities, duties, and liability of a trustee (6) Make determinations of fact affecting the administration, distribution, or duration of a trust (7) determine a question arising in the administration or distribution of a trust (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or the Trust Code
Direct or permit the trustee to do acts that are not authorized or that are forbidden by the terms of the trust	(4) Determine the powers, responsibilities, duties, and liability of a trustee (6) Make determinations of fact affecting the administration, distribution, or duration of a trust (7) determine a question arising in the administration or distribution of a trust
Prohibit the trustee from performing acts required by the terms of the trust	(4) Determine the powers, responsibilities, duties, and liability of a trustee (6) Make determinations of fact affecting the administration, distribution, or duration of a trust (7) determine a question arising in the administration or distribution of a trust (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or the Trust Code

Section 112.054(a)	*Section 115.001(a)*
Terminate the trust in whole or in part	4) Determine the powers, responsibilities, duties, and liability of a trustee (6) Make determinations of fact affecting the administration, distribution, or duration of a trust (7) determine a question arising in the administration or distribution of a trust (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or the Trust Code
	(1) Construe a trust instrument
	(2) Determine the law applicable to a trust instrument
	(5) Ascertain beneficiaries
	(9) Require an accounting by a trustee, review trustee fees, and settle interim or final accounts
	(10) Surcharge a trustee

Though entitled "Jurisdiction," Section 115.001 is more than a jurisdiction section — it is the substantive basis for causes of action. For example, Section 115.001(a) is the only authority in the Trust Code for a judicial settlement of interim or final accounts. Because of this, and because of the general equitable powers of the courts with respect to trusts, it is a good idea to plead both Section 112.054 and Section 115.001 as bases for modifying or terminating a trust. Then, if the proof does not exactly match the specific categories expressed in Section 112.054, general equitable principles and Section 115.001 can be relied upon.

3. Findings Required

a. Prior to 2005 Changes

Prior to the 2005 changes, the court could take these wonderful actions under Section 112.054 if it found that one of the two following conditions had occurred: (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; or (2) because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust.

These findings were virtually identical to those applicable under the common law doctrine of deviation. *See Amalgamated Transit Union, Local Division 1338 v. Dallas Public Transit Board,* 430 S. W. 2d 107, 117 (Tex. Civ. App. — Dallas 1968, writ ref'd), cert. denied, 396 U. S. 838 (1969) (quoted at page 1 above).

Of these two grounds for action, unknown or changed circumstances was by far the most common basis under the prior law. It provided more flexibility. Nonetheless, it set a high standard – no change was possible absent a showing that following the trust instrument as written would "defeat or substantially impair" accomplishment of the "purposes" of the trust.

b. Findings Required Under Current Statute

The new statute keeps the first ground, reduces the level of proof required for the second ground and adds three new grounds for modifying or terminating a trust. A trust may be modified or terminated, etc., if: (2005 changes highlighted)

> (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill; [~~or~~]
>
> (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 avoid impairment of the trust's administration;
>
> (4) the order is necessary or appropriate to achieve the settlor's tax objectives 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 [~~compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust~~].

Following is a discussion of each of these purposes:

c. Impossible to Fulfill Purposes

The first possible finding probably is the least common. One may take the position that the purposes of a trust for a minor have been fulfilled if the beneficiary has attained a level of age and maturity where the trust is no longer necessary. Also, one can imagine certain fact patterns where the trust, when drafted, called for the trustee to take certain legal actions (for example, actions based on race or ethnicity) which, through the passage of time and changes in the law, now are illegal. For the most part, however, this will not be the basis for modifying or terminating most trusts.

d. Unknown or Unanticipated Circumstances

The 2005 changes to this standard make it much easier to meet. Instead of having to show that the unknown or unanticipated circumstances would mean that complying with the unmodified trust would "***defeat or substantially impair*** the accomplishment of the purposes of the trust," the applicant need only show that, because of the changed circumstances, modifying or terminating the trust "***will further*** the purposes of the trust."

e. Administrative, Nondispositive Provisions

Perhaps the most significant change in 2005 was to permit "administrative, nondispositive" provisions to be modified upon a showing that the change is "necessary or appropriate to prevent waste or avoid impairment of the trust's administration." Not that this finding is not based on the apparent or supposed intention of the settlor. Rather, it focuses on the efficient administration of the trust regardless of the intent of the settlor.

What is an administrative, nondispositive provision? The author believes this includes most investment restrictions (*e.g.*, "don't sell Blackacre," "invest only in New York Stock Exchange stocks," etc.), choice of law provisions and provisions affecting administration and management powers. With respect to provisions requiring the retention of specific assets, one might argue that the provision is "dispositive" and, therefore, not subject to change under Section 1123.054(a)(3), if the purpose of the restriction was to assure that the specific asset passed to the remainder beneficiaries. However, in most cases, this is a convenient way for a trustee to seek to free itself of restrictions which make it difficult or impossible to comply with the new prudent investor standard.

f. Necessary to Achieve Tax Objectives

Section 112.054(a)(4) permits retroactive modification of provisions if necessary or appropriate to achieve the settlor's tax objectives in a way which is not contrary to the settlor's intentions. The retroactive feature is welcome but may not be binding on the IRS. A nonstatutory reformation action still may be the best way to fix a scrivener's error causing a tax problem (*e.g.*, a crummey power that doesn't work).[1]

g. Modification or Termination with Beneficiary Consent

Section 112.054(a)(5) permits termination of a trust upon a finding that "continuance of the trust is not

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[1] Texas has not adopted a provision based on Section 415 of the Uniform Trust Code, which permits a court to reform the terms of a trust to conform with the settlor's intention if both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Case law in Texas supports reformation, so a similar remedy is available in Texas without express statutory authority.

necessary to achieve any material purpose of the trust" if, but only if, all beneficiaries agree. Similarly, the subsection permits modification of a trust if the change "is not inconsistent with a material purpose of the trust" if, but only if, all beneficiaries agree. Consent of minor, incapacitated, unborn or unascertained beneficiaries may be obtained using virtual representation concepts or by appointment of a guardian ad litem. Tex. Trust Code Sec. 112.054(d).

4. Conforming to the Intent of the Settlor

Tex. Trust Code §112.054(b) directs the court to exercise its discretion "to order a modification or termination" under Section 112.054(a) "in the manner that conforms as nearly as possible to the ***probable*** intention of the settlor." The word "probable" was added to Subsection (b) by the 2005 changes. Obviously, if the modification is needed because of a circumstance truly unanticipated by the settlor, it is hard to prove what the settlor intended with respect to that circumstance. Lowering the standard to the "probable" intention makes it easier to meet.

Two things about this requirement are important to note:

First, it applies only to "modification or termination orders." Does this mean that it does not apply to the other actions permitted by Section 112.054(a), such as changing trustees, ordering the trustee to do something prohibited by the trust instrument or prohibiting the trustee from doing something required by the trust instrument? One can argue that the intentions of the settlor are less important to these actions permitted by Section 112.054(a), so the drafters of the legislation intended to make this requirement applicable only to modifications or terminations. After all, changing trustees or directing or prohibiting an action specifically addressed in the trust instrument necessarily requires the court to go against the stated intention of the settlor. On the other hand, it seems possible that "modification or termination" was just a shorthand way of saying the five actions permitted under Section 112.054(a), and the intention of the settlor is important with respect to all such actions.

Second, while this requires the court to conform "as nearly as possible" with the settlor's probable intention, implicit in Section 112.054 is the concept that *some* departure from the settlor's probable intention is permitted, if not required. It makes no sense to have a statute on modifying or terminating trusts if the court cannot veer away from the settlor's intention at least to some degree.

5. Spendthrift Clauses are a Factor But Not an Impediment

Section 112.054(b) provides in part:

> The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate, but the court is not precluded from exercising its discretion to modify or terminate solely because the trust is a spendthrift trust.

Most irrevocable trusts include spendthrift provisions — provisions which prohibit a beneficiary from anticipating his or her receipt of trust property and which prohibit a beneficiary's creditors from attaching the beneficiary's interest in the trust. These provisions are at least some indication that the settlor did not want the beneficiaries to have the power to deal with and/or receive the trust property prior to the time for distribution under the trust instrument. Thus, absent some mention of the effect of a spendthrift clause in a modification or termination statute, a court might find that the inclusion of a spendthrift provision by itself is a sufficient reason not to modify or terminate a trust if the effect of the modification or termination would be to accelerate the receipt of trust property by one or more beneficiaries.

Of course, in most cases spendthrift clauses are included as part of the administrative provisions of a trust, rather than as an integral part of the trust's dispositive provisions. When administrative provisions conflict with the dispositive or beneficial provisions, in general the administrative provision must yield. *See* Bogert, Trusts and Trustees (2nd Ed. Rev.), §561.

Section 112.054(b) wisely provides that the court should consider the spendthrift provision as a factor, but that the inclusion of the spendthrift provision is not an automatic bar to modification or termination. In some cases, the court's consideration of the spendthrift provision may lead it to conclude that acceleration of distributions to beneficiaries runs counter to the settlor's primary intent and would necessarily frustrate the settlor's purposes in setting up the trust. In other cases, the court may conclude that the spendthrift provision was included for prophylactic creditor protection or

for other, relatively insignificant reasons, so the spendthrift provisions should not impede the modification or termination for other, more pressing reasons.

Note that the provision regarding spendthrift trusts in Section 112.054(b) speaks in terms of the court's discretion to "modify or terminate" a trust, not its discretion regarding changing trustees, ordering the trustee to do something prohibited by the trust instrument or prohibiting the trustee from doing something required by the trust instrument — the other actions permitted under Section 112.054(a).

Drafting Suggestion 1

In cases where the spendthrift provision is a key part of the trust, consider adding a purposes clause which makes it clear that the spendthrift clause is not mere boilerplate. For example (more subtle):

Purpose of Trust. The primary purpose of this trust is to provide for the health, support and maintenance of [Primary Beneficiary] for his lifetime by protecting the trust principal from anticipation by [Primary Beneficiary] or taking by his creditors during his lifetime. The trustee shall keep this purpose in mind in administering the trust and in determining whether or not to make distributions from the trust.

Another example (less subtle):

Purpose of Trust. Notwithstanding the power of the court to modify or terminate this trust pursuant to Tex. Trust Code §112.054 or similar statute, I direct that no trustee or court shall modify or terminate this trust in such a way that [Primary Beneficiary] is entitled to receive benefits from this trust sooner or faster than provided in this instrument.

Obviously, these are not boilerplate-type changes — including them in every trust is inappropriate and defeats the purpose of earmarking those one or two trusts out of a hundred where the settlor wants to trump the power of the court to modify or terminate the trust and pay it to a spendthrift beneficiary.

6. No Justiciable Controversy Required

Proceedings under Tex. Trust Code §112.054 do not require a justiciable controversy. *Gregory v. MBank Corpus Christi, N.A.*, 716 S.W.2d 662 (Tex. App.--Corpus Christi 1986, no writ). Therefore, a modification or termination suit is not subject to attack merely because there is no actual controversy before the court.

C. Reformation and Recission

Reformation suits[2] are kin to modification and termination suits, but the basis for the suit is different. Reformation suits are based on mistakes of fact at the inception of the trust, not deviation from the trust terms due to changed circumstances. If, due to a mistake in the drafting of the trust instrument, the instrument does not contain the terms of the trust as intended by the settlor and trustee, the settlor or other interested party may maintain a suit in equity to have the instrument reformed so that it will contain the terms which were actually agreed upon. Bogert, Trusts and Trustees (2nd Ed. Rev.), §991.

Reformation based on mistake must be based on a mistake of fact, not a mistake of law. *Community Mut. Ins. Co. v. Owen*, 804 S.W.2d 602 (Tex. App.-Houston (1st Dist.) 1991, writ denied. However, while the general rule is well settled that a court will not relieve against a mistake of law, it is also generally held that such rule is confined to mistake of the general rules of law, and has no application to the mistake of persons as to their own private legal rights and interests, so that, if parties contract under a mutual mistake and misapprehension as to such rights, the result is that

[2] Texas has not adopted a provision based on Section 415 of the Uniform Trust Code, which permits a court to reform the terms of a trust to conform with the settlor's intention if both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Case law in Texas supports reformation, so a similar remedy is available in Texas without express statutory authority.

the agreement is liable to be set aside as having proceeded upon a common mistake. *Furnace v. Furnace*, 783 S.W.2d 682, 686 (Tex. App.-Houston (14th Dist. 1989, writ dismissed w.o.j. In *Furnace,* for example, the parties were mistaken as to what effect a sale would have on their interests in a trust. Dicta in the opinion indicates that this was a mistake of fact, not of law, even though legal interpretations of instruments were involved. (Despite the dicta, the court of appeals in *Furnace* found that the parties waived this issue by failing to submit it at trial.)

A recent trend in cases is to permit reformation of the trust to achieve the clearly expressed intent to save transfer taxes even though the instrument would otherwise fail to achieve that intent. *Id.* For example, if the settlor's intent to save generation-skipping taxes is clearly stated in the trust instrument, the dispositive provisions of the trust may be reformed where necessary to effectuate such intent. *Loeser v. Talbot,* 589 N. E. 2d 301, 412 Mass. 361 (1992). However, in one case applying Texas law, reformation was denied where the alleged mistake as to tax consequences was not the overriding reason for the trust. In *duPont v. Southern National Bank of Houston,* 575 F. Supp. 849 (S. D. Texas 1983), affirmed in part, vacated in part, on other issues 771 F. 2d 849 (5th Cir. 1985), cert. denied 475 U. S. 1085 (1986). In *duPont,* the court found that there was insufficient evidence that the settlor would not have created the trust but for his alleged mistake as to tax consequences. The court apparently believed that the primary purpose of the trust was to keep property from his wife, not tax savings.

Drafting Suggestion 2

Use tax savings clauses. They will not save every will or trust with drafting errors, but they cannot hurt. For example:

Settlor's Intention Regarding Tax Effects. It is my intention that the XYZ Trust meet the requirements of a qualified terminable interest property (QTIP) trust under Section 2056 of the Internal Revenue Code, and this instrument shall be construed and, if necessary, reformed to fully effectuate such intention.

Tex. Trust Code §112.036 expressly permits reformation of a trust which would otherwise violate the rule against perpetuities.

If a settlor never intended to create a trust, then recission is the proper remedy. In *Wils v. Robinson,* 934 S.W.2d 774 (Tex. App.-- Houston. (14th Dist.) 1996, writ granted), judgment vacated without reaching merits 938 S.W.2d 717 (Tex. 1997), the court of appeals found that Section 112.054(a)(2) was not a basis for terminating a trust which the settlor said he never intended to create; rather, recission was the proper remedy, based on mistake, fraud, duress or undue influence. 934 S. W. 2d at 779. Despite the result in *Wils,* the prudent course is to plead and attempt to prove modification and termination under Section 112.054 as an alternative theory when recission is a possible theory.

D. Jurisdiction

District courts and statutory probate courts have jurisdiction over trust matters. Tex. Trust Code §115.001; Tex. Prob. Code §5(d). Other courts exercising probate jurisdiction have jurisdiction to hear issues involving trusts created under Section 867 of the Texas Probate Code (guardianship management trusts) and trusts created under Section 142.005 of the Property Code, but they do not have jurisdiction over other trust matters. Tex. Trust Code §115.001(d); Tex. Prob. Code §869C.

Problems can arise when a probate proceeding is pending in a constitutional county court or a statutory county court other than a statutory probate court (a "county court-at-law") and an issue involving a testamentary trust arises. For example, in a will construction suit in a county court-at-law, can the court hear a construction issue involving a testamentary trust which is yet to be created? For a discussion of these and other wonderful probate court jurisdiction issues, see Frank N. Ikard, Jr.'s paper on Probate Jurisdiction, which was most recently presented to the Advanced Estate Planning and Probate Law Course in 1997 (presented that year by Judge Don R. Windle). Mr. Ikard concludes his analysis with five rules governing whether to file in the district court or the probate court. After going through the "appertaining to estates" and "incident to estates" analysis in the first four rules, he concludes with

Rule 5:

When in doubt, file in both the probate court and the district court and let your opponent worry about jurisdiction.

For actions which even tangentially involve trusts, perhaps a modified Rule 5 is in order:

When in doubt, file in a district court or a statutory probate court.

E. Venue

Venue of a trust action is based on Section 115.002 of the Trust Code:

> Sec. 115.002. VENUE. (a) The venue of an action under Section 115.001 of this Act is determined according to this section.
>
> (b) If there is a single, noncorporate trustee, an action shall be brought in the county in which:
>
> (1) the trustee resides or has resided at any time during the four-year period preceding the date the action is filed; or
>
> (2) the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed.
>
> (c) If there are multiple trustees or a corporate trustee, an action shall be brought in the county in which the situs of administration of the trust is maintained or has been maintained at any time during the four-year period preceding the date the action is filed, provided that an action against a corporate trustee as defendant may be brought in the county in which the corporate trustee maintains its principal office in this state.
>
> (d) For just and reasonable cause, including the location of the records and the convenience of the parties and witnesses, the court may transfer an action from a county of proper venue under this section to another county of proper venue:
>
> (1) on motion of a defendant or joined party, filed concurrently with or before the filing of the answer or other initial responsive pleading, and served in accordance with law; or
>
> (2) on motion of an intervening party, filed not later than the 20th day after the court signs the order allowing the intervention, and served in accordance with law.
>
> (e) Notwithstanding any other provision of this section, on agreement by all parties the court may transfer an action from a county of proper venue under this section to any other county.
>
> (f) For the purposes of this section:
>
> (1) "Corporate trustee" means an entity organized as a financial institution or a corporation with the authority to act in a fiduciary capacity.
>
> (2) "Principal office" means an office of a corporate trustee in this state where the decision makers for the corporate trustee within this state conduct the daily affairs of the corporate trustee. The mere presence of an agent or representative of the corporate trustee does not establish a principal office. The principal office of the corporate trustee may also be but is not necessarily the same as the situs of administration of the trust.
>
> (3) "Situs of administration" means the location in this state where the trustee maintains the office that is primarily responsible for dealing with the settlor and beneficiaries of the trust. The situs of administration may also be but is not necessarily the same as the principal office of a corporate trustee.

Thus, venue is proper in the county of the "situs of administration." "Situs of administration" should not be a county in which an automatic teller machine (ATM) is located, but trustees should not be able to force venue where it does the back-room number-crunching if it has officers hustling trust business out of a branch bank in another county.

Keep in mind that, while jurisdiction is a mandatory requirement, venue is permissive. A

judgment in a court without jurisdiction is void or voidable, but a judgment in a court with jurisdiction but without proper venue is valid and enforceable. Therefore, it is possible to file a friendly suit (or an unfriendly suit, for that matter, so long as no one objects to venue) in a county where venue is improper if that location is more convenient for the parties.

F. Parties to Termination/Modification Suit

1. Who May Initiate Suit

As noted at page 3 above, Section 112.054(a) of the Trust Code provides that a trustee or a beneficiary may commence an action under that section, while Section 115.011(a) provides that any "interested person" may commence an action under Section 115.001, the general jurisdictional statute. This inconsistency makes it unclear whether an "interested person" who is not a trustee or beneficiary (for example, the settlor) can initiate a modification or termination suit.

The definition of "interested person" in Section 111.004(7) was amended in 1995 in response to at least one case at the trial court level (and, therefore, unreported) in which the court determined that a beneficiary was not an "interested person" and, therefore, could not initiate an action under Section 115.001. That should not be a problem with an action under Section 112.054, since that section specifically authorizes a beneficiary to bring the action. Nonetheless, the 1995 amendment to Section 111.004(7) makes it clear that, while a trustee or a beneficiary always is an "interested person," whether a person other than a trustee or a beneficiary is an "interested person" for purposes of bringing a trust code action "may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding." Among those persons who have been found to *not* be "interested persons" were a father of minor beneficiaries seeking to compel an accounting or remove a trustee, *Davis v.Davis,* 734 S. W. 2d 707 (Tex. App. — Houston (1st Dist) 1987, writ ref'd, n. r. e.), and the settlor's wife, who was not a trustee, was not a beneficiary, did not stand to inherit any trust assets, and had no community property interest in corpus or undistributed income of trust. *Lemke v. Lemke*, 929 S.W.2d 662 (Tex. App. -- Fort Worth 1996, writ denied).

2. Necessary and Proper Parties

Often the most difficult problem facing an attorney seeking to judicially modify or terminate a trust is determining which parties are necessary parties and which are merely proper parties. The vast majority of trusts have potential contingent beneficiaries who are unknown, undeterminable or suffering a legal disability such as minority. If these persons are necessary parties, then an guardian ad litem usually will be necessary to fully resolve the proceeding. If, on the other hand, these persons merely are proper parties, it may be unnecessary to have an ad litem.

The Trust Code attempts to bring some clarity to the issue of necessary versus proper parties. Tex. Trust Code §115.011(b) starts out by stating plainly that contingent beneficiaries designated as a class are not necessary parties. It then provides that the *only* necessary parties are:

(1) A beneficiary on whose act or obligation the action is predicated;

(2) A beneficiary designated by name in the instrument creating the trust;

(3) A person who is actually receiving distributions from the trust estate at the time the action is filed; and

(4) The trustee, if a trustee is serving at the time the action is filed.

In the case of a charitable trust, §115.001(c) provides that the attorney general shall be given notice of any proceeding as provided in Chapter 123 of the Property Code. That chapter gives the attorney general the opportunity to intervene if he sees fit.

A beneficiary who first raises the modification or termination issue with the trustee (the instigator, so to speak) probably is a necessary party under subparagraph (1) of Section 115.011(b). Other beneficiaries are necessary parties either because they are named in the instrument or are actually receiving distributions from the trust when the action is filed.

Drafting Suggestion 3

Consider the implications of including the names of multiple generations in a trust instrument. In general, it is a good idea to name only the per stirpetal takers — those persons representing their branches of the family tree — and not more remote descendants.

Example 1 (many potential necessary parties):

My Descendants. I have two children, Rhonda Russell and Ronnie Russell. Rhonda Russell has three children, Rita, Rudolph and Rodney. Ronnie Russell has four children, Rebecca, Rusty, Ricky and Reese.

Distribution on Trust Termination. Upon my wife's death, the trust shall terminate and be distributed among my descendants, per stirpes.

Example 2 (fewer potential necessary parties):

My Descendants. I have two children, Rhonda Russell and Ronnie Russell. All references in this will to "my descendants" are to these two children and their descendants.

Distribution on Trust Termination. Upon my wife's death, the trust shall terminate and be distributed among my descendants, per stirpes.

What does "actually receiving distributions . . . at the time the action is filed" mean? Surely it cannot be limited to beneficiaries actually receiving distributions at the instant the lawsuit is filed, for this would usually yield no necessary parties. At the other extreme, surely it does not mean persons to whom distributions are possible at the time the suit is filed — for example, descendants of the primary beneficiary in cases where the trustee holds a spray power. The more probable middle ground includes each person who has received distributions from the trust and whose basis for receiving those distributions has not terminated. This is a good reason not to routinely include spray powers in bypass trusts. For others, see Glenn Karisch's paper, "Protecting the Surviving Spouse" presented to the 1999 Southwestern Legal Foundation Wills and Probate Institute.

3. Virtual Representation and Related Issues

Sometimes it is impossible to get all beneficiaries before the court due to the status of some of the beneficiaries. Beneficiaries who are minors, incapacitated, unborn or unascertained cannot themselves participate in a judicial modification or termination proceeding. Trustees and other persons interested in the trust understandably are reluctant to take actions involving the trust which do not bind these other beneficiaries.

Of course, one alternative is to have a guardian of the estate or a guardian ad litem appointed for such persons. Tex. Trust Code §115.014(a) authorizes the court to appoint one or more guardians ad litem if the court determines that the representation of those persons' interests otherwise would be inadequate. Tex. Trust Code §115.013(c)(2)(A) provides that, to the extent there is no conflict of interest between the guardian ad litem and the persons represented, an order binding the guardian ad litem binds the "ward."

In 2005, Subsection (c) was added to Section 115.014 of the Trust Code, permitting a guardian ad litem to "consider general benefit accruing to the living members of a person's family" in deciding how to act. This makes it easier to obtain guardian ad litem approval to a modification that provides no direct benefit to minor or unascertained beneficiaries but which benefits the family (and, presumably, the minor or unascertained members of the family) generally.

There is another way to bind minors, unborn and unascertained beneficiaries in some cases -- virtual representation. The doctrine of virtual representation exists at common law independent of statute. *See, e.g., Mason v. Mason*, 366 S.W.2d 552 (Tex. 1963); *Starcrest Trust v. Berry*, 926 S.W.2d 343 (Tex. App. --Austin, 1996); *Hedley*

Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826 (Tex. App.--Amarillo 1993, no writ); and *Citizens State Bank v. Bowles*, 663 S.W.2d 845 (Tex. App.--Houston [14th Dist.] 1983, writ dism'd). In addition, however, the doctrine has been codified in Section 115.012(c) of the Trust Code.

Under Section 115.013(c), if there is *no conflict of interest* and *no guardian of the estate or guardian ad litem* has been appointed, a parent may represent his minor child as guardian ad litem or as next friend. Also, an unborn or unascertained person who is *not otherwise represented* is bound by an order to the extent his *interest is adequately represented* by another party having *a substantially identical interest* in the proceeding.

While this statutory statement of virtual representation is limited to parents acting for their minor children and other beneficiaries acting for unborn or unascertained persons, the cases do not appear to limit virtual representation to minors and unborns. *See, e.g., Mason v. Mason*, 366 S.W.2d 552 (Tex. 1963). Also, the *Mason* case makes clear that the doctrine of virtual representation is not limited to beneficiaries representing other beneficiaries. In *Mason*, it was the trustee who was found to have virtually represented the beneficiaries in a suit challenging the validity of the trust.

Normally, only parties may appeal a judgment. An exception exists for persons represented in a case by virtual representation. Even though they are not actually joined in a proceeding and made an actual party, they probably have the right to appeal the judgment — they may be bound by the judgment when it becomes final, but they have an independent right to appeal it before it becomes final. *See American Physicians Insurance Exchange v. Cardenas,* 717 S. W. 2d 707 (Tex. App. -- San Antonio 1986, writ ref'd, n. r. e.); *Grohn v. Marquardt*, 487 S.W.2d 214 (Tex. Civ. App.--San Antonio 1972, writ ref'd n.r.e.). This right of appeal should be factored into the parties' decision about when it is appropriate to make distributions following a judicial modification or termination — better to wait until the judgment becomes final and binding on virtually represented parties before doling out the money.

If a beneficiary is not a necessary party under Section 115.011, and if he or she is not represented in the proceeding by a guardian, a guardian ad litem or by virtual representation, that beneficiary is not bound by the judgment.

4. Analysis of Necessary Parties, Virtual Representation, and Ad Litem Requirements in Modification and Termination Proceedings

The virtual representation statute (Section 115.013(c) and the necessary parties statute (Section 115.011) provides a safe harbor in most cases where trust modification or termination is sought — if all of the necessary parties described in Section 115.011 can be served or otherwise brought into the suit, if all minors can be represented by their parents without a conflict of interest, and if the interests of all unborn or unascertained persons are adequately represented by another party having a substantially identical interest, then a guardian ad litem generally can be avoided and the parties can have a moderate level of comfort that the modification or termination order will be binding on all beneficiaries. If some or all of these requirements cannot be met, then one or more ad litems probably are necessary under Section 115.014.

It is useful to examine these factors in the following hypothetical:

Virtual Representation Hypothetical

Assume Settlor S creates an irrevocable trust with T as trustee, income to I for life, remainder to R on the death of I, or to R's descendants per stirpes if R predeceases I. None of R's descendants are adults.

Example 1: Assume I and R are adults with capacity. T wishes to modify the trust to invest in equities. (S required the investment in FDIC-insured accounts only, but T believes S could not have anticipated the circumstances now presented, with low interest rates on accounts and high return on equities.)

T, I and R are necessary parties — each is named in the trust instrument. R can virtually represent his minor children (there's no conflict of interest, since R's interest is identical to those of his children on

Virtual Representation Hypothetical

Assume Settlor S creates an irrevocable trust with T as trustee, income to I for life, remainder to R on the death of I, or to R's descendants per stirpes if R predeceases I. None of R's descendants are adults.

this issue), and R can virtually represent unborn and unascertained persons (he can adequately represent their interest, and they have a substantially identical interest with R).

Example 2: Assume I is an adult with capacity, while R is I's minor child. T wishes to modify the trust to invest in equities.

T, I and R are necessary parties — each is named in the instrument. I cannot virtually represent R, however, since there is a conflict of interest. (Investment in equities affects the income interest and the remainder interest differently.) Also, I's interest is not substantially identical to that of R's descendants, so I cannot virtually represent those unborn or unascertained persons. A guardian ad litem is needed for R and R's descendants, but only one ad litem ought to be needed, since the interests of R and R's descendants are identical.

Example 3: Assume I and R are adults with capacity. I wants to terminate the trust early and have all of the trust property distributed to I. R is willing to agree, and T is willing to permit the termination if a court orders it.

T, I and R are necessary parties — each is named in the trust instrument. In theory, at least, R can virtually represent his minor children, since there's no conflict of interest and since R's interests are identical to those of his children on this issue. Similarly, in theory, at least, R can virtually represent unborn and unascertained persons (he can adequately represent their interest, and they have a substantially identical interest with R). In reality, however, it is not clear that virtual representation would bind R's descendants, since R is basically giving up the store — yes, his interests are identical, but he's doing nothing to protect those interests. The minute the termination is approved, his interests and those of his descendants go away. A guardian ad litem probably is needed. The guardian ad litem may determine that, notwithstanding that R's descendants get nothing directly from this plan, it nevertheless may be beneficial to R's descendants because there will be less money eaten up in trust fees and R's descendants may eventually get something.

Example 4: Assume I and R are adults with capacity. I wants to terminate the trust early and have part of the trust property distributed to I and part of the trust property distributed to R. R is willing to agree, and T is willing to permit the termination if a court orders it.

T, I and R are necessary parties — each is named in the trust instrument. R cannot virtually represent his minor children or other descendants, since there's a conflict of interest -- under the plan, R gets part of the trust property and R's descendants do not. A guardian ad litem is needed. The guardian ad litem may determine that, notwithstanding that R's descendants get nothing directly from this plan, it nevertheless may be beneficial to R's descendants because there will be less money eaten up in trust fees and R's descendants may eventually get something.

Example 5: Assume I and R are adults with capacity. I wants to terminate the trust early and have part of the trust property distributed to I and part of the trust property distributed to R. R is willing to agree, but T is unwilling to consent. T will agree to have the trust modified so that noncorporate trustees are permitted and I becomes the trustee. I and R agree to proceed with this modification rather than the modification.

T, I and R are necessary parties — each is named in the trust instrument. R can virtually represent his minor children (there's no conflict of interest, since R's interest is identical to those of his children on the modification issue), and R can virtually represent unborn and unascertained persons (he can adequately represent their interest, and they have a substantially identical interest with R on the modification issue).

Virtual Representation Hypothetical

Assume Settlor S creates an irrevocable trust with T as trustee, income to I for life, remainder to R on the death of I, or to R's descendants per stirpes if R predeceases I. None of R's descendants are adults.

Example 6: Assume I and R are adults with capacity. T, I and R agree to have the trust modified so that noncorporate trustees are permitted and I becomes the trustee. Shortly after the judicial modification, I, as trustee, distributes all of the trust property to I and R.

T, I and R are necessary parties — each is named in the trust instrument. If the post-modification was not prearranged, R presumably can virtually represent his minor children (there's no conflict of interest, since R's interest is identical to those of his children on the modification issue), and R can virtually represent unborn and unascertained persons (he can adequately represent their interest, and they have a substantially identical interest with R on the modification issue). However, the deal looks fishy, and R's descendants might have a basis to complain about I's and R's actions upon attaining majority.

III. NONJUDICIAL MODIFICATION OR TERMINATION

In many cases, it may not be necessary to resort to a judicial proceeding to modify or terminate a trust. (Of course, the trustee may wish to get the court's blessing to the modification or termination in some cases even if there is a nonjudicial basis for modification or termination.

A. Actions Permitted by the Trust Instrument

Clearly, the best way to modify or terminate a trust nonjudicially is to do so in accordance with the trust instrument. Therefore, the drafter of the trust instrument can do a lot to make life easier — or harder — for trustees or beneficiaries who later want to modify or terminate the trust.

1. Express Provisions of the Trust Instrument

Many trusts include provisions which expressly permit the trustee or others to modify or terminate the trust in certain circumstances. Some modification or termination provisions are quite broad, but care must be taken not to give the person holding the power to modify or terminate a general power of appointment for federal gift and estate tax purposes.

Here are several examples of modification and termination clauses:

a. Termination of Small Trust

A common (and very useful) provision is one that gives the trustee the power to terminate a trust if the trust corpus becomes so small that it is either inconvenient or too expensive to maintain the trust. If the trustee is a beneficiary of the trust who might take a portion of the trust upon termination, one or more of the following should be used to avoid giving the trustee/beneficiary a general power of appointment:

- Bar the trustee from receiving a distribution under this provision. For example, provide that, if the trustee would otherwise receive the property upon the exercise of this power, he or she shall be deemed to have died prior to the trust termination for purposes of determining who gets the property.

- Provide that the power is not exercisable by the trustee if he or she would receive all or any portion of the property on termination of the trust. Then the trustee can resign and a successor trustee be appointed if necessary.

- Give the power to someone else, or share it with a party holding an adverse interest. For example, provide that, if the trustee would otherwise receive the property upon the exercise of this power, the trust will terminate under this provision only with the joinder of all of the adult nonincapacitated beneficiaries of the oldest generation.

- Make the power to terminate a small trust arise only when the trust corpus reaches a sufficiently low, objective standard. For example, provide that the trustee can terminate a trust under this provision only if the trust corpus is $25,000 or less. This should limit the general power of appointment problem to $25,000, even if the trustee is the

only person making the termination decision.

While these drafting suggestions may help avoid a problem in the future, they also help focus one's attention on a necessary detail when advising a trustee of a trust which includes such a provision — always be aware of the potential general power of appointment problem and advise the trustee accordingly.

b. Trust Merger and/or Division

Many trust instruments give the trustee the power (or affirmatively direct) to merge or divide trusts either solely in the trustee's discretion or upon the occurrence of certain events. Tex. Trust Code §112.057, discussed below, authorizes the trustee to divide a trust nonjudicially even if the trust instrument does not include an express provision, but the trust instrument may give the trustee much broader authority regarding trust division. For example, the trust instrument can mandate that a trust be divided into two shares, one with a generation-skipping tax (GST) inclusion ratio of zero and one with a GST inclusion ratio of one, rather than permitting even the possibility of a single trust with a GST inclusion ratio of between zero and one. Also, the trust instrument can authorize division or merger for any reason, not just tax reasons as provided in Section 112.057.

c. Termination Due to Tax Changes

Far less common but potentially useful is a provision permitting termination of the trust in the event of tax law changes. These are particularly useful when drafting long-term generation-skipping trusts or dynasty trusts. These clauses are particularly tricky when it comes to avoiding the general power of appointment problem. Here's an example:

Drafting Suggestion 4

Change of Law. In the event of a change in either state or federal law, including a change in the interpretation of tax laws, or in the event of any other unforeseen contingency and as a result one or more of the provisions of this Trust are no longer appropriate or work to the benefit of the beneficiaries as originally intended by the Settlor, then the primary current income beneficiary or beneficiaries may appoint an attorney who must be Board Certified in Estate Planning and Probate Law by a State Board of Legal Specialization. If a beneficiary is under age 18 or under a legal disability then a parent or guardian may act for the beneficiary for purposes of this paragraph. The attorney so appointed shall have the power to modify the trust only to the extent necessary to accommodate the change in law or circumstance such that the purpose of the trust as it affects the beneficiaries shall not be thwarted. This shall include any changes necessary to obtain the same or similar tax treatment as was initially intended. This power shall be limited by whatever extent is necessary to insure that it not constitute a general power of appointment for tax purposes.

2. Termination by Distribution

Even if the trust instrument contains no express modification or termination provision, it may be possible to terminate the trust by distributing all of the trust property to the beneficiaries under the mandatory or discretionary distribution standards. The trustee may be reluctant to fully exhaust the trust by distribution to the income beneficiaries, since presumably the remainder beneficiaries may question this action. For this reason, it is a good idea to include a provision indicating that the settlor anticipates that the trustee may exhaust the trust by distribution. Here's an example:

Drafting Suggestion 5

Termination by Distribution. A trust will terminate if all income and principal is paid out under mandatory or discretionary powers granted in such trust.

A trust terminates when there is no res remaining, so this provision probably is not necessary, but it gives the trustee some comfort in distributing those last dollars to the income beneficiary, since presumably the settlor would not have included such a provision if he or she had not anticipated

this possibility.

Another way to make it easier for the trustee to terminate a trust by distribution to the income beneficiary is to include a conflict of interest provision favoring the income beneficiary. While this may not be appropriate in every case, in the vast majority of cases the settlor is more concerned with sustaining the income beneficiaries than with leaving a big pile of money behind for the remainder beneficiaries. Here's an example:

Drafting Suggestion 6

Conflicts of Interest. I realize that in the course of the administration of my estate, in the course of making distribution of estate assets, in the course of valuing any estate property, and in the course of administering any trusts established hereunder, certain conflicts of interest may develop between my wife and our descendants, between the various classes of beneficiaries or between the fiduciary in the capacity of personal representative and the fiduciary in the capacity of trustee, and the beneficiaries. In the resolution of any conflict of interest, I direct each fiduciary first to make a reasonable effort to determine the overall effect of the conflict in the administration of my estate and of the trust or trusts herein created and then to make reasonable efforts to resolve the conflict by mutual agreement of the respective beneficiaries. In the event that mutual agreement cannot be reached after such reasonable efforts, then my fiduciary shall resolve such conflicts in its sole discretion based upon the following priorities:

(1) My wife shall be favored at the expense of our descendants.

(2) Among our descendants, our children shall be favored at the expense of more remote descendants.

(3) Life tenants shall be favored at the expense of remaindermen of whatever class.

Even if the trust instrument does not include an express modification or termination provision, the trustee may be able to terminate a trust by distributing the remaining assets pursuant to a facility of payment provision. Tex. Trust Code §113.021 provides a rudimentary facility of payment provision for trusts with no broader express provision. It permits the trustee to make a distribution required or permitted to be made to a minor or incapacitated beneficiary in one of several ways, including to a custodian under the Uniform Transfers to Minors Act. Of course, a well-drafted trust usually has a much broader facility of payment provision which, for example, may not be limited to minors or incapacitated persons. These provisions can provide the means for getting property out of a cumbersome, expensive trust into a form that is more beneficial to the beneficiary. Following is an example of a broader facility of payment provision:

Drafting Suggestion 7

Recipients of Distributions. Any authorized distributions (either from my estate or during the term of a trust or upon final distribution of a trust) may, in my fiduciary's sole and absolute discretion, be made (1) to or for the benefit of the beneficiary, (2) directly to the beneficiary, (3) on behalf of the beneficiary for the beneficiary's benefit, (4) to any account in a bank or savings institution either in the name of such beneficiary or in a form reserving title, management and custody of such account to a suitable person for the use of such beneficiary, (5) in any form of annuity, (6) in all ways provided by laws dealing with gifts or distributions to or for minors (including but not limited to the Texas Uniform Transfers to Minors Act) or persons under disability, and (7) to any suitable person with whom the

beneficiary resides or who has the care or control of the beneficiary, without obligation to see to the further application of such distribution, and the receipt for distribution by any such person shall fully discharge my fiduciaries.

B. Termination and Modification Permitted by Statute

Even if the trust instrument contains no provision authorizing modification or termination of the trust, the Trust Code may contain a provision that makes it possible to accomplish the same purpose.

1. Revocation by Settlor

Unlike most states, in Texas a trust is revocable by the settlor unless it is irrevocable by the express terms of the instrument. Tex. Trust Code §112.051. The trust instrument should be examined for an express irrevocability clause. If the trust is revocable, then of course the settlor can terminate it and modify it at will, provided that the settlor cannot enlarge the trustee's duties without the trustee's consent. *Id.*

2. Termination by Occurrence of Event

Although it almost goes without saying, a trust terminates if by its terms the trust is to continue only until the expiration of a certain period or until the happening of a certain event and the period of time has elapsed or the event has occurred. Tex. Trust Code §112.052.

3. Merger

Tex. Trust Code §112.034 is a codification of the doctrine of merger. It provides that a settlor does not create a trust if he retains both legal title and all equitable interests or if he transfers both legal title and all equitable interests to the same person. Also, Section 112.034 provides that a trust terminates if the legal title to the trust property and all equitable interests (other than a settlor's beneficial interest protected under a spendthrift trust) in the trust become united in one person. This doctrine rarely applies with most modern trusts (or attempts at trust) since there usually is one or more remainder beneficiaries other than the settlor.

4. Division of Trust for Tax Purposes

Section 112.057 of the Trust Code permits the trustee to divide a trust into two or more separate trusts without a judicial proceeding "if the trustee reasonably determines that the division of the trust could result in a significant decrease in current or future federal income, gift, estate, generation-skipping transfer taxes, or any other tax imposed on trust property." The section sets the parameters of trust divisions under the statute, which generally are more restrictive than those which a settlor may impose in an express provision.

5. Amendment of Charitable Trusts

Section 112.055 of the Trust Code provides for certain tax-oriented provisions to be included in a trust instrument governing private foundations and certain split-interest trusts by operation of law, while Section 112.056 permits the settlor of a trust and the trustee of a trust to consent to such amendments nonjudicially.

C. Termination by Agreement of Settlor and Beneficiaries

Although the beneficiaries of a spendthrift trust may not alienate or encumber their interest in the trust property, a spendthrift trust may be modified or terminated by the consent of all the parties to it. If a settlor of a trust is alive and all of the beneficiaries of an irrevocable spendthrift trust consent (and there being no incapacity to consent by any of the parties), the settlor and all of the beneficiaries may consent to a modification or termination of the trust. *Musick v. Reynolds*, 798 S.W.2d 626 (Tex. App.--Eastland 1990, no writ); *Becknal v. Atwood,* 518 S.W.2d 593 (Tex. Civ. App.--Amarillo 1975, no writ); and *Sayers v. Baker*, 171 S.W.2d 547 (Tex. Civ. App.--Eastland 1943, no writ). Texas case law appears to make no provision that the trustee consent or even be a party to the agreement to modify or terminate a spendthrift trust. In contrast, Section 112.051(b) of the Texas Trust Code provides that the settlor of a trust may modify or amend a trust that is revocable, but the settlor may not enlarge the duties of the trustee without the trustee's express consent. The necessity of obtaining the trustee's consent before enlarging the trustee's duties is certainly proper. One can only assume that a modification of a spendthrift trust must not enlarge the duties of a trustee, or the trustee must be made a party.

There are two serious practical impediments to

terminating a trust by agreement of the settlor and all beneficiaries. First, the settlor often is dead, rendering this method ineffective. Second, the concept of virtual representation available in judicial proceedings to modify or terminate trusts is not available, and all too often there are minor or contingent beneficiaries who cannot enter into the agreement.

D. The 1999 Nonjudicial Virtual Representation Statute

In 1999, Section 114.032 was added to the Texas Trust Code, to read as follows:

> Sec. 114.032. LIABILITY FOR WRITTEN AGREEMENTS. (a) A written agreement between a trustee and a beneficiary, including a release, consent, or other agreement relating to a trustee's duty, power, responsibility, restriction, or liability, is final and binding on the beneficiary and any person represented by a beneficiary as provided by this section if:
>
> (1) the instrument is signed by the beneficiary;
>
> (2) the beneficiary has legal capacity to sign the instrument; and
>
> (3) the beneficiary has full knowledge of the circumstances surrounding the agreement.
>
> (b) A written agreement signed by a beneficiary who has the power to revoke the trust or the power to appoint, including the power to appoint through a power of amendment, the income or principal of the trust to or for the benefit of the beneficiary, the beneficiary's creditors, the beneficiary's estate, or the creditors of the beneficiary's estate is final and binding on any person who takes under the power of appointment or who takes in default if the power of appointment is not executed.
>
> (c) A written instrument is final and binding on a beneficiary who is a minor if:
>
> (1) the minor's parent, including a parent who is also a trust beneficiary, signs the instrument on behalf of the minor;
>
> (2) no conflict of interest exists; and
>
> (3) no guardian, including a guardian ad litem, has been appointed to act on behalf of the minor.
>
> (d) A written instrument is final and binding on an unborn or unascertained beneficiary if a beneficiary who has an interest substantially identical to the interest of the unborn or unascertained beneficiary signs the instrument. For purposes of this subsection, an unborn or unascertained beneficiary has a substantially identical interest only with a trust beneficiary from whom the unborn or unascertained beneficiary descends.
>
> (e) This section does not apply to a written instrument that modifies or terminates a trust in whole or in part unless the instrument is otherwise permitted by law.

Subsection (3) of the new statute seemingly shuts the door on using it for trust modifications and terminations. However, one person's "modification" is another person's "agreement relating to a trustee's duty, power, responsibility, restriction, or liability."

The drafters of Section 114.032 apparently intended it to be useful in obtaining releases of the trustee which are binding on minors and unborns, and subparagraph (e) seems to present no impediment to that. For example, if the trustee discovers that it made a mistake, it can make a full disclosure of the mistake, offer some sort of restitution to the trust, and get a release from the current beneficiaries. This statute would make that agreement binding on minors and unborns in many cases, since their interests would be "substantially identical" to their parents or other beneficiary.

IV. SELECTED PROBLEM AREAS IN TRUST MODIFICATION AND TERMINATION

A. Tax Issues on Trust Modification and Termination

While this paper primarily the state law issues surrounding trust modifications and termination, it

touches on some of the tax issues which might arise. For detailed discussions of these issues, see Linda L. Kelly, "Tax Aspects of Family Settlement Agreements," 1998 Advanced Estate Planing and Probate Law Course.

1. Gift and Estate Tax Issues

a. Gift on Trust Termination or Modification of Beneficial Interest

The most likely tax problem arising from a trust modification or termination is a gift tax problem. Section 2501 of the Internal Revenue Code imposes a tax on transfers of property by gift. Under Treas. Reg. §25.2512-8, a sale, exchange or other transfer of property made in a transaction which is bona fide, at arms' length, and free from any donative intent will be considered as made for adequate and full consideration in money or money's worth and, therefore, not a gift. The Internal Revenue Service does not consider intra-family agreements to be bona fide and at arms' length "unless the parties' claims were bona fide and are satisfied, to the extent feasible, on an economically fair basis." PLR 8902045. This private letter ruling and this entire subject is discussed at length in Linda Kelly's paper, cited above.

If an agreement to terminate a trust results in a division of trust assets in a manner that is inconsistent with the beneficiaries' interests in the trust, a gift may occur. *See Nelson v. United States*, 89-2 U. S. T. C. (CCH) ¶ 13,823 (D.N.D. 1989); PLR 9308032. For example, if a remainder beneficiary agrees to the termination of a trust and gives up his or her interest in the trust in favor of the income beneficiary, the remainder beneficiary may be treated as having made a gift subject to the gift tax.

There are three mitigating factors in this possible scenario: First, if the trust was judicially terminated rather than terminated solely by agreement, then arguably there was no transfer by the remainder beneficiary; rather, the termination was merely an extension of the settlor's power in creating the trust and setting forth its terms, albeit with a little help of the court and Tex. Trust Code §112.054. The parties may have a problem with the *Bosch* doctrine, but they at least have the argument. *See Commissioner v. Estate of Bosch*, 387 U. S. 456 (1967) (Congress intended that federal courts in tax cases should be bound only by a decision of a state's highest court; accordingly, a state court decree might not be binding for federal tax purposes if it were a consent decree or the product of a collusive proceeding.)

Second, the gift may be difficult to value, especially if the "income" beneficiary's interest was not an absolute right to all income but instead was based on a discretionary standard or an ascertainable standard, such as health, education, maintenance and support (HEMS). If there is a discretionary standard or an HEMS standard, how does one determine the value of a remainder interest? This difficulty in valuing the gift could make it possible to value the gift at a relatively low value. *See* PLR 9451049.

Third, the gift (if there is one) would be of a present interest in property qualifying for the annual gift tax exclusion under Section 2503 of the Internal Revenue Code. Thus, the combination of these factors may permit the parties to better deal with the potential gift tax problems.

b. Exercise, Release or Lapse of General Power of Appointment

The exercise, release or lapse of a general power of appointment is deemed a transfer of property by the individual possessing the power. I. R. C. §2514(b). Care must be taken that trustee/beneficiaries (1) do not possess general powers of appointment over trust property and (2) that the machinations of the trust modification or termination does not result in the creation, exercise, release or lapse of a general power of appointment.

As noted on page 14 above, if the trustee holds an express power to terminate the trust and the trustee also is a beneficiary of the trust, he or she may hold a general power of appointment. When drafting trust modification or termination clauses, this issue should be kept in mind and avoided in the manner described on page 14. Even if the power does not exist in the trust instrument, care must be taken in modifying irrevocable trusts that new general power of appointment problems are not created. Estate planners are used to thinking of these issues when drafting trusts; those same attorneys may not be so focused on these issues when in problem-solving mode at the time of trust termination.

c. Exercise of Power by Settlor in Participating in Modification or Termination

Usually the settlor intended for his or her initial transfer of property into an irrevocable trust to be a completed gift — that is why the trust was made to be irrevocable. Does the settlor run any risks in

participating in the modification or termination of an irrevocable trust, either by agreement or by judicial proceeding?

The author finds no authority for the proposition that the settlor's participation in a trust modification or termination by itself causes inclusion of the trust assets in the settlor's estate. The only possible basis for inclusion would appear to be Sections 2036 or 2038 of the Internal Revenue Code, based on the theory that the settlor somehow retained a power of change or revocation when he or she created the otherwise-irrevocable trust. If one assumes that the settlor retained no express power to modify or terminate the trust, the power, to the extent it exists, must arise under Texas law. Under Texas law the settlor does *not* have the power to terminate or modify an irrevocable trust. The settlor may be a proper party to a termination or modification proceeding, and the settlor and all of the beneficiaries may have the right to terminate the trust by agreement under Texas law, but the settlor has no unilateral right or power to act. Therefore, there appears to be no tax reason why the settlor cannot participate in a modification or termination proceeding or agreement.

2. Generation-Skipping Transfer Tax Issues

A trust which was irrevocable on September 25, 1985, is exempt from the generation-skipping transfer (GST) tax, so long as no additions to or modifications of the trust were made after that date. *See* Treas. Reg. §26.2601-1(b); Tax Reform Act of 1986, Pub. L. No. 99-514, §1433(b)(2)(A), 100 Stat. 2731 (1986). Actual or constructive additions to one of these "grandfathered" trusts make a proportionate amount of distributions from and terminations of interests in property in the trust subject to the GST tax. Examples of constructive additions are the release, exercise, or lapse of a power of appointment. *See* Treas. Reg. §26.2601-1(b)(1)(v).

Through private letter rulings one can see how the Internal Revenue Service regards the effects of modifications on the grandfathered status of a trust. In general, *any* change in the value of interests, in beneficial enjoyment and/or timing of enjoyment — even an acceleration of the receipt of property by a skip person, which would result in exposing the trust property to transfer taxation more rapidly that if the grandfathered trust held such property to the full term — results in a loss of grandfathered status. *See, e.g.*, PLR 8851017. On the other hand, various administrative changes appear not to jeopardize the grandfathered status. *See, e.g.*, PLR 8902045; PLR 8912038; PLR 9005019; PLR 9849007.

Therefore, care must be taken in modifying any trust created prior to September 25, 1985. The GST tax implications should be considered before proceeding with the modification. For an in-depth discussion of this subject, see Linda Kelly's paper, cited above. See also Carol A. Harrington's paper entitled "Repairing Generation Skipping Planning Trusts" presented to the 1992 Advanced Estate Planning and Probate Law Course.

B. Charitable Remaindermen and Contingent Remaindermen

1. Charity/Attorney General Involvement

In most actions involving a charitable trust, the action will affect the interest of the charity as beneficiary, and therefore the charity must be made a party. Additionally, the party initiating any proceeding involving a charitable trust is required to give notice to the attorney general by sending the attorney general, be registered or certified mail, a copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but no less than 10 days prior to a hearing in such a proceeding, Texas Prop. Code §123.003(a). At any time the attorney general is a proper party and may intervene in a proceeding involving a charitable trust. Additionally, the attorney general may enter into a compromise, settlement agreement, contract or judgment relating to a proceeding involving a charitable trust, Texas Prop. Code §123.002.

While the folks at the charitable trusts section is no doubt just trying to do their jobs, they can throw a monkey wrench into what is otherwise a fairly straightforward problem. When trying to terminate or modify a trust with a remote contingent charitable beneficiary, the attorney general's involvement can impede the ability of the family to come to a fair solution. Charities themselves do not usually take positions which are adverse to those espoused by family members in such cases because usually they want to maintain a good working relationship with the family. However, because of the nature of the task undertaken by the attorney general — protecting the theoretical interests of the general public — the attorney general often is forced to end up on the opposite side of everyone else at the counsel table. It is

critical to give the required notice under Tex. Prop. Code §123.003 in a timely manner and to cooperate as much as possible with the attorney general's representative. It also is a good idea to establish contact with the charity first and try to have a good relationship established before the attorney general's office looks at the file. If the attorney general's representative sees that the charity is actively involved in the proceeding, he or she may be more likely to pass on the opportunity to become involved in the proceeding.

Drafting Suggestion 8

Warn estate planning clients about the possible attorney general involvement in will construction and trust modification proceedings. If the decision to include the charity as a last resort beneficiary is just an afterthought, encourage them to consider another way to handle the problem.

If the clients have strong philanthropic feelings, by all means include those gifts in the estate planning documents. In that case, consider making the gifts to the charities separate and apart from the family gifts. In other words, do not make the charity a beneficiary of the general family trust — make an outright bequest or make it in a separate trust. (Obviously, split interest gifts such as charitable remainder unitrusts have to have both charitable and noncharitable beneficiaries.) By using this approach, the charity and the attorney general may not be a necessary party to suits involving the family trust.

2. Cy Pres

Generally speaking, the cy pres doctrine is a rule for the construction of instruments in equity, by which the intention of the party is carried out as near as may be, when it would be impossible or illegal to give it literal effect. More commonly, it is the equitable power which enables the court to carry out a testamentary or inter vivos trust established for a particular charitable purpose if the testator/settlor has expressed general charitable intent, and for some reason his purpose cannot be accomplished in the manner specified in the will or trust instrument. Prior to August 30, 1999, a judicial proceeding with attorney general involvement is the only way to get a new charitable beneficiary if the one in the trust instrument fails and the trust instrument is silent as to its replacement.

Beginning August 30, 1999, new Section 113.026 of the Trust Code takes effect, providing a means for the settlor or trustee to nonjudicially select a new charity to replace the failed charity when the trust instrument is silent. The attorney general still gets notice, and the charity selected still has to fall within the cy pres doctrine. However, if the attorney general chooses not to intervene, the replacement of the failed charity can occur nonjudicially.

New Section 113.026 represents a compromise between the proponent of the bill, who wanted broader substitution powers (outside the cy pres doctrine if the settlor was alive and wished to designate a charity which did not have a same or similar purpose) and less attorney general involvement, and the attorney general's office, which wanted the cy pres doctrine to apply in all cases. One unfortunate aspect of the compromise is that the new law only applies to trusts created on or after August 30, 1999. One fortunate (and almost unbelievable) quirk of the statute is that the attorney general can be held responsible for all court costs of the parties involved if the court determines that the attorney general acted unreasonably in seeking judicial review of the appointment of the replacement charitable beneficiary.

Drafting Suggestion 9

Always include an express provision for replacing a failed charitable beneficiary. In virtually all cases, the trustee can be given the power to pick a new beneficiary. For example:

Failed Charitable Beneficiary. Notwithstanding anything in this instrument to the contrary, each of the Charities must be an organization described in Sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code. If any of the Charities is not an organization described in Sections 170(b)(1)(A),

170(c), 2055(a) and 2522(a) of the Code at the time when any principal or income of the trust is to be distributed to it, then the Trustee shall distribute such principal and income pro rata to those of the Charities which are organizations described in Sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code. If none of the Charities is an organization described in Sections 170(b)(1)(A), 170(c), 2055(a) and 2522(a) of the Code, then the Trustee shall distribute such principal and income to such one (1) or more organizations described in Sections 170(b)(1)(A), 170(c), 2055(a), and 2522(a) of the Code as the Trustee shall select in the Trustee's sole discretion. In exercising this discretion, the Trustee **[optional language: shall/shall not]** be required to assure that the organization so selected has a same or similar purpose as one or more of the Charities named in this instrument.

C. Problems Unique to the Trustee

When a modification or termination action is contemplated, the trustee usually faces unique problems and issues. The trustee often finds itself reluctant to modify or terminate while the beneficiaries are all enthusiastic about the action, or precisely the reverse — the trustee may see an immediate need to modify the trust, but the beneficiaries are not so excited about the prospect of reviewing all this legal mumbo-jumbo.

Here are suggestions for trustees when modification or termination is considered:

1. Retain outside counsel in all but the most routine and small cases. While this may seem self-serving, it actually makes a lot of sense. Under *Huie v. DeShazo,* 922 S. W. 2d 920 (Tex. 1996), a trustee's consultations with its attorneys are protected by the attorney-client privilege. The trustee can get (hopefully) good, independent advice and protect its communications about the propriety of terminating or modifying the trust and the problems which may be experienced with beneficiaries.

2. Make a full and reasonable disclosure of all material facts, including all material nonstandard transactions. Only by doing so can the trustee have any hope of making an agreement with beneficiaries binding and enforceable. *See Montgomery v. Kennedy,* 669 S. W. 2d 309, 313 (Tex. 1984); Tex. Trust Code §22however.

3. The trustee's starting point with respect to any modification or termination ought to be: get a release, indemnity and/or judicial discharge. Even if the modification is occurring judicially, consider getting a release and, possibly, an indemnity from all adult beneficiaries, and consider using new Section 114.032 (discussed on page 18 above) to attempt to bind minors and unborns to the terms of the release. The consideration for the release can be the trustee's willingness not to oppose the modification or termination proceeding. While new Section 114.032 does not permit agreements which terminate or modify trusts, it should permit the trustee to be released for actions leading up to such action.

4. If possible, merely agree not to oppose the modification or termination rather than actively seeking, supporting or agreeing to the termination or modification. The trustee has a common law duty to defend the trust, and it is preferable to let the beneficiaries push for the termination of the trust rather than having the trustee out on the front lines. Obviously, this ignores the real world to a certain degree — there are going to be many times when the trustee has to take the lead in a modification or termination, and such action often is entirely accurate.

5. Make sure the necessary parties are joined, and make sure the parties being virtually represented fall comfortably within the virtual representation statute or doctrine. If there's any doubt, recommend to the court that a guardian ad litem be appointed.

6. Remember that trustees not only have a duty to act reasonably when they exercise discretion, they also have a duty to decide whether or not to exercise discretion given to them by the trust instrument. Failure to exercise discretion when it is given (for example, failure to exercise discretion to terminate a small trust using the nonjudicial termination power given the trustee in the trust instrument) can be as much of a breach as exercising the discretion wrongfully or improperly. Document the trust records not only if the trustee chooses to exercise discretion, but also when the trustee chooses

not to exercise discretion. For example, a notation may be "considered terminating trust under small trust provision, but decided that the purposes of the trust continue to be served at this time, so termination is inappropriate."

7. While this should go without saying and does not have particularly to do with trust modification or termination suits, remember to treat all beneficiaries with courtesy and respect, and remember that the trustee's internal email probably is discoverable if it exists.

8. If the trust is terminated, delay the actual distribution of trust property until the judgment is final. Remember that parties who were virtually represented in the proceeding may have an independent right to appeal the judgment.

V. CONCLUSION

Modifying or terminating trusts is something most attorneys face at some point in their practices. The author hopes this outline will be a ready resource for those occasions, with both legal and practical advice.

VI. APPENDICES

A. Appendix A — Agreement and Mutual Release Terminating Trusts

AGREEMENT AND MUTUAL RELEASE FOR TRUST 1 AND TRUST 2

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

This Agreement and Release is entered into by and among Beneficiary #1 of _____, Texas, individually and as beneficiary of the TRUST 1; Beneficiary #2 of _____, Texas, individually and as beneficiary of the TRUST 2; Co-Trustee #1 of _____, Texas, as Co-Trustee of the TRUST 1 and the TRUST 2; and Co-Trustee #2 of _____, Texas, as Co-Trustee of the TRUST 1 and the TRUST 2.

Recital

WHEREAS, Section 6.7 of the TRUST 1 and the TRUST 2 allow the Trustees to terminate the Trusts after any calendar year in which the value of each Trust was under $20,000.00; and

WHEREAS, to the best of the Trustees knowledge the TRUST 1 and the TRUST 2 each had a value under $20,000.00 at the end of calendar year 1996 and each has a value under $20,000.00 at the time of this Agreement and Release; and

WHEREAS, the Trustees desire to terminate these Trusts in accordance with the Terms of the Trust instruments; and

WHEREAS, both Beneficiary #1 and Beneficiary #2, individually and as Trust beneficiaries, desire the Trustees to terminate the Trusts; and

WHEREAS, both Beneficiary #1 and Beneficiary #2, individually and as Trust beneficiaries, desire to release the Trustees for any and all liability from early termination of these Trusts, as well as release the Trustees from any liability, known or unknown, relating to any action or inaction on the part of the Trustees in the administration of these Trusts;

Agreement

THEREFORE, in satisfaction of the recitals set forth hereinabove and acknowledging as sufficient consideration the mutual covenants to follow, each party agrees as follows:

1. Beneficiary #1 hereby releases and forever discharges Co-Trustee #1 of _____, Texas, and Co-Trustee #2 of _____, Texas, as the named persons to serve as Co-Trustees of the TRUST 1 and their agents, servants, representatives and all of the persons, firms and corporations whether named herein or not, of and from any and all claims, demands, obligations, liabilities, suits and causes of action whatsoever, whether known or unknown, which he either has or may have in connection with the TRUST 1 and/or any other claim, demand, obligation, liability, suit or cause of action, whether known or unknown, which he either has or may have against Co-Trustee #1 or Co-Trustee #2.

2. Beneficiary #2 hereby releases and forever discharges Co-Trustee #1 of _____, Texas, and Co-Trustee #2 of _____, Texas, as the named persons to serve as Co-Trustees of the TRUST 2 and their agents, servants, representatives and all of the persons, firms and corporations whether named herein or not, of and from any and all claims, demands, obligations, liabilities, suits and causes of action whatsoever, whether known or unknown, which she either has or may have in connection

with the TRUST 2 and/or any other claim, demand, obligation, liability, suit or cause of action, whether known or unknown, which she either has or may have against Co-Trustee #1 or Co-Trustee #2.

3. Co-Trustee #1 of _____, Texas, and Co-Trustee #2 of _____, Texas, as Co-Trustees of the TRUST 1 and the TRUST 2, hereby agree to terminate the TRUST 1 and the TRUST 2 in accordance with Section 6.7 of the Trust instruments. Upon termination, the serving Co-Trustees agree to distribute the remaining trust corpus to the beneficiaries outright. The only corpus known to the Trustees and Beneficiaries are _____, which ownership shall be transferred from the Trust to the beneficiaries individually.

4. Beneficiary #1 and Beneficiary #2 represent that they have retained an attorney of their own choice and consulted with him and relied upon him for advice in connection with the matters herein mentioned and have not relied on the representation of any party in whose favor this release runs. They further represent that no part of any cause of action hereby settled and released has been transferred or assigned to anyone.

5. Co-Trustee #1 represents that he has retained an attorney of his own choice and consulted with him and relied upon him for advice in connection with the matters herein mentioned and have not relied on the representation of any party in whose favor this release runs. He further represents that no part of any cause of action hereby settled and released has been transferred or assigned to anyone.

6. Co-Trustee #2 represents that he has retained an attorney of his own choice and consulted with him and relied upon him for advice in connection with the matters herein mentioned and have not relied on the representation of any party in whose favor this release runs. He further represents that no part of any cause of action hereby settled and released has been transferred or assigned to anyone.

7. It is understood and agreed that this release shall be binding upon Beneficiary #1, Beneficiary #2, Co-Trustee #1, Co-Trustee #2, and the respective heirs, representatives, successors and assigns of each.

8. It is understood and agreed that this release supersedes any and all prior agreements, arrangements or understandings between the parties relating to the TRUST 1 and the TRUST 2.

9. The Parties agree that there are no oral understandings, statements, promises or inducements contrary to the terms of this settlement and release, and that this Agreement and Release may only be modified by written agreement signed by all Parties.

10. It is understood and agreed that this release shall be governed by, construed and enforced in accordance with, and subject to, the laws of the State of Texas.

11. It is understood and agreed that this release shall be executed in 4 originals, each of which shall be deemed an original for all purposes.

This instrument is intended to be effective _____.

_____

BENEFICIARY #1

_____

BENEFICIARY #2

_____

CO-TRUSTEE #1, AS CO-TRUSTEE

_____
CO-TRUSTEE #2, AS CO-TRUSTEE

STATE OF TEXAS
COUNTY OF TRAVIS

This instrument was acknowledged before me on the _____ day of _____, 20__, by Beneficiary #1, Beneficiary #2, Co-Trustee #1 and Co-Trustee #2..

Notary Seal:

_____
Notary Public, State of Texas

B. Appendix B – Agreement and Mutual Release for Terminated Trust

AGREEMENT AND MUTUAL RELEASE FOR TERMINATED TRUST

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

This Agreement and Release is entered into by and among BENEFICIARY of _____, Texas, individually and as beneficiary of the TERMINATED TRUST and TRUSTEE of _____, Texas, as Trustee of the TERMINATED TRUST (hereinafter referred to as the "Trust").

Recital

WHEREAS, the Trust was created by _____ on or about _____, for the benefit of BENEFICIARY (hereinafter sometimes referred to as "Beneficiary"). The Trust was funded with stocks and bonds, however, the Trust contains only real estate at the time of this Agreement. The initial Trustee of the Trust was TRUSTEE (hereafter referred to sometimes as "Trustee"). TRUSTEE is the only Trustee who has ever served as such for the Trust and is the only currently serving Trustee of the Trust, and references hereafter to the "serving Trustee" shall mean her; and

WHEREAS, Paragraph J of Article IV of the Trust allows the Trustee to terminate the Trust if the Trustee determines, in her sole and absolute discretion, that continuation of the Trust is no longer in the best interest of the Beneficiary and further that continuation of the Trust is no longer economical; and

WHEREAS, upon termination of the Trust in accordance with Paragraph J of Article IV, the Trust property is distributable outright to the person entitled to receive the income therefrom; and

WHEREAS, the Beneficiary is the only person entitled to Trust income at the time of this Agreement and Release; and

WHEREAS, the sole asset of the Trust is real estate that is subject to one or more liens approximately equal to the value of the real estate; and

WHEREAS, the currently serving Trustee desires to terminate this Trust in accordance with the Terms of the Trust instrument; and

WHEREAS, BENEFICIARY, individually and as Trust beneficiary, desires the serving Trustee to terminate the Trust; and

WHEREAS, BENEFICIARY, individually and as Trust beneficiary, acknowledges and appreciates the performance of the fiduciary responsibilities by the Trustee; and

WHEREAS, BENEFICIARY, individually and as Trust beneficiary, desires to release the serving Trustee for any and all liability from early termination of this Trust, as well as release the Trustee from any liability, known or unknown, relating to any action or inaction on the part of the Trustee in the administration of this Trust;

Agreement

THEREFORE, in satisfaction of the recitals set forth hereinabove and acknowledging as sufficient consideration the mutual covenants to follow, each party agrees as follows:

1. BENEFICIARY hereby releases and forever discharges TRUSTEE as the serving Trustee of the TERMINATED TRUST of and from any and all claims, demands, obligations, liabilities, suits and

causes of action whatsoever, whether known or unknown, which he either has or may have in connection with the TERMINATED TRUST and any claim, demand, obligation, liability, suit or cause of action, whether known or unknown, which he either has or may have against her arising from her service as Trustee of the Trust. BENEFICIARY hereby personally assumes all indebtedness associated with the Trust property and agrees to indemnify the Trustee of and from any and all liability associated therewith.

2. TRUSTEE, as the serving Trustee of the TERMINATED TRUST, in her sole discretion and without inducement from the beneficiary or any other person, has determined that termination of the Trust is in the best interest of the beneficiary and that its continuation is uneconomical. Therefore, TRUSTEE as Trustee hereby terminates the TERMINATED TRUST pursuant to her authority to do so given her in Paragraph J of Article IV of the Trust instrument. The serving Trustee warrants and represents that that the serving Trustee has all the authority originally given to her in the Trust instrument. The serving Trustee acknowledges that upon termination of the Trust, in accordance with Paragraph J of Article IV of the Trust, the remaining trust corpus is distributable to the Beneficiary outright. The serving Trustee therefore hereby assigns, transfers and conveys all of her interest as Trustee in 100% of the corpus of the Trust to the beneficiary, subject to the above referenced indebtedness on the Trust corpus.

3. It is understood and agreed that this agreement and release shall be binding upon BENEFICIARY and TRUSTEE, and the respective heirs, representatives, successors and assigns of each as a result of the Trust terminations and stock transfers.

4. It is understood and agreed that this agreement and release supersedes any and all prior agreements, arrangements or understandings between the parties relating to the TERMINATED TRUST. The parties further agree that they are each entering into this agreement and release in good faith and shall timely do or take whatever actions are necessary to comply with the provisions of this Agreement and Release.

5. The Parties agree that there are no oral understandings, statements, promises or inducements contrary to the terms of this agreement and release, and that this agreement and release may only be modified by written agreement signed by all Parties.

6. It is understood and agreed that this release shall be governed by, construed and enforced in accordance with, and subject to, the laws of the State of Texas.

7. It is understood and agreed that this release shall be executed in 2 originals, each of which shall be deemed an original for all purposes.

This instrument is executed by the parties on the dates indicated below.

_____ Date:_____
BENEFICIARY

_____ Date:_____
TRUSTEE, AS TRUSTEE

STATE OF TEXAS
COUNTY OF TRAVIS

This instrument was acknowledged before me on the _____ day of _____ _____, 20__, by BENEFICIARY.

Notary Seal:

_____
Notary Public, State of Texas

STATE OF TEXAS

COUNTY OF TRAVIS

This instrument was acknowledged before me on the _____ day of _____ _____, 20__, by TRUSTEE.

Notary Seal:

_____
Notary Public, State of Texas

C. Appendix C — Original Petition for Approval of Trustee's Resignation and Termination of Trust

Cause No. _____

IN RE:	**§**	**IN THE DISTRICT COURT OF**
	§	
	§	**TRAVIS COUNTY, TEXAS**
	§	
BUSTED TRUST	**§**	**_____ JUDICIAL DISTRICT**

ORIGINAL PETITION FOR APPROVAL OF TRUSTEE'S RESIGNATION AND TERMINATION OF TRUST

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES TRUSTEE, Trustee of the BUSTED TRUST, Petitioner herein, and respectfully files this Original Petition for Approval of Trustee's Resignation and Termination of Trust, respectfully showing the Court as follows:

PARTIES

1. Petitioner TRUSTEE is a trust company duly organized and existing under the laws of the State of Texas, with its principal office in _____, _____ County, Texas. Petitioner brings this action in its capacity as Trustee of the BUSTED TRUST (hereinafter referred to as the "Trust").

2. The following persons have an interest in this proceeding and are joined as Respondents herein because they currently eligible, or potentially eligible, to receive distributions of income and principal from the Trust:

Primary Beneficiary:

PB
Date of birth:
Address
Social Security #

Contingent Remainder Beneficiaries:

CRB Date of birth: Address Social Security #	CRB Date of birth: Address Social Security #

The Primary Beneficiary of the Trust, PB (hereinafter referred to as the "Primary Beneficiary") is an adult, and has executed and filed a waiver of citation in this proceeding attached hereto as Exhibit "A" and incorporated for all purposes, therefore the issuance of service of citation upon the adult beneficiary is not required. The Contingent Remainder Beneficiaries are minors and therefore Petitioner requests the issuance of service of citation upon these minor Trust beneficiaries.

JURISDICTION

3. This Court has jurisdiction to grant the relief requested in this petition pursuant to Section115.001 of the Texas Trust Code.

VENUE

4. Venue of this proceeding is proper in Travis County, Texas pursuant to Section 115.002(c) of the Texas Trust Code.

FACTS

5. The Trust is an inter vivos trust that was created by _____ by agreement dated _____ for the benefit of their son/daughter/grandchild, the Primary Beneficiary. A true and correct copy of the trust agreement is attached hereto as Exhibit "B" and incorporated for all purposes.

6. At the present time, the only permissible beneficiary of the Trust is the Primary Beneficiary. The Trust is authorized to make disbursements to the Primary Beneficiary as follows:

7. The Trust is further authorized to make disbursements, from time to time as determined in the discretion of the Trustee, in the event of any serious emergency adversely affecting the health or well being of the Primary Beneficiary.

8. The Trust is further mandated to make distributions to the Primary Beneficiary, as follows: _____, until _____ when the Trustee is mandated to distribute to the Primary Beneficiary all funds and assets of the Trust then remaining, and the Trust terminates.

9. In the event the Primary Beneficiary should die before _____, then all assets remaining in the Trust shall be held and/or distributed by the Trustee for the benefit of the Primary Beneficiary's issue [i.e. – for the benefit of the Contingent Remainder Beneficiary(ies)] until the youngest attains age ____, at which time the Trust shall terminate and the assets thereof shall be divided equally among the issue of the Primary Beneficiary, with the share of any deceased issue to go the his or her issue, if any. During the continuance of any such Trust, the Trustee is authorized to make payments from time to time of income and/or principal as the Trustee, in its discretion, deems necessary or appropriate for the health, education, maintenance and support of the Contingent Remainder Beneficiary(ies).

10. The initial Trustee of the Trust was _____. TRUSTEE is currently serving as Trustee of the Trust as a result of the following transactions:

11. The Trust's primary assets are cash, stocks and bonds in the amount of approximately $1,000.00 without taking into account tax liability associated therewith. Because of the small size of the Trust, it has become uneconomical for the Trust to pay the Trustee to administer the trust, a circumstance not known or anticipated by the Settlors when they created the Trust in _____. Compliance with the terms of the trust and forcing the Trustee to continue to administer the Trust until _____ would defeat or substantially impair the accomplishment of the purposes of the Trust, which is to provide for the health and well being of the Primary Beneficiary.

12. Section 112.054 of the Texas Trust Code provides that on the petition of a Trustee, a Court may order that the Trust be terminated if, because of circumstances not known to or anticipated by the settlor, termination of the trust will further the purposes of the Trust.

RELIEF REQUESTED

13. Petitioner requests this Court to determine that the services of a corporate fiduciary have become uneconomical due to the small size of the Trust; that continued administration of the Trust would defeat or substantially impair the accomplishment of the Trust; that such circumstances were not known to or anticipated by the Settlors upon creation of the Trust; the Court approve Petitioner's resignation as Trustee of the Trust; that termination of the trust will further the purposes of the Trust; that the Trust be terminated; that the remaining assets of the Trust, after payment of all Trustee's fees, Court costs and expenses, and legal fees, be distributed outright to the Primary Beneficiary; and that the Court enter such other orders as may be appropriate to provide for the delivery of all Trust assets from Petitioner to the Primary Beneficiary.

14. After the hearing on this petition, if the Court approves Petitioner's resignation as Trustee of the Trust and terminates the Trust, Petitioner will submit a final accounting that describes all of the actions Petitioner has taken as Trustee of the Trust. In that event, Petitioner asks the Court to review its final accounting, and to enter an order approving the accounting and discharging Petitioner from any liabilities in connection with its actions as Trustee of the Trust, including the termination.

15. Petitioner brings this action for the purpose of preserving and protecting the interests of the Trust and its beneficiaries. The relief sought herein is necessary to enable to Trust to fulfill its purposes as created by Settlors. Accordingly, Petitioner is entitled to recover its reasonable attorney's fees and court costs from the Trust pursuant to Section 114.064 of the Texas Trust Code. If any of the other parties to this proceeding retain counsel, including counsel appointed by this Court, to represent their interests in this cause, the Court should determine whether all or any portion of the attorney's fees and court costs incurred by these parties should be paid from the Trust.

PRAYER

WHEREFORE PREMISES CONSIDERED, Petitioner TRUSTEE, Trustee of the BUSTED TRUST, prays that; (a) all minor beneficiaries be served with citation in the manner required by law, and that upon final trial hereof, the Court determine that the services of a corporate fiduciary have become uneconomical due to the small size of the Trust; (b) that the Court determine that termination of the Trust will further the purposes of the Trust; (c) that the Court determine that such circumstances were not known to or anticipated by the Settlors upon creation of the Trust; (d) the Court approve Petitioner's resignation as Trustee of the Trust; (e) the Court approve the final accounting of Petitioner and discharge Petitioner from any liabilities in connection with its actions as Trustee of the Trust, including the termination; (f) that the Trust be terminated; (g) that Petitioner's reasonable attorney's fees and court costs be paid from the Trust; and (h) that the remaining assets of the Trust, after payment of all Trustee's fees, Court costs and expenses, and legal fees, be distributed outright to the Primary Beneficiary. Petitioner also prays that this Court appoint an attorney ad litem to represent the Contingent Remainder Beneficiaries. Petitioner further prays for such other and further relief, at law or in equity, to which Petitioner may show itself justly entitled.

Respectfully submitted,

[Pleadings Signature Block]

D. Appendix D — Waiver of Citation

Cause No. _____

IN RE:	**§**	**IN THE DISTRICT COURT OF**
	§	
	§	**TRAVIS COUNTY, TEXAS**
	§	
BUSTED TRUST	**§**	**_____ JUDICIAL DISTRICT**

WAIVER OF CITATION

STATE OF TEXAS	**§**
	§
COUNTY OF TRAVIS	**§**

BEFORE ME, the undersigned authority, personally appeared PB, who by me duly sworn, made the following statements and swore that they were true:

"I, PB, am a Respondent if the above-entitled and numbered cause. My mailing address is _____ _____. I have been given a copy of the Original Petition that has been filed in this cause, and I have read it and understood it. I hereby enter my appearance in this cause for all purposes and waive the issuance and service of process."

_____
PB

STATE OF TEXAS	§
	§
COUNTY OF TRAVIS	**§**

This instrument was acknowledged before me on the _____ day of _____, 20__, by PB.

_____
Notary Public, State of Texas

E. Appendix E -- Affidavit of Trust Officer

Cause No. _____

IN RE:	**§**	**IN THE DISTRICT COURT OF**
	§	
	§	**TRAVIS COUNTY, TEXAS**
	§	
BUSTED TRUST	**§**	**JUDICIAL DISTRICT**

AFFIDAVIT OF TRUST OFFICER

STATE OF TEXAS	**§**
	§
COUNTY OF TRAVIS	**§**

BEFORE ME, the undersigned authority, on this day personally appeared TRUST OFFICER, who, being by me first duly sworn, on her oath did state as follows:

1. "My name is TRUST OFFICER. I am at least 21 years of age, of sound mind, capable of making this Affidavit, and fully competent to testify to the matter stated herein, and have personal knowledge of each of the matters stated herein. The matters stated herein are true and correct pursuant to my own personal knowledge.

2. "I am a Trust Officer employed by TRUSTEE, a trust company licensed to do business in the State of Texas and having its principal place of business in _____, _____ County, Texas.

3. "The BUSTED TRUST (hereinafter referred to as the "Trust") is an inter vivos trust that was created by _____, by agreement dated _____ for the benefit of their son/daughter/grandchild, PB (the "Primary Beneficiary"). A true and correct copy of the Trust Agreement is attached hereto as Exhibit "A" and incorporated for all purposes.

4. "The current Trustee of the Trust is TRUSTEE.

5. Attached to this affidavit as Exhibit "B" is an accounting of TRUSTEE's actions as Trustee of the Trust (the "Final Accounting"). The Final Accounting accurately identifies (i) all properties of the Trust that have come to TRUSTEE's knowledge or into its possession while it was serving as Trustee of the Trust, (ii) all receipts of income and principal of the Trust while TRUSTEE was serving as Trustee of the Trust, (iii) all disbursements of income and principal of the Trust while TRUSTEE was serving as Trustee of the Trust, and (iv) all other transactions affecting the property of the Trust while TRUSTEE was serving as Trustee of the Trust. As the Final Accounting reflects, TRUSTEE has administered the Trust in accordance with the requirements of the Trust Agreement and Texas law.

6. The Trustee filed its Original Petition for Approval of Trustee's Resignation and Termination of Trust in accordance with Section 112.054 of the Texas Trust Code for the purpose of preserving and protecting the interests of the Trust and its beneficiaries. The relief sought in this action was necessary to enable the to Trust to fulfill its purposes as created by the Settlors."

FURTHER AFFIANT SAYETH NOT.

_____

TRUST OFFICER

Affiant

STATE OF TEXAS **§**

§

COUNTY OF TRAVIS **§**

SUBSCRIBED AND SWORN to before me the undersigned authority by the above signed Affiant, TRUST OFFICER, on this _____ day of _____, 20__, to certify witness my hand and seal of office.

_____

Notary Public, State of Texas

F. Appendix F — Final Judgment

Cause No.

IN RE:	**§**	**IN THE DISTRICT COURT OF**
	§	
	§	**TRAVIS COUNTY, TEXAS**
	§	
BUSTED TRUST	**§**	**_____ JUDICIAL DISTRICT**

FINAL JUDGMENT

On the _ day of _____, 20__, came on to be heard the Original Petition for Approval of Trustee's Resignation and Termination of Trust in the above-entitled and numbered cause by TRUSTEE, Trustee of the BUSTED TRUST. Petitioner TRUSTEE, Trustee of the Trust, appeared through its duly authorized representative and attorney of record and announced ready for trial. Respondent PB, having filed waiver of citation in this cause and having approved the relief granted by this judgment, did not appear for trial. Respondents CRB and CRB appeared by and through their duly authorized representative and attorney of record and announced ready for trial. No jury having been demanded by any party, all issues of fact and law were submitted to the Court for decision.

Having reviewed the pleadings and other papers on file in this cause, and having considered the evidence presented at trial and the arguments of counsel, the Court finds as follows:

1. This Court has jurisdiction and venue of this action.

2. All necessary parties to this action are properly before the Court and have been duly served with citation in the manner required by law, or have voluntarily entered a general appearance in this cause.

3. The BUSTED TRUST (hereinafter referred to as the "Trust") is an inter vivos trust that was created by _____, by agreement dated _____ for the benefit of their son/daughter/grandchild, PB (hereinafter referred to as the "Primary Beneficiary").

4. The current Trustee of the Trust is TRUSTEE, Petitioner.

5. Section 112.054 of the Texas Trust Code provides that on the petition of a trustee, a court may order that the trust be terminated if, because of circumstances not known to or anticipated by the settlor, termination of the trust will further the purposes of the trust.

6. TRUSTEE has tendered its resignation as Trustee of the Trust and requested termination of the Trust contingent upon the Court's finding that: (a) because of the small size of the Trust, it has become uneconomical for the Trust to pay the Trustee to administer the trust, a circumstance not known or anticipated by the Settlors when they created the Trust in _____; (b) compliance with the terms of the trust and forcing the Trustee to continue to administer the Trust until _____, would defeat or substantially impair the accomplishment of the purposes of the Trust, which is to provide

for the health and well being of the Primary Beneficiary; and (c) termination of the Trust will further the purposes of the Trust.

7. The continued services of TRUSTEE as Trustee of the Trust have become uneconomical due to the small size of the Trust, a circumstance not known or anticipated by the Settlors when they created the Trust in _____, and compliance with the terms of the trust and forcing the Trustee to continue to administer the Trust until _____ would defeat or substantially impair the accomplishment of the purposes of the Trust, which is to provide for the health and well being of the Primary Beneficiary. Consequently, this Court should accept TRUSTEE's resignation as Trustee of the Trust and terminate the Trust.

8. The interests of the Trust and its beneficiaries, to enable to Trust to fulfill its purposes as created by Settlors, would be furthered and best served by accepting the resignation of TRUSTEE as Trustee of the Trust and by terminating the Trust.

9. TRUSTEE has tendered an accounting of its actions as Trustee of the Trust (the "Final Accounting"). The Final Accounting reflects that TRUSTEE has administered the Trust in accordance with the requirements of the Trust and Texas law.

10. The Final Accounting should be approved in all respects, and TRUSTEE should be released and discharged from any and all liabilities arising out of or in any way related to the administration of the Trust or the Trust termination.

11. The Trust should be terminated and the remaining Trust estate, after payment of all Trustee's fees, Court costs and expenses, legal fees and medical bills of the Primary Beneficiary, be distributed outright to the Primary Beneficiary, PB.

12. TRUSTEE should promptly liquidate all non-cash assets of the Trust.

13. Although there may be unborn or unascertained contingent beneficiaries of the Trust, their interests have been adequately represented in this proceeding by CRB and CRB, whose interests are substantially identical to the interests of all unborn or unascertained contingent beneficiaries of the Trust.

14. TRUSTEE brought this action for the purpose of preserving and protection the interests of the Trust and its beneficiaries. The relief sought in this action was necessary to enable the Trust to accomplish the purposes of the Trust as established by the Settlors. Accordingly, TRUSTEE is entitled to recover its reasonable and necessary attorney's fees and litigation expenses from the Trust pursuant to Section 114.064 of the Texas Trust Code.

It is therefore, ORDERED, ADJUDGED and DECREED that the resignation of TRUSTEE as Trustee of the Trust is accepted; that the Trust is hereby terminated; that the termination shall be effective immediately upon the entry of this Final Judgment by the Court; that the Trustee is directed to deliver the remaining Trust estate, after payment of all Trustee's fees, Court costs and expenses, and legal fees to PB. The provisions of this Final Judgment shall constitute sufficient legal authority to all persons owing any money to the Trust, having custody of any property of the Trust, or acting as registrar or transfer agent of any evidence of the Trust, for payment or transfer of such money, property or right, without liability, to PB, the Primary Beneficiary, and his/HER legal successors in interest.

It is further ORDERED, ADJUDGED and DECREED that TRUSTEE shall promptly liquidate all non-cash assets of the Trust held in the Trust's name, and that TRUSTEE shall then deliver all properties, after payment of all Trustee's fees, Court costs and expenses, and legal fees in its possession to PB, the Primary Beneficiary, as soon as reasonable possible after the entry of this Final Judgment. In addition, if requested to do so, TRUSTEE shall execute any other documents reasonably required to effect the transfer of title or delivery of its interest in the properties of the Trust to PB as Primary Beneficiary of the Trust.

It is further ORDERED, ADJUDGED and DECREED that upon receipt of the Trust properties by PB, PB shall deposit the Trust properties into a separate account with a financial institution and may use the funds, income and/or principal, for his health, education, maintenance and support as he/she deems advisable in his/her sole reasonable discretion. In addition, PB shall maintain records of the separate account, and in the event PB should die prior to attaining age ___ the remaining funds in the account containing Trust properties (if still in existence) shall pass to his/her descendants, per stirpes, and PB shall make no attempt to dispose of the account containing the Trust properties contrary to this Order, either by Last Will and Testament or otherwise, and any such attempt to violate this Order shall be null and void. In addition, after attaining age _____, PB shall have the right to dispose of the account containing Trust properties (if still in existence) in any manner he deems advisable.

It is further ORDERED, ADJUDGED and DECREED that the Final Accounting submitted by TRUSTEE is hereby approved in all respects, and that TRUSTEE is hereby released and discharged from any and all liabilities arising out of or in any was related to the administration of the Trust, including its termination. This release and discharge does not relieve TRUSTEE from any obligation imposed upon it by the immediately preceding paragraph of this Final Judgment.

It is further ORDERED, ADJUDGED and DECREED that TRUSTEE is entitled to recover its reasonable attorney's fees and court costs of $_____ from the Trust pursuant to Section 114.064 of the Texas Trust Code, and that these fees shall be paid prior to the delivery of any properties to the Primary Beneficiary.

It is further ORDERED, ADJUDGED and DECREED that _____, the guardian ad litem appointed to represent the interests of the Contingent Remainder Beneficiaries, is awarded a fee of $ _____ taxed as costs, from the Trust pursuant to Section 114.064 of the Texas Trust Code, and that these fees shall be paid prior to the delivery of any properties to the Primary Beneficiary, and that such guardian ad litem is discharged.

It is further ORDERED, ADJUDGED and DECREED that all filing fees and court costs in this cause are hereby taxed against the Trust, for which execution shall issue if not timely paid.

All relief requested and not expressly granted herein in denied. Signed this _____ day of _____ _____, 20__.

_____

JUDGE PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

[SIGNATURE BLOCKS FOR PARTIES' ATTORNEYS]

APPROVED AS TO FORM:

[SIGNATURE BLOCK FOR GUARDIAN AD LITEM]

G. Appendix G — Order Appointing Guardian Ad Litem

Cause No. _____

IN RE:	**§**	**IN THE DISTRICT COURT OF**
	§	
	§	**TRAVIS COUNTY, TEXAS**
	§	
BUSTED TRUST	**§**	**_____ JUDICIAL DISTRICT**

ORDER APPOINTING GUARDIAN AD LITEM

It has been brought to the attention of this Court that the Contingent Remainder Beneficiaries whose names and whereabouts are unknown, known Contingent Remainder Beneficiaries whose whereabouts are unknown, and known Contingent Remainder Beneficiaries suffering legal disability have not answered or entered an appearance herein, and that a guardian ad litem should be appointed to represent their best interests in this proceeding.

It is therefore ORDERED, ADJUDGED and DECREED that _____, licensed attorney at law in this state, is appointed such guardian ad litem to defend such suit on behalf of such defendants' interests and that this suit may proceed as in other causes where service is made _____ _____ office is located at _____, _____, Texas _____, and his/her telephone number is _____. The guardian ad litem shall be allowed a reasonable fee for his/her services, to be taxed as part of the costs.

SIGNED this _____ day of _____, 20__.

_____

JUDGE PRESIDING