

HOW TO NOT FUND A TESTAMENTARY TRUST

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Biography of Michele A. Mobley

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- Selected for the Martindale-Hubbell® Bar Register of Preeminent Women Lawyers, 2011
- The Association of Former Students, Texas A&M University; Board Member, 2010-present
- Austin Bar Association (Probate and Estate Planning Section; Business, Corporate and Tax Section)
- American Bar Association (Section of Taxation; Co-Chair, Employee Benefits Committee, 2000-2004)
- State Bar of Texas (Chairman, Estate and Inheritance Tax Committee, Section of Taxation, 2000; Vice Chairman, 1998-1999)
- State Bar of New York
- State Bar of Florida
- The National Committee on Planned Giving, member
- The University of Texas at Austin Planned Giving Advisory Board, member
- Texas A&M Foundation's Planned Giving Council, member
- Duke University Estate Planning Council, member
- University of Texas at Austin College of Engineering Foundation Advisory Council, member 2007-2011
- The University of Texas at Austin College of Natural Sciences Foundation Advisory Council, member 2008-2012
- Dean's Development Council of Texas A&M University College of Liberal Arts

Publications & Presentations:

- Author/Presenter, “How To Not Fund The Testamentary Trust,” State Bar of Texas 25th Annual Estate Planning and Probate Drafting Course, Houston, Texas October 2014
- Co-Author/Presenter, “QDOTs: Drafting and Administering Marital Trusts for Non-US Citizens,” State Bar of Texas 24th Annual Estate Planning and Probate Drafting Course, Houston, Texas October 2013
- Co-Author/Presenter, “Transfers of Legacy Real Estate,” State Bar of Texas 23rd Annual Estate Planning and Probate Drafting Course, Dallas, Texas October 2012
- Presenter, “Generational Differences in Wealth Planning,” Texas A&M Foundation Seminar, May 2012
- Author/Presenter, Post-Appreciation Event Planning, ML&R Lunch Series, November 2011
- Author/Presenter, “The Well-Prepared Executive: Personal Wealth Preservation Strategies,” co-presenter with Robert Barbetti of JP Morgan, State Bar of Texas Advanced Estate Planning and Probate Course, June 2006
- Author/Presenter, “Trust Protectors: Fiduciaries or Not?,” Duke Estate Planning Conference, October 2004
- Author/Presenter, “Donor Advised Funds as Alternatives to Private Foundations,” The Trust Company, San Antonio, Texas, October 2004
- Author/Presenter with Michael Hatfield and Ryland Howard, “Gifts of Specific Non-Cash Assets,” State Bar of Texas Charitable Giving Course, July 2004
- Author/Presenter with Bryan W. Lee and JP Morgan Chase Bank, “Executive Compensation: Options and Beyond,” Austin In-House Counsel Lunch, June 2003
- Author/Presenter, “Drafting Fiduciary Powers, Including Trust Protector Provisions,” State Bar of Texas Advanced Drafting: Estate Planning and Probate Course 2002
- Author/Presenter, “Legal Issues Fundraisers Face,” State Bar of Texas Representing Nonprofit Organizations Seminar, June 2002
- Author, “Donor-Advised Funds: An Alternative to Private Foundations,” Texas Tax Lawyer, May 2002
- Author/Presenter, “Planned Giving: Directing Where the Money Goes,” The Financial Planning Association of Greater Austin, February 2002
- Author/Presenter, “Donor-Advised Funds: An Alternative to Private Foundations,” The El Paso Planned Giving Council Annual Meeting, July 2001
- Texas A&M Foundation presentation on Planned Giving Techniques, 1999 and 2001
- Author, “Recent Developments in Estate Tax,” Texas Tax Lawyer, October 2000
- Author/Presenter, “Drafting Buy-Sell Agreements,” State Bar of Texas 10th Annual Advanced Drafting: Estate Planning and Probate Course, 1999
- Author, “Grantor Retained Annuity Trusts: Transferring Stock While Minimizing Transfer Tax,” Community Bankers’ Update, Spring 1999
- Texas Association of Museums, presentation on Planned Giving Techniques, 1998 and 1999
- Jenkens & Gilchrist Corporate Luncheon Series, presentation on Pre-IPO Estate Planning, 1997
- Lorman Business Institute presentation on Tax-Exempt Organizations and Planned Giving Techniques, 1996 and 1997
- Co-Author with Henry Talavera and Riva T. Johnson, “What Are a Spouse’s Rights in Retirement Plans and IRAs?” Estate Planning, March 1996
- Independent Bank Services presentation on Family Limited Partnerships, 1996
- Presenter, “Key Issues in Estate Planning and Probate in Texas,” National Business Institute, October 1995
- Presenter, “Estate Planning for Family Business Owners,” Texas Society of CPAs full-day seminars, 1995-1998
- New York State Bar Association presentation on Limited Liability Companies, 1994

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I. INTRODUCTION

Between the time a document is prepared and the time it is implemented, many changes can occur – in family circumstances, in financial circumstances, and in the tax law. This is particularly the case with Wills or living trust agreements that often are prepared many years before a person dies, and are not updated to fit the new circumstances prior to the death of the testator or settlor. This paper discusses the options when a testamentary trust described in a Will or living trust agreement apparently no longer is desired or needed due to a change in circumstances.

Here are just a few of the many things that can occur that make a decision to use a trust in a Will or living trust agreement seem to be an incorrect decision by the time the testator or settlor dies.

1. An unexpected order of deaths such that the children die before the testator or settlor;
2. A decline in the net worth of the testator or settlor prior to death;
3. A child recovers from a disability, or recovers from alcohol or drug abuse;
4. The surviving spouse becomes a US citizen;
5. The tax law changes such that there is no longer an estate tax benefit to a trust; or
6. The tax law changes such that there is an income tax detriment to a trust.

Numbers 5 and 6 have occurred since 2012 in a large number of estates due to the increase in the transfer tax free amount for individuals to \$5.43 million and \$10.86 million for a married couple (in 2015). The situation will arise more frequently in the coming years that the surviving spouse does not want to fund a trust described in the Will or living trust agreement of the first spouse to die because there is no longer any estate tax benefit – and in fact may be an income tax detriment.

II. REASONS TO CONSIDER NOT FUNDING A TRUST

A. There Is No Longer An Estate Tax Benefit.

The transfer tax free amount for an individual is now \$5.43 million and is increasing annually with inflation. In most years this will mean an annual increase in the transfer tax free amount of \$70,000 to \$120,000. This high limit makes the estate tax inapplicable to roughly 99% of the citizens in our country. In addition portability means that a bypass

trust is no longer needed to segregate the tax free amount of the first spouse to die into a different category from what the surviving spouse owns. If portability is elected on an estate tax return filed after the death of the first spouse, the assets can be held in the name of the survivor individually and the remaining estate tax free amount of the first to die will add to the remaining estate tax free amount available at the survivor's death to shield the combined amount of assets from estate tax. Thus the standard tax planned Will or living trust agreement that uses a bypass trust for a tax planning reason may not be needed anymore.

B. There May Be An Income Tax Detriment.

In addition, there is no step up in basis for income tax purposes at the surviving spouse's death as to any assets owned by a bypass trust. A step up in basis is available only as to assets that are included in the survivor's estate – namely the assets owned by the survivor individually and the assets in a marital trust for which the marital deduction was claimed. Since the net investment income tax of 3.8% when added to income tax rates of up to 39.6% can result in a tax that exceeds the flat 40% estate tax rate, it is important to pay attention to the likely future income tax consequences associated with funding a trust. Also, capital gains tax rates of up to 20% added to the 3.8% net investment income tax further underscore the need for capital gains tax planning.

C. Adds Complexity.

A testamentary trust is a different owner than the surviving spouse. Accordingly it has its own tax id number, its own accounts, and files its own income tax return annually on IRS Form 1041. Many surviving spouses will be uncomfortable with the notion of two check books, and of having to consider whether a given expense or investment is most appropriate from the survivor's individual assets or from the testamentary trust. Thus many survivors will prefer to avoid creating a trust if possible, in favor of the simplicity of individual ownership.

D. Circumstances Have Changed.

As described above several changes can occur in the structure of the family or in the net worth of the family such that a trust may not be needed. For example, a trust may have been set up for the survivor with the intent of locking in the remaining assets to go to the only daughter. If the daughter dies before her parents, there may no longer be any advantage to using a trust. Similarly, a trust might be described to meet the requirements of a qualified domestic trust ("QDOT") and thereby secure a marital deduction for assets going to a surviving spouse who is not a US citizen. If the non-citizen spouse becomes a US

citizen, then there no longer is a need for a QDOT trust to secure the marital deduction at the first death. Another example is the case of the child who recovers from an illness or from chemical dependency such that a trust for the child no longer is needed to protect the child.

III. REASONS TO CONSIDER FUNDING A TRUST

If the change in the tax laws is the only reason the survivor is considering not funding a trust, then other factors may be important enough to justify funding a trust anyway. Some of those factors are described below.

A. Creditor Protection.

Creditor protection for the beneficiary is a significant reason to fund a trust even if there is no estate tax reason to do so.. A creditor of a beneficiary can reach the beneficiary's own assets, but generally cannot reach the assets of a testamentary trust unless those assets are distributed out of the trust.

B. Divorce Protection.

Maintaining assets in a trust acts as a stealth pre-marital agreement. The assets in the trust are clearly set aside as inherited assets, and hence separate property. Assets distributed outright to a beneficiary from an estate start as separate property, but it can be difficult to maintain that status since separate property commingled with community property is deemed to all become community property, and there is a strong presumption favoring community property. Also, income from separate property generally is community property. For these reasons maintaining separate property through outright ownership of assets can be difficult unless a marital property agreement is used to maintain separate property status. In the event of divorce, community property can be divided by the court as the court finds appropriate, however, a judge in Texas will not change the ownership of separate property.

C. Ensuring The Decedent's Wishes Are Carried Out At The Second Death.

A spouse or parent may want a trust for the beneficiary for entirely non-tax reasons. Such reasons may include protection from overreaching family members, help with managing assets, limiting spending to allow assets to last for the life of the beneficiary, or protecting a substance abuser from overdosing due to too much available cash. Also, a trust established at the first death can ensure that the remainder beneficiaries continue to be those picked by the first spouse to die. The trust can be structured such that the surviving spouse cannot re-direct the trust assets to

benefit a second spouse, stepchildren, or charity upon the death of the surviving spouse. Such non-tax reasons may outweigh any tax factors in deciding whether or not to fund a trust. An additional factor that may have influence on the family is simply the desire to follow the structure established by the decedent – as a way to honor the decedent's judgment and wishes.

D. Separate Control From Beneficial Enjoyment.

Many beneficiaries are not well-suited to asset management. A key reason to form a trust is to allow the role of Trustee to be held by someone else on behalf of the beneficiary. A Trustee makes investment decisions and distribution decisions on behalf of the beneficiary. This can allow the assets to last longer and thereby enhance the long term benefit to the beneficiary. If there are medical issues, then the judgment of the Trustee also can be helpful in deciding what path to pursue. Also, if the beneficiary is young, or older to the point of mental incapacity, then the Trustee role can be invaluable in separating the role of beneficiary from the role of Trustee.

E. Preserve Full GST Benefits.

Finally, although for many people there is no estate tax reason to form a trust, and may even be an income tax detriment, it is important not to forget about the generation skipping transfer tax. Portability does not apply to the GST tax. Thus to maximize the GST exempt amount of both spouses may still require the use of a trust after the first spouse dies.

IV. CONSIDERATIONS REGARDING THE BYPASS TRUST SPECIFICALLY

In his paper presented in 2014 at the Advanced Estate Planning and Probate Course, Paul Strug lists several factors to consider regarding a bypass trust specifically. Paul Strug, *To Fund... Or Not To Fund: What To Do With The Bypass Trust*, 38th Annual Advanced Estate Planning and Probate Course, State Bar of Texas June 2014 at 34-2.

Advantages to funding the bypass trust include:

1. All growth from the date of death of the first spouse to the date of death of the second spouse escapes estate tax;
2. Allows full use of the GST exempt amount (portability does not apply to the GST exempt amount);
3. Offers creditor protection for the beneficiaries;
4. Offers divorce protection;
5. Offers incapacity protection; and
6. Allows flexibility through powers of appointment held by the surviving spouse.

Disadvantages to funding the bypass trust include:

1. Adds complexity;
2. May no longer be needed to achieve estate tax savings at the second death due to portability and the increase in the estate tax free amount;
3. No step-up in basis on the bypass trust assets when the survivor dies;
4. Trust income tax brackets are compressed compared to an individual (although income distributed out is taxed at the beneficiary's individual rate); and
5. Accountability to the remainder beneficiaries.

V. FIDUCIARY DUTIES AND ETHICS

Does the decision whether to fund a testamentary trust or not lie solely in the hands of the beneficiaries? The personal representative apparently has no standing to force creation of a trust. Also, the decedent clearly cannot implement his plans after his death. So, on a practical level, the beneficiaries can opt to not implement testamentary trusts described in the Will or revocable trust agreement. What about the attorney, though? The attorney's client was the decedent, and presumably the attorney helped to devise the estate plan. Does the attorney have an obligation to try to see that the decedent's plan is carried out? If so, does this still apply even if the attorney would no longer recommend the plan based on the circumstances at the time of the decedent's death?

A. Is There A Duty To Follow The Will Or Revocable Trust Agreement?

As discussed further below in Section VI(C), the law of Texas favors settlement agreements. One role of settlement agreements is to document variations from the Will, and indicate that the beneficiaries are in agreement.

B. Is There A Duty To Follow The Client's Wishes?

i. Who Is The Client?

Often the client was the decedent. After the decedent's death, the client typically is the Executor or Trustee tasked with carrying out the wishes of the decedent. The Executor or Trustee has a fiduciary duty to carry out the terms of the document. The attorney-client privilege applies to protect communications from disclosure. Whether to waive the privilege that belonged to the decedent is a decision for the Executor. Also, in the event of a dispute among the beneficiaries, there is a "testamentary exception" to the attorney-client privilege that may apply. Tex. R. Evid. 503(d)(2). Typically the attorney for the Executor/Trustee does not also represent the

beneficiaries. For this reason in proceeding with a family settlement or a court proceeding it is wise to suggest that the beneficiaries have their own counsel review the documents and any court filings.

ii. Who Has The Right To Complain?

Any beneficiary who is financially affected by a decision to not fund a trust has the right to complain. The Executor does not have the right to complain simply due to the role as Executor. If the Executor also is an affected beneficiary then the action should be brought in the role of beneficiary.

C. Does A Release Solve Anything?

A release through a settlement agreement may be effective. Of course all parties should have adequate information or access to adequate information, and there must be no fraud or misrepresentation in order to make the agreement enforceable. The agreement is not enforceable against anyone who is not a party. A court order that contains a release carries more protection than an agreement of the parties. For this reason, the Executor or Trustee may want to have the court adopt the settlement agreement in an order of the court. If a corporate Trustee is involved, the corporate Trustee almost certainly will want the blessing of a court and a full release in the court order.

VI. THE PATH FORWARD IF THE DECISION IS NOT TO FUND A TRUST

If a decision is made not to fund a testamentary trust, what can be done to carry out that decision? There are several options, described below.

A. Do Nothing.

One option is to do nothing. Do not fund the trust, simply re-title the assets outright into the name of the primary beneficiary. This option is simple. Like the so-called "undocumented split dollar plan," this is the undocumented non-funding plan. It assumes there will be no paperwork filed with the court, no written agreement among the beneficiaries, and no other action taken regarding not following the Will, other than the re-titling of the assets.

The risk to this approach is that there will be a later decision to fund the trust, and nothing can be produced indicating an earlier decision not to do so. Of course, this flexibility also is the benefit. Several outlines have been written, such as Mickey R. Davis, *Funding Testamentary Trusts: Tax and Non-Tax Issues*, 19th Annual Advanced Estate Planning Strategies Course, State Bar of Texas, April 2013, pages 36-45, on how to proceed if a bypass trust was never funded and then after the second death a determination is made that it should have been funded. The theories in general are either that the survivor held

the bypass trust assets in constructive trust, or that the survivor owed a debt to the trust which must be satisfied at the second death. The key issue is even if we know the starting value of the bypass trust based on values at the first death, how do we determine what the value should be at the second death when such a trust is belatedly recognized? Do we assume a growth factor on the starting value, and also assume a spending rate? Or do we assume an interest rate as well as a spending rate?

There is no obligation on the IRS to respect such a belated funding approach. The assets in the belatedly funded bypass trust will not be reported on the estate tax return of the second spouse to die except as a debt or as an attachment explaining why certain assets titled in the name of the survivor are not counted. This will reduce the estate tax. In deciding whether to proceed with a late funding, it is important to consider the income tax impact as well. Any assets owned by the bypass trust will not receive a step up in basis at the second death.

So, on balance, does the undocumented approach create opportunity or create risk? Does it create an opportunity for a second look, or an opportunity for a lawsuit for breach of duty by the original Executor of the first to die for not funding the bypass trust? With the undocumented approach there is no release of the parties, and no release by a court.

B. Fund And Then Distribute All.

i. Shifts Responsibility From Executor To Trustee.

A second option is to fund the trust described in the Will or living trust agreement, and then after it is funded distribute all of the assets to the beneficiaries. This has the effect of terminating the trust. With this option the Executor or Trustee of the living trust has completed his or her obligation under the document. The Trustee then is the one who must decide whether distribution of everything in the trust is the right course of action, and if so decide when and how to proceed.

We may see this option implemented just prior to the death of the surviving spouse. In that way the survivor has the benefit of creditor protection for most of the time, and then just prior to the survivor's death, distributing the assets out of the trust preserves the step up in basis since then the assets are owned by the surviving spouse.

Another example is the case of the low basis asset that is to be sold, but it is owned by a trust. If the beneficiary individually has significant losses that would limit capital gains exposure if only the asset were owned individually, then the Trustee may decide to go ahead and distribute the asset to the beneficiary individually, and have the beneficiary then sell the asset, rather than having the trust sell the asset.

ii. Can The Distribution Standard Be Met?

Most trusts have some form of standard that governs when distributions can be made. A key consideration for the Trustee is whether the distribution standard can be met when a large amount of assets are distributed to one beneficiary. A typical standard of health, support, education, and maintenance, generally will not support distribution of hundreds of thousands of dollars, let alone millions of dollars, all at once.

Where the distribution standard cannot be met, the Trustee should at least obtain a release from all of the beneficiaries for terminating the trust early, or should consider getting a court order. Both of these options are described below.

iii. Consider Distributing The Actuarial Value Of Remainder Interest To Remainder Beneficiaries.

One method of hopefully limiting future disputes with the remainder beneficiaries is to terminate the trust by distributing to the remainder beneficiaries the actuarial value of their interest. This requires calculating the expected life expectancy of the primary beneficiary, and assuming certain other factors in determining how the trust assets should be divided among the primary beneficiary and the remainder beneficiaries. Dividing based on actuarial values also limits gift tax exposure.

iv. Gift Tax Risk.

If the trust assets are distributed entirely, or disproportionately to the primary beneficiary, then is there an argument that the primary beneficiary has made a gift to the remainder beneficiaries, or conversely, have the remainder beneficiaries made a gift to the primary beneficiary? This issue arose in the Kite decisions at TC Memo 2013-43 (Kite 1) and Cause No. 6772-08, unpublished opinion October 25, 2013 (Kite II).

C. Family Settlement Agreements.

i. Favored In Texas.

When there is a variation from what the Will or living trust agreement describes, it is wise to either have everyone involved sign a family settlement agreement, or to get a court order authorizing the change. Family settlement agreements generally are favored in Texas. They represent a streamlined way to document what everyone has agreed to, and also can be used to attempt to protect the Executor or Trustee from liability for not following the document. Such agreements balance a decedent's right to make a testamentary plan, with the beneficiaries' rights to convey their rights. *See In re Estate of Halbert*, 172

S.W.3d 194, 199-200 (Tex.App. – Texarkana 2005, pet. denied). Since the rights of the beneficiaries vest immediately upon the decedent’s death, the beneficiaries then have the right to change the plan as they may agree, subject, of course, to the rights of creditors. See *Shepard v. Ledford*, 962 S.W.2d 28 (Tex. 1998); *Stringfellow v. Early*, 40 SW 871 (Tex. Civ. App. 1897, writ dism’d); Nicole Wolff, *Effective Uses of Family Settlement Agreements in Will Contests*, Intermediate Estate Planning & Probate Course, State Bar of Texas 2014.

Such agreements seem to be favored by the courts of Texas. See, for example, *Piltner v. U.S.*, 388 F.2d 651, 656 (5th Cir. 1967); *Shepherd* 962 S.W.2d 28; *In re Estate of Hodges*, 725 S.W.2d 265, 267 (Tex. App. – Amarillo 1986); *Estate of Morris*, 577 S.W.2d 748, 755-56 (Tex.Civ.App. – Amarillo 1979, writ ref’d n.r.e.); *Carter ex rel. Estate of Haley v. Campbell*, 427 S.W.3d 503, 505 (Tex. App. – Austin 2014).

ii. Seem To Be Enforceable.

As described above, these agreements seem to be enforceable in Texas. Since they generally avoid litigation, they are favored. See for example, Tex. Civ. Prac. & Rem. Code Ann. § 154.071 (West 2014), and Tex. R. Civ. P. 11. Of course, such agreements are not enforceable where there is fraud, concealment, misrepresentation, or other inequitable conduct. See *Crossley v. Staley*, 988 S.W.2d 791 (Tex.App. – Amarillo 1999, mand.denied). Generally a party seeking to overturn a settlement agreement has four years to file with the court an action based on breach of contract. The Executor, however, does not have standing to object to a family settlement agreement. See *Hodges*, 725 S.W.2d 265. For those seeking enforcement of a family settlement agreement, a Motion to Enforce Settlement Agreement can be filed with the court.

If the agreement changes the tax burden, then the settlement agreement must be the result of a bona fide dispute for the IRS to accept it. See Linda Kelly, *Tax Aspects of Family Settlement Agreements*, 1998 Advanced Estate Planning and Probate Course, State Bar of Texas. However, a court is not bound by a settlement agreement entered into by the parties when the subject is taxes. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). The IRS is not bound either since it is not a party to the settlement agreement.

iii. Actual Litigation Is Not Required.

It is not required that a lawsuit be started which can then be settled. It is generally sufficient to describe in the agreement itself what the dispute is, and what the parties have agreed to do. Several examples of settlement agreements are attached in the Exhibits.

Typically, these agreements are not taken to a court for blessing. Often, though, they are put on court paper, if there is a probate estate, so that the agreement can easily be filed if that is needed later in the event of a dispute. Seeking the blessing of a court, though, to the family settlement agreement is recommended where the family intends to overturn a probated Will, where a minor’s guardian has a different interest from the minor (see Tex. Est. Code Ann. § 53.104 (West 2014)), where there are unknown remaindermen with interests different from known remaindermen, where disposition of real property is changed and the Executor needs to have authority to sign a deed, and where an irrevocable trust is modified or terminated. See generally, Sharon Gardner and Patrick Pacheco, *The Estate Administration Guide*, 13th Annual Building Blocks of Wills, Estates, and Probate Course, State Bar of Texas January 2012 at K-8.

iv. Who Should Be A Party?

In short, anyone whose interest is affected should be a party. This includes heirs if intestacy is relevant, and any affected beneficiaries if a Will or living trust agreement is relevant. Tex. R. Civ.P.39; Tex. Est. Code Ann. § 51.001(West, 2014). Minors can be represented by those with similar interests, or by a parent as natural guardian, or by a court-appointed guardian. Those whose interests are not affected do not need to be a party. If a charity is affected, be sure to include not just the charity as a party, but also give any required notice to the Texas attorney general. See Texas Est. Code Ann. § 308.002 (West 2014) (formerly Texas Probate Code Section 128A).

Only those with a pecuniary interest can challenge a settlement agreement of this type. Others do not have standing. See *Hodges*, 725 S.W.2d at 268; *Logan v. Thompson*, 202 S.W.2d 212 (Tex. 1947); *Biddy v. Jones*, 475 S.W.2d, 322 (Tex.Civ.App. – Amarillo 1971, no writ.).

v. Key Provisions.

The typical family settlement agreement covers several topics. First, the preamble covers any background information such as information about the family, and any court proceeding. The preamble also addresses in summary form the nature of the dispute and the resolution to which everyone has agreed – in this case that would be a decision to not fund a trust.

The substantive provisions of the agreement again describe the agreement. Also, typically the agreement spells out the exact distribution plan, including (sometimes in an attachment) what each person or other recipient will receive.

If partial distributions already have been made, then a receipt provision should be included acknowledging what was already distributed.

Since the Will or living trust agreement is not being followed, each party should release the Executor and Trustee from any liability for following the agreement rather than following the decedent's document. Often this includes an indemnification provision in which the beneficiaries promise to pay any costs of the Executor or Trustee in enforcing the agreement.

If tax issues or other debts/obligations may arise, then it also can be prudent to include a refunding provision in which the beneficiaries promise to refund sufficient funds to cover the unexpected tax or debt/obligation.

Exhibits C, D, and E are examples of family settlement agreements.

D. Court Modifications.

Asking a court to bless a trust modification or an early termination is safer for the Trustee or Executor than a family settlement agreement. A court can release the Executor and Trustee from liability, and can terminate the trust.

i. Texas Trust Code Section 112.054.

Section 112.054 of the Texas Trust Code allows for judicial modification of a trust in the following circumstances:

1. The purposes of the trust have been fulfilled, or become illegal or impossible to fulfill;
2. Due to circumstances no known to or anticipated by the settlor;
3. Modification of administrative provisions are needed to prevent waste or avoid impairment of the trust's administration;
4. Modification is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intent; or
5. Subject to having all of the beneficiaries consent, continuance of the trust is not necessary to achieve any material purpose of the trust, or the order is not inconsistent with any material purpose of the trust. Texas Trust Code § 112.054(a) (West 2014).

This allows a court to modify a trust for several reasons. The most often used reason is changed circumstances. The court is to modify the trust in a manner that carries out the intent of the settlor as closely as possible.

Section 115.001 of the Texas Trust Code allows several other modifications a court can make to a trust. This includes construing the trust, appointing or removing a Trustee, determining the beneficiaries, and requiring an accounting.

ii. Parties.

Only an "interested person" can bring such a proceeding. This includes a fiduciary, a beneficiary, and a creditor of the trust. Texas Trust Code §

111.004(7) (West 2014). The parties to a trust modification proceeding include the fiduciaries and the trust beneficiaries. If a minor or incapacitated beneficiary has the same interest as a beneficiary with capacity, virtual representation can be used. Texas Trust Code § 115.013(c)(4) (West 2014). Also, the court typically appoints an ad litem to represent unborn and unknown beneficiaries. Texas Trust Code § 115.014(a) (West 2014).

If a charity is a party, the attorney general must be given notice. Texas Trust Code § 115.001 (West 2014). The attorney general then either will enter a notice of appearance, or enter a waiver, or will remain silent.

iii. Which Court.

The court typically is the district court, or the statutory probate court, or the county court at law if an estate is pending there. Texas Trust Code § 115.001 (West 2014), and Texas Est. Code Ann. § 32.002 (West 2014) (formerly Texas Probate Code Section 4B(b)). Texas Trust Code Section 115.002 describes the venue rules. Venue generally is where the Trustee is.

iv. Process.

A very helpful summary of the procedure involved in seeking a court modification or termination of a trust is contained in the outline prepared by Amanda Gyeszly, *Drafting for Trust Modifications and Private Letter Ruling Requests* at 16-8, 24th Annual Estate Planning and Probate Drafting, State Bar of Texas, October 2013.

v. What To Cover In The Court Order.

The court order should address a summary of the facts, demonstrate that jurisdiction and venue are correct, describe the modification or termination, and include a clear finding as to the reasons why the modification or termination is appropriate.

Exhibits F and G show sample pleadings and sample orders for court modifications of trust.

E. Reporting On A Tax Return.

i. Should A First And Final Income Tax Return Be Filed?

If the trust is funded and then distributed, then a first and final income tax return for the trust should be filed. If the trust is never funded to start with, then presumably no income tax return will be filed, and no tax id number will be assigned to the trust – since the trust never existed.

ii. Three Year Statute Only Runs If Gift Tax Return Is Filed With Sufficient Disclosure.

If a trust is terminated early or never funded at all, then there is a risk that the remaindermen have made a gift to the primary beneficiary, and also a risk that the primary beneficiary has made a gift to the remaindermen. See IRC Section 2512 (b); Rev. Rul. 84-105; see Kite 1, T.C. Memo 2013-43 and Kite 2, unpublished opinion October 25, 2103 Cause No. 6772-08. If the transaction is described adequately on a gift tax return, then the IRS has only three years from the time the return is filed to challenge any aspect as a gift. For this reason, consideration should be given to reporting on a gift tax return any decision to terminate a trust early, or never to fund it at all. If no reporting is made, or if the disclosure of information is inadequate on the return, then the IRS has three years after the filing of the estate tax return (which typically is many years later) to challenge any gift aspect of the decision to terminate early or not fund a trust.

Another option is to report the plan regarding trusts on the estate tax return for the decedent, not on the estate tax return for the surviving spouse. See Exhibit H for a sample statement filed with an estate tax return explaining why a bypass trust was not funded.

F. Consider A Private Letter Ruling.

Another avenue to seek assurance that a proposed termination or modification of a trust will have the desired tax effect is to seek a private letter ruling. This is an expensive proposition. Accordingly, it provides the most security for the Trustee and the Executor. As discussed above, the IRS is not bound to follow either a family settlement agreement or a court order to the extent those determine tax matters. Such a letter ruling applies the tax law to the facts specific to the case. Since the ruling is fact specific, a taxpayer may not rely on a letter ruling obtained by a different taxpayer.

The cost of obtaining a letter ruling is in the range of \$20,000, which includes a filing fee and estimated attorneys' fees. Also, it generally takes at least 6 months to receive a response to a ruling request. In addition, a key aspect of obtaining a valid ruling is to disclose all of the facts associated with the matter. As a result, confidentiality will be lost.

Before filing a ruling request be sure that your issue does not appear on the "no ruling list." The IRS issues this list each year of topics that it will not address through the letter ruling process. The no ruling list is always the third revenue ruling issued for the year.

VII. CONCLUSION

A family settlement agreement, a court order, or a private letter ruling can be helpful in documenting and avoiding future issues related to a decision not to fund a trust or to terminate a trust early. These options should be compared with the undocumented options of doing nothing, or of distributing all of the trust assets.

EXHIBITS

- A. Distribution Agreement
- B. Letter To Family Regarding Planned Termination By Distribution
- C. Family Settlement Agreement 1
- D. Family Settlement Agreement 2
- E. Family Settlement Agreement 3
- F. Motion To Permit Non-Funding Of Trust And Sample Order
- G. Motion To Modify Trust And Sample Order
- H. IRS Form 706 Attachment for Unfunded Bypass Trust.

EXHIBIT A

AGREEMENT AND ASSIGNMENT OF TRUST ESTATE OF DAD QTIP TRUST

This Agreement and Assignment of Trust Estate of Dad QTIP Trust (this "Agreement") is made and entered into to be effective as of December 26, 2013 (the "Effective Date"), by and between (a) Friend, as successor trustee of the Dad QTIP Trust under Will of Mom ("Assignor"); (b) Dad ("DAD" or "Beneficiary").

WHEREAS, Mom ("Decedent") died in Travis County, Texas, on _____, leaving a will dated _____, a First Codicil dated _____ and a Second Codicil dated _____ (collectively, the "Will") which were admitted to probate in Cause Number __,__, styled the Estate of Mom, Deceased in Probate Court Number One of Travis County, Texas; and

WHEREAS, Decedent was survived by her husband, DAD and her three and only children, Daughter1, Daughter2 and Son ("Decedent's Children"), all of whom are adults; and

WHEREAS, the Dad QTIP Trust (the "QTIP Trust") was established by Decedent pursuant to Article 1-3A of the Will for the benefit of Beneficiary for life with remainder to or for the benefit of Decedent's Children; and

WHEREAS, Article 1-3A.1[a] of the Will provides that all net income of the QTIP Trust shall be paid to Beneficiary at least annually; and

WHEREAS, Assignor is a duly qualified and acting independent successor trustee of the QTIP Trust; and

WHEREAS, Article 4-2.7 of the Will authorizes Assignor to pay to Beneficiary so much of the principal of the QTIP Trust, whether the whole or lesser amount, as Assignor in his

sole discretion determines to be advisable to provide for Beneficiary's support, maintenance, health, welfare, comfort and education; and

WHEREAS, Assignor, as successor trustee of the QTIP Trust, has determined that it is advisable to terminate the QTIP Trust and distribute the entire trust estate thereof to Beneficiary, free of trust, in order to provide for his welfare and comfort; and

WHEREAS, Beneficiary has consented to the termination of the FAMILY QTIP Trust and to the distribution of the trust estate thereof to Beneficiary, free of trust; and

WHEREAS, Beneficiary desires to accept the trust estate of the QTIP Trust.

NOW, THEREFORE, in consideration of the premises, warranties, and mutual covenants set forth herein, the parties hereto agree as follows:

1. Assignment of Trust Estate. Assignor hereby transfers, assigns, distributes and delivers to Beneficiary the trust estate of the QTIP Trust, and all of Assignor's right, title and interest thereto, including, but not limited to, all assets, cash, cash equivalents and securities described on Exhibit A, attached hereto (the "Trust Estate") to have and to hold the Trust Estate of the QTIP Trust unto Beneficiary, and Beneficiary's heirs, executors, personal representatives and assigns, forever.

2. Acceptance of Trust Estate by Beneficiary. Beneficiary hereby accepts the Trust Estate.

3. Effective date. The assignment and transfer herein is effective as of the Effective Date, and from and after that date all income, gains and losses of the QTIP Trust shall be credited or charged, as the case may be, to the Beneficiary or his assignee(s), and not to Assignor.

4. No Encumbrances. Assignor hereby agrees and covenants that he shall deliver and assign the Trust Estate of the QTIP to such person, entity or account as may be directed by the Beneficiary, free and clear of any liens, pledges, encumbrances, collateral assignments or hypothecations. Assignor further represents and warrants that to Assignor's knowledge there are no claims, demands, causes of action or rights against or any action or proceeding pending or threatened involving the QTIP Trust.

5. Heirs, Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns.

6. Survival of Representations. The representations, warranties, covenants and agreements of the parties contained in this Agreement shall survive the execution hereof.

7. Modification and Waiver. No supplement, modification, waiver or termination of this Agreement or any provisions hereof shall be binding unless executed in writing by the parties to be bound thereby.

8. Further Assurances. Assignor and Beneficiary shall each cooperate reasonably with each other in connection with any steps required to be taken as part of their respective obligations under this Agreement, and shall (a) furnish upon request to each other such further information; (b) execute and deliver to each other such other and further documents; and (c) do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of this Agreement.

9. Governing Law. This Agreement was made and executed in the State of Texas and shall be governed by, construed and enforced in accordance with the laws of the State of Texas.

10. Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be an original and all of which when taken together shall constitute one and the same Agreement.

[signature page follows]

IN WITNESS WHEREOF, this Agreement is executed by Assignor, Beneficiary and Assignee to be effective as of the Effective Date.

ASSIGNOR:

_____, Successor Trustee of the
Dad QTIP Trust under the Will of
Mom

BENEFICIARY:

Dad

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the ____ day of December, 2013, by _____, as Successor Trustee of the Dad QTIP Trust under the Will of Mom.

NOTARY PUBLIC, State of Texas

THE STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the ____ day of December, 2013, by Dad.

NOTARY PUBLIC, State of Texas

EXHIBIT B

September 29, 2014

Via e-mail to _____

Daughter1
Daughter2
Son
[Address]

Re: 2013 Gift Tax Return

Dear Daughter1, Daughter2, and Son:

I am writing to you to remind you of my recommendation that you each file IRS Form 709; United States Gift (and Generation-Skipping Transfer) Tax Return to report the termination of the Marital Trust that was completed in 2013. Although not required, I recommend you each file a return to voluntarily disclose to the IRS the termination of the Dad QTIP Trust created under the Will of Mom.

As we discussed last December, giving up your remainder interest in the trust at the time of termination could possibly be considered a gift, by the IRS. If it is viewed that way, and assuming the value of the Marital Trust was \$10.8 million, then the value of the remainder interest would have been roughly \$8.3 million. This is a potential \$2.76 million gift from each of you to your Dad.

As we also discussed, the decision as to whether the trust termination constituted a gift could depend on the recent (and surprising) 2013 Kite I or Kite II Tax Court decisions. Your situation has several differences from the Kite circumstances, but it is relevant since it is a case about termination of a marital trust.

Even though I do not think the trust termination constitutes a gift, I recommend that you file a 2013 gift tax return to disclose the termination. Filing the return will start the three year statute running in which the IRS has to review gift tax returns.

If you do decide to proceed with filing a gift tax return, I assume that CPA Firm will prepare it for you. I am copying him. If you would prefer that our firm prepare any gift tax returns, please let me know. The returns are due by April 15, 2014, unless extended to October 15, 2014.

If you have any questions or comments, please let me know.

Very truly yours,



Michele Mobley

cc: CPA Firm (by e-mail to _____)

EXHIBIT C

ESTATE OF MOM

DISTRIBUTION AGREEMENT AND MUTUAL RELEASE

This Distribution Agreement and Mutual Release (the “**Agreement**”), effective as of the ___ day of _____, 2013 (the “**Effective Date**”), is entered into by and among the following parties:

1. Son1 (“**Son1**”) and Son2 (“**Son2**”) (the “**Co-Executors of Mom’s Estate**”), in their capacity as Independent Co-Executors of the Estate of Mom, Deceased (“**Mom’s Estate**”);

2. Son1 (“**Son1**”), in his capacity as Trustee of The Dad and Mom Trust, created under Agreement dated June 29, 2013, which amended and restated the ____ Community Trust dated _____ (the “**MAD Trust**”);

3. Son1 and Son2 (the “**Co-Executors of Dad’s Estate**”), in their capacity as Independent Co-Executors of the Estate of Dad, Deceased (“**Dad’s Estate**”);

4. **Son1, Son2 and Daughter**, in their capacity as Co-Trustees of the Dad and Mom Great Grandchildren’s Trust created under agreement dated December 28, 2013 (the “**Great Grandchildren’s Trust**”);

5. Daughter (“**Daughter**”), in her capacity as Trustee of the Daughter Child’s Share Trust created under the MAD Trust (the “**Daughter Child’s Trust**”);

6. Son1 (“**Son1**”), in his capacity as Trustee of the Grandson1 MAD Trust created under the MAD Trust (the “**Grandson1 Trust**”);

7. Son1, in his capacity as Trustee of the Grandson2 MAD Trust created under the MAD Trust (the “**Grandson2 Trust**”);

8. Son1, in his capacity as Trustee of the Granddaughter1 MAD Trust created under the MAD Trust (the “**Granddaughter1 Trust**”);

9. Daughter, in her capacity as Trustee of the Granddaughter² MAD Trust created under the MAD Trust (the “**Granddaughter² Trust**”);

10. Daughter, in her capacity as Trustee of the Granddaughter³ MAD Trust created under the MAD Trust (the “**Granddaughter³ Trust**”);

11. Son² (“**Son²**”), in his capacity as Trustee of the Granddaughter⁴ MAD Trust created under the MAD Trust (the “**Granddaughter⁴ Trust**”);

Daughter, Son¹, and Son² are each a “**Party**” and together are “**Parties**” to this Agreement.

RECITALS

The parties have entered into this Agreement under the following circumstances and to effect the following aims and purposes:

A. During their lifetime, Dad and Mom created the MAD Trust

B. Mom (“**Mom**”) died testate on _____, 2012. Mom’s Will, dated _____, 2010 was admitted to probate in Cause No. C-1-PB-__-_____ on _____, 2012 in Travis County Probate Court Number One of Travis County, Texas

C. Dad (“**Dad**”) died testate on _____, 2012. Dad’s Will dated _____, 2010 was admitted to probate in Cause No. C-1-PB-__-_____ on _____, 2012 in Travis County Probate Court Number One of Travis County, Texas.

D. Mom and Dad were survived by (i) their children, Son¹, Daughter and Son², (ii) their grandchildren, Granddaughter⁴, Grandson¹, Grandson², Granddaughter¹, Granddaughter², and Granddaughter³, and (iii) their great-grandchildren, Great-Granddaughter¹, Great-Grandson¹, Great-Grandson², Great-Grandson³, Great-Granddaughter², Great-Grandson³, Great-Grandson⁴, Great-Grandson⁵, Great-Grandson⁶, Granddaughter³, Great-Grandson⁷, Great-Grandson⁸, Great-Granddaughter³ and Great-Grandson⁹.

E. Pursuant to the terms of Mom's Will, the following property was bequeathed to Dad, Mom's surviving spouse.

- i. Condominium (contract rights for deposit redemption) (value \$172,543.00);
- ii. Automobile (value \$5,497.00);
- iii. Rare Books" (value \$17,250.00); and
- iv. Household effects (value \$10,000.00).

F. Dad died less than three months after Mom.

G. Article IV of Mom's Will provides that the remaining property passes to the MAD Trust. Article 4 of the MAD Trust Agreement provides that, after Mom's death, a pecuniary gift of the Tax Sheltered Amount (defined in the MAD Trust) shall be allocated to the Family Trust. The provisions for administration and distribution of the Family Trust are described in Article 7 of the MAD Trust, and provide that at the death of the surviving spouse, the Family Trust terminates and after payment of debts and expenses, distributes to beneficiaries named in the MAD Trust.

H. Because Dad's death occurred less than three months after Mom's death, the Family Trust created under the MAD Trust had not yet been created or funded prior to Dad's death. The Executor has administered the estate and has reported on the estate tax return the distributions as they would have been reported if the Family Trust had been created and then distributed as described upon the later death of Dad as the surviving spouse. In an effort to simplify the administration of Mom's estate, the Executor and Trustee omitted the formal creation of the Family Trust, and funding of the assets directed by the MAD Trust to pass to the Family Trust, but has allocated the tax-free amount as instructed by the terms of the Family Trust upon the death of Dad, and has allocated the GST Exempt Amount directly to the trusts created upon termination of the Family Trust, since the Family Trust is GST Exempt.

I. Accordingly, the Trustee has distributed the assets attributable to Mom's Estate as follows:

- i. Dad and Mom Great-Grandchildren's Trust - \$100,000.00
- ii. Daughter Child's Share Trust - \$155,265.00
- iii. Grandson1 MAD Trust - \$333,453.00
- iv. Grandson2 MAD Trust - \$333,453.00
- v. Granddaughter1 MAD Trust - \$333,453.00
- vi. Granddaughter2 MAD Trust - \$333,453.00
- vii. Granddaughter3 MAD Trust - \$333,453.00
- viii. Granddaughter4 MAD Trust - \$179,881.00

J. This Distribution Agreement and Mutual Release applies only to the assets owned by Mom's Estate.

The Parties desire to document the distribution of assets of the Estate of Mom in the manner described in this Agreement and to fully resolve all claims against each other arising prior to the Effective Date of this Agreement.

Agreement

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the Parties do hereby agree to be bound as follows:

1. **Estate of Mom Assets.** The Parties agree that at Mom's date of death, her Estate owned the assets listed on the Inventory, Appraisalment and List of Claims that each beneficiary received pursuant to the Affidavit in Lieu of Inventory, Appraisalment and List of Claims filed in Cause No. C-1-PB-__-_____ in Travis County Probate Court on _____, 2013. A copy of

the Affidavit is attached as Exhibit A.

The Parties also agree that the assets of the Estate shall be distributed in the manner described in Paragraphs E. and I. above. The Parties agree to reserve Fifteen Thousand Dollars (the "Reserve Amount") in the MAD Trust for expenses, including attorneys' fees and accounting fees relating to settlement and distribution of the Estate which will be withheld on a pro-rata basis from the amounts listed in Paragraph I. above. Any portion of the Reserve Amount remaining after payment of all expenses of the Estate shall be distributed in pro-rata shares to the recipients listed in Paragraph I. above, no later than June 15, 2014.

2. **Mutual Releases Among The Parties.**

A. **Release by Dad Estate.** With the exception of the obligations of the Parties contained herein, Son1 and Son2, in their capacity as Co-Executor's of Dad's Estate, on behalf of themselves, their agents, heirs, representatives, and assigns, and for anyone claiming by, through, or under any of them, do hereby, now and forever, fully and finally RELEASE and DISCHARGE (i) Mom's Estate, (ii) Son1 and Son2, as Co-Executor's of Mom's Estate, (iii) MAD Trust, and (iv) Son1, as Trustee of the MAD Trust, from any and all actions, causes of action, claims, suits, accounts, demands, debts, obligations, liabilities, losses, damages, injuries, expenses or costs of Court of any and every character and nature whatsoever whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the Effective Date of this Agreement, related in any fashion to (i) the Co-Executor's administration and distribution of Mom's Estate, (ii) the Trustee's administration and distribution of the MAD Trust or (ii) any other matter relating to or arising out of Mom's Estate, it being Son1 and Son2's intention that the scope of this release be broad, general, and all-encompassing.

B. **Release by Daughter.** With the exception of the obligations of the Parties contained herein, Daughter, (i) individually, (ii) in her capacity as Co-Trustee of the Great-Grandchildren's Trust; (iii) in her capacity as Trustee of the Daughter Child's

Share Trust, (iv) in her capacity as Trustee of the Granddaughter² MAD Trust, (v) in her capacity as Trustee of the Granddaughter³ MAD Trust, on behalf of herself, her agents, heirs, representatives, and assigns, and for anyone claiming by, through, or under any of them, does hereby, now and forever, fully and finally RELEASE and DISCHARGE (i) Mom's Estate, (ii) Son1 and Son2, as Co-Executor's of Mom's Estate, (iii) MAD Trust, and (iv) Son1, as Trustee of the MAD Trust, from any and all actions, causes of action, claims, suits, accounts, demands, debts, obligations, liabilities, losses, damages, injuries, expenses or costs of Court of any and every character and nature whatsoever whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the Effective Date of this Agreement, related in any fashion to (i) the Co-Executor's administration and distribution of Mom's Estate, (ii) the Trustee's administration and distribution of the MAD Trust or (ii) any other matter relating to or arising out of Mom's Estate, it being Daughter's intention that the scope of this release be broad, general, and all-encompassing.

C. **Release by Son1.** With the exception of the obligations of the Parties contained herein, Son1, (i) individually, (ii) in his capacity as Co-Trustee of the Great-Grandchildren's Trust; (iii) in his capacity as Trustee of the Grandson1 MAD Trust, (iv) in his capacity as Trustee of the Grandson2 MAD Trust, (v) in his capacity as Trustee of the Granddaughter1 MAD Trust, on behalf of himself, his agents, heirs, representatives, and assigns, and for anyone claiming by, through, or under any of them, does hereby, now and forever, fully and finally RELEASE and DISCHARGE (i) Mom's Estate, (ii) Son1 and Son2, as Co-Executor's of Mom's Estate, (iii) MAD Trust, and (iv) Son1, as Trustee of the MAD Trust, from any and all actions, causes of action, claims, suits, accounts, demands, debts, obligations, liabilities, losses, damages, injuries, expenses or costs of Court of any and every character and nature whatsoever whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the Effective Date of this

Agreement, related in any fashion to (i) the Co-Executor's administration and distribution of Mom's Estate, (ii) the Trustee's administration and distribution of the MAD Trust or (ii) any other matter relating to or arising out of Mom's Estate, it being Son1's intention that the scope of this release be broad, general, and all-encompassing.

D. **Release by Son2.** With the exception of the obligations of the Parties contained herein, Son2, (i) individually, (ii) in his capacity as Co-Trustee of the Great-Grandchildren's Trust; (iii) in his capacity as Trustee of the Granddaughter4 MAD Trust, on behalf of himself, his agents, heirs, representatives, and assigns, and for anyone claiming by, through, or under any of them, does hereby, now and forever, fully and finally RELEASE and DISCHARGE (i) Mom's Estate, (ii) Son1 and Son2, as Co-Executor's of Mom's Estate, (iii) MAD Trust, and (iv) Son1, as Trustee of the MAD Trust, from any and all actions, causes of action, claims, suits, accounts, demands, debts, obligations, liabilities, losses, damages, injuries, expenses or costs of Court of any and every character and nature whatsoever whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the Effective Date of this Agreement, related in any fashion to (i) the Co-Executor's administration and distribution of Mom's Estate, (ii) the Trustee's administration and distribution of the MAD Trust or (ii) any other matter relating to or arising out of Mom's Estate, it being Son2's intention that the scope of this release be broad, general, and all-encompassing

THE RELEASES GIVEN HEREIN ARE INTENDED TO BE GLOBAL RELEASES OF ALL CLAIMS, DEMANDS, AND CAUSES OF ACTION THAT THE RELEASING PARTIES NOW HAVE OR MAY HAVE AGAINST THE RELEASED PARTIES WITH RESPECT TO THE CLAIMS DESCRIBED ABOVE AND ARE TO BE INTERPRETED LIBERALLY TO PROVIDE MAXIMUM PROTECTION FOR THE RELEASED PARTIES.

3. **Representations and Warranties.** The Parties hereby make the following respective representations and warranties to each other and acknowledge that these and all other representations and warranties contained herein are material to this Agreement:

A. The Parties are fully competent and authorized to execute this Agreement and thereby to bind the Parties to the promises, covenants, terms and conditions set forth herein;

B. The Parties represent, covenant and warrant that they or their duly authorized representatives have read the Agreement and fully understand it; that they have executed the Agreement with the intent to be fully bound according to its terms; that in signing the Agreement, they have relied solely on their own knowledge or their duly authorized representatives' knowledge and judgment and/or the advice of their own attorneys and not in reliance upon any representation, warranty, advice, statement or action of any kind of the other Parties, except to the extent such representations, warranties, advice, statements or actions are expressly set forth in this Agreement. The Parties expressly disclaim reliance on any fact or representation made by the other Parties if not expressly contained in this Agreement.

C. The Parties hereby represent and warrant that no rights, actions, causes of action, suits or claims whatsoever that they had, now have or may later claim to have or have had against each other have been assigned, conveyed or transferred in any manner to any other individual or entity.

4. **Governing Law.** This Agreement shall be deemed to have been executed in the State of Texas, and all matters pertaining to the validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the State of Texas. The venue of any cause of action arising out of the performance or breach of any provision of this Agreement is in Travis County, Texas

5. **Assumption of Risk.** Each Party declares and agrees that each has had the opportunity to obtain the benefit of legal counsel prior to the execution of this Agreement and that each understands fully the terms of this Agreement and that each relies wholly upon its own judgment in accepting the same for the purpose of making a full and final compromise, adjustment and settlement of the claims referred to above.

6. **Freely Executed.** Each Party warrants, represents and acknowledges to the other

that such Party executed and delivered this Agreement without any duress or wrongful pressure whatsoever imposed by any other Party or by any other person or entity acting on behalf of or in concert with any other Party hereto or by any independent third party and this Agreement has been executed as the free act and deed of such Party.

7. **Entire Agreement.** This Agreement contains the entire agreement among the Parties regarding the matters set forth herein and no promise, inducement or representation other than hereinabove set forth as to the subject matter contained herein has been made, offered or agreed upon. The terms of this Agreement are contractual and not merely a recital. The terms of this Agreement may not be modified unless in writing signed by all of the Parties.

8. **Execution in Counterparts.** This Agreement may be executed in counterparts, in which event each counterpart shall, standing alone, constitute an original.

9. **Severability.** If any provision of this Agreement or the application thereof to any person, entity or circumstance shall, for any reason and to any extent, be invalid or unenforceable, the remainder of this Agreement and the application of such provision to the other persons, entities or circumstances shall not be effected thereby but rather shall be enforced to the greatest extent permitted by law.

10. **Mutual Drafting.** By their authorized signatures below, the Parties certify that they have carefully read and fully considered the terms of this Agreement, they have had an opportunity to discuss the terms with attorneys or advisors of their own choosing, that they agree to all the terms of this Agreement, that they intend to be bound by them and to fulfill the promises set forth herein and that they voluntarily and knowingly enter into this Agreement with full understanding of the binding legal consequences.

11. **Headings.** The descriptive headings that are used in this Agreement are for convenience only and shall not affect the meaning of any provision in this Agreement.

12. **Execution of Additional Documents.** Each Party shall cooperate fully with the other Parties in performing any acts and in executing, acknowledging and delivering any instruments, documents or property required to accomplish the intent of this Agreement.

IN WITNESS WHEREOF the Parties have signed and delivered this Agreement, effective as of the Effective Date set forth above.

<hr/> <p style="text-align: center;">Date</p>	<hr/> <p>Son1, individually, and in his capacity as Independent Co-Executor of the Estate of Mom, as Trustee of the Dad and Mom Trust, as Independent Co-Executor of the Estate of Dad, as Co-Trustee of the Dad and Mom Great Grandchildren's Trust, as Trustee of the Grandson1 MAD Trust, as Trustee of the Grandson2 MAD Trust, and as Trustee of the Granddaughter1 MAD Trust</p>
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<hr/> <p style="text-align: center;">Date</p>	<hr/> <p>Son2, individually, and in his capacity as Independent Co-Executor of the Estate of Mom, as Independent Co-Executor of the Estate of Dad, as Co-Trustee of the Dad and Mom Great Grandchildren's Trust, and as Trustee of the Granddaughter4 MAD Trust</p>
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<hr/> <p style="text-align: center;">Date</p>	<hr/> <p>Daughter, individually and in her capacity as Co-Trustee of the Dad and Mom Great Grandchildren's Trust, as Trustee of the Daughter Child's Share Trust, as Trustee of the Granddaughter2 MAD Trust, and as Trustee of the Granddaughter3 MAD Trust</p>
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How To Not Fund A Testamentary Trust

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Son1, individually and in his capacity as Independent Co-Executor of the Estate of Mom, as Trustee of the Dad and Mom Trust, as Independent Co-Executor of the Estate of Dad, as Trustee of the Grandson1 MAD Trust, as Co-Trustee of the Dad and Mom Great Grandchildren’s Trust, as Trustee of the Grandson2 MAD Trust, and as Trustee of the Granddaughter1 MAD Trust, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacities therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ____ day of _____,
_____.

Notary Public, State of Texas

How To Not Fund A Testamentary Trust

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Son2, individually, and in his capacity as Independent Co-Executor of the Estate of Mom, as Independent Co-Executor of the Estate of Dad, as Co-Trustee of the Dad and Mom Great Grandchildren’s Trust, as Trustee of the Granddaughter4 MAD Trust, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed and in the capacities therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ____ day of _____,
_____.

Notary Public, State of Texas

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Daughter, individually and in her capacity as Co-Trustee of the Dad and Mom Great Grandchildren’s Trust, as Trustee of the Daughter Child’s Share Trust, as Trustee of the Granddaughter2 MAD Trust, and as Co-Trustee of the Granddaughter3 MAD Trust, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed and in the capacities therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this ____ day of _____,
_____.

Notary Public, State of Texas

EXHIBIT D

NO. P-____

ESTATE OF § **IN THE COUNTY COURT**
DAD, § **OF**
DECEASED § **BURNET COUNTY, TEXAS**

FAMILY SETTLEMENT AGREEMENT AND RELEASE

This Family Settlement Agreement and Release (this “Agreement”) is entered into by and among the following parties (collectively, the “Parties”):

1. Mom as Independent Executor of the Estate of Dad, Deceased (“Executor”);
2. Mom, prospective co-trustee of a testamentary trust referenced by Dad's (“Decedent”) will dated _____ (the “Will”), in her individual capacity, and as next friend and on behalf of her minor children, Granddaughter1 (date of birth: _____) and Grandson1 (date of birth: _____) (collectively, “Mom”);
3. Son1, prospective co-trustee of testamentary trust referenced by Decedent's Will, in his individual capacity, and next friend and on behalf of his minor Granddaughter1 and Grandson1 (collectively, “Son1”);
4. Son2, as prospective co-trustee of a testamentary trust referenced by Decedent's Will, in his individual capacity, and as next friend and on behalf of his minor children, Grandson2 (date of birth: _____) and Granddaughter2 (date of birth: _____) (collectively, “Son2”);
5. Son3, in his individual capacity (“Son3”);

6. Son4, in his individual capacity and as next of friend and on behalf of his minor children, Grandson3 (date of birth: _____) and Grandson4 (date of birth: _____) (collectively, "Son4");

7. Step-Son, in his individual capacity and as next friend and on behalf of his minor Children, Step-Granddaughter (date of birth: _____) and Step-Grandson (date of birth: _____) (collectively, "Step-Son");

8. Adult Grandson1, in his individual capacity ("Adult Grandson1");

9. Adult Grandson2, in his individual capacity ("Adult Grandson2"); and

10. Adult Grandson3, in his individual capacity ("Adult Grandson3")

for the purpose of settling the various claims, controversies and disputes among these parties arising out of the facts and circumstances relating directly or indirectly any of the allegations of the above-styled lawsuit and estate administration.

RECITALS

The parties have entered this Agreement under the following circumstances and to effect the following aims and purposes:

A. On _____, 2000, Decedent died in Austin, Texas, and on _____, 2000, the Will was admitted to probate and letters testamentary were issued to Executor.

B. During the administration of Decedent's estate, Executor made several distributions to estate beneficiaries in accordance with the terms of the Will, and received receipts from such beneficiaries. A chart indicating the distributions made up the date of this Agreement is attached as Exhibit 1. The Parties recognize that several beneficiaries of Decedent's estate are not parties to this Agreement. This Agreement is only

contemplated as binding upon the named Parties and signatories and does not attempt to alter the rights of any other estate beneficiaries referenced in Exhibit 1.

C. A dispute has arisen among the Parties regarding the proper classification of the bequests made by Decedent under his Will, and the various possible classifications might result in different distributions to the Parties and beneficiaries of the Will. The Parties acknowledge that Executor would be entitled to ask a proper court to construe certain terms of the Will and declare the Executor's proper duties under the Will.

D. Article the Twelfth of Decedent's Will purports to establish a trust to support the education of Decedent's grandchildren (the "Education Trust"), but the proper funding, creation and administration of the Education Trust is not apparent from the plain meaning of the Will. A dispute has arisen among the Parties regarding the initial funding of the Education Trust, the permissible beneficiaries of the Education Trust, and the continuing administration of the Education Trust.

E. During the administration of Decedent's estate, Executor sold Decedent's real property located at _____ and placed all net proceeds in a separate account (the "Education Funds") to be used in the initial funding of the Education Trust. At the date of this Agreement, the Education Funds have an approximate gross value of \$_____, which includes interest income since the date of the sale.

F. On or about _____, 2002, Executor delivered to counsel for Son2 an accounting of Executor's actions in the administration of Decedent's estate for the period of _____, 2000 to _____, 2002 (the "Accounting"), a copy of which is attached to this Agreement as Exhibit 2. The Accounting was later supplemented with copies of

Executor's bank statements and brokerage statements during the period of the Accounting.

G. The Parties acknowledge the costs, hazards, uncertainties, pitfalls, and inconveniences of litigation over the disputes mentioned herein, and desire to execute this Agreement in order to settle and lay to rest their controversy, to avoid further costs, litigation and risks, and to bring peace.

IT IS, THEREFORE, AGREED:

1. Consideration. The Parties acknowledge the adequacy of consideration as expressed by the recitations and mutual covenants in this Agreement. The releases, payments, recitations, and other promises set forth in the preceding and succeeding paragraphs constitute valid and adequate consideration for each of the recitations and other covenants made herein.

2. Warranties. Each party warrants (a) that he or she has been fully informed and has full knowledge of the terms, conditions and effects of this Agreement; (b) that he or she, either personally or through his or her independently retained attorneys, has fully investigated to his or her satisfaction all facts surrounding the various claims, controversies and disputes and is fully satisfied with the terms and effects of this Agreement; (c) that no promise or inducement has been offered or made to him or her except as expressly stated in this Agreement, and that this Agreement is executed without reliance on any statement or representation by any other party or any other party's agent; (d) that he or she has the full authority to enter into this Agreement in the capacity or capacities indicated herein; and (e) that he or she is the sole owner of the claims or causes of action released in this Agreement and not previously assigned any interest in such

claims to any other person or entity. All of the warranties and representations made in this paragraph 2 shall survive the execution performance of this Agreement.

3. Acceptance of Distributions. Son3, Son1 and Step-Son, in their individual capacities, agree that they have already accepted and received their full and complete share of that portion of Decedent's estate to which they are entitled, as such distributions are represented on Exhibit 1.

4. Distribution to Son2. Within five (5) days of the effective date of this Agreement, Executor will distribute the sum of \$_____ cash to Son2, in his individual capacity, in full and complete satisfaction of that portion of Decedent's estate to which he is entitled.

5. Distribution to Son4. Within five (5) days of the effective date of this Agreement, Executor will distribute the sum of \$_____ cash to Son4, in his individual capacity, in full and complete satisfaction of that remaining portion of Decedent's estate to which he is entitled.

6. Distribution of Education Funds. Within thirty (30) days of the effective date of this Agreement, Executor will divide the remaining Education Funds in her control into eleven (11) separate, equal shares, with one share allocated to each of the following grandchildren of Decedent: Adult Grandson2, Granddaughter, Grandson, Grandson2, Granddaughter2, Adult Grandson, Adult Grandson3, Grandson3, Grandson4, Step-Granddaughter, and Step-Grandson (collectively, the "Grandchildren" and individually, a "Grandchild"). Each share will be responsible for payment of its proportionate (1/11) share of any income taxes associated with interest income received on the Education Funds during the administration of Decedent's estate. For the purposes of the distribution

of the Education a "minor" is defined as any person under the age of twenty-one (21) years, an "adult" is any person twenty-one (21) years of age or older. Executor will distribute each minor Grandchild's share of the Education Funds to his or her custodial parent or parents for use in a custodial account governed by the rules and regulations of Texas Property Code Chapter 141, as amended. Executor will distribute each adult Grandchild's share directly to such Grandchild. Each custodian will make his or her best efforts to use the custodial funds in the furtherance of the education of the Grandchild. Mom shall have no obligation to review any of the created custodial accounts, nor shall she be held liable for any of the various custodians.

7. Investment of Funds. Each custodial parent of a Grandchild agrees to invest such Grandchild's share of the Education Funds in a manner consistent with such Grandchild's educational desires and in the spirit of Decedent's wishes under his Will.

8. No Continuing Duty Over Education Funds. Neither Executor or Mom, Son1, or Son2 will have any responsibility for the investment, oversight, or distributions of the Education Funds after they are distributed the custodial parent(s) of a minor Grandchild or directly to an adult Grandchild.

9. Distribution to Mom. As detailed in the Accounting, Mom has distributed to herself individually, as her inheritance in this estate and reimbursement, the approximate amount of \$_____, since the administration began. The approximate amount of \$_____ is expected to remain in Executor's custody after distribution of remaining inheritances, and payment and/or reimbursement of estate administration expenses, and Executor shall distribute the remaining funds to Mom after such distributions, payments and reimbursements. In the interests of reducing additional costs of administration, the Parties

to this Agreement hereby waive the preparation of a supplemental accounting dating _____, 2002 to the date of this Agreement. The Parties recognize that the \$_____ value is an estimate, and would be affected by interest income received since the Accounting, additional professional fees and administration costs incurred by Mom after the date of this Agreement. This Agreement makes no provision for the distribution of any other estate assets that may be subsequently discovered. The Parties recognize that Executor may be obligated to pay additional professional fees or administration expenses and Mom accepts responsibility for such unknown, valid administration expenses occurring after the date of this Agreement.

10. Mom's Attorney's Fees. The Parties understand that Mom has indicated that she incurred reasonable and necessary attorneys' fees and expenses as prospective co-trustee of the Education Trust. The Parties agree that the Education Funds shall be responsible for \$_____ of such attorneys' fees, and Executor shall pay Mom such amount as reimbursement for her fees prior to distributing the Education Funds pursuant to Agreement No. 6.

11. Son2's Attorney's Fees. The Parties understand that Son2 has indicated that he incurred reasonable and necessary attorneys' fees and expenses as prospective co-trustee of the Education Trust. The Parties agree that Education Funds shall be responsible for \$_____ of such attorneys' fees, and Executor shall pay Son2 such amount as reimbursement for his fees prior to distributing the Education Funds pursuant to Agreement No. 6.

12. Executor's Attorney's Fees. The Parties further agree that the additional sum of \$_____ shall be paid by Executor from the Education Funds prior to their

division under Agreement No. 6 to Executor's attorneys as reasonable expenses associated with the preparation of this Agreement.

13. Additional Attorney's Fees. Any attorney's fees and expenses incurred by the Parties not specifically addressed in this Agreement shall be the sole responsibility of the Party incurring such expenses, and no additional claims may be made against Executor or other Parties for repayment thereof.

14. Expenses of Administration. All expenses of administering Decedent's estate incurred by Executor, including her attorneys' fees, not addressed elsewhere in this Agreement shall be borne by Mom, from her share of Decedent's estate she receives under Article the Third of the Will.

15. Release by Mom. Mom, on behalf of herself, her minor children, her agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Son1, Son2, Son3, Son4, Step-Son, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Mom's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that

Mom is not herein releasing any rights which are expressly provided for within this Agreement.

16. Release by Son1. Son1, on behalf of himself, his minor children, his agents, heirs, representatives, assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son3, Son4, Step-Son, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Son1's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Son1 is not herein releasing any rights which expressly provided for within this Agreement.

17. Release by Son2. Son2, on behalf of himself, his minor children, his agents, heirs, representatives, and assigns, does hereby discharge and acquit Executor, Decedent's Estate, Mom, Son1, Son3, Son4, Step-Son, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law,

at law or inequity, arising out of any matter at any time up to and including the date of this Agreement, related in fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Son2's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Son2 is not herein releasing any rights which are expressly provided for within this Agreement.

18. Release by Son3. Son3, on behalf of himself, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son1, Son4, Step-Son, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Son3's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Son3 is not herein releasing any rights which are expressly provided for within this Agreement.

19. Release by Son4. Son4, on behalf of himself, his minor children, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son3, Son1, Step-Son, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Son4's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Son4 is not herein releasing any rights which are expressly provided for within this Agreement.

20. Release by Step-Son. Step-Son, on behalf of himself, his minor children, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son3, Son4, Son1, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date

of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Step-Sons's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Step-Son is not herein releasing any rights which are expressly provided for within this Agreement.

21. Release by Adult Grandson1. Adult Grandson1, on behalf of himself, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son3, Son1, Son4, Step-Son, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Adult Grandson1's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Adult Grandson1 is not herein releasing any rights which are expressly provided for within this Agreement.

22. Release by Adult Grandson2. Adult Grandson2, on behalf of himself, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son1, Son3, Son4, Step-Son, Adult Grandson1, and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Adult Grandson2's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Adult Grandson2 is not herein releasing any rights which are expressly provided for within this Agreement.

23. Release by Adult Grandson3. Adult Grandson3, on behalf of himself, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son1, Son3, Son4, Step-Son, Adult Grandson1, and Adult Grandson2 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date

of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Adult Grandson3's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Adult Grandson3 is not herein releasing any rights which are expressly provided for within this Agreement.

24. Release by Executor. Executor, on behalf of himself, his agents, heirs, representatives, and assigns, does hereby release, discharge and acquit Executor, Decedent's Estate, Mom, Son2, Son1, Son3, Son4, Step-Son, Adult Grandson1, Adult Grandson2 and Adult Grandson3 from any causes of action, claims, demands, debts, liability, expense or costs of Court of any and every character and nature whatsoever, whether known or unknown, whether asserted or unasserted, either in or arising out of the law of contracts, torts or property rights, whether arising under statutory or common law, at law or in equity, arising out of any matter at any time up to and including the date of this Agreement, related in any fashion to (i) Executor's administration of Decedent's estate, (ii) the Will, (iii) the Education Trust, (iv) the Education funds, (v) the Accounting, or (vi) any other matter that was or could have been brought in the lawsuit relating to the issues discussed in sections (i) through (v), it being Executor's intention that the scope of this release be broad, general, and all-encompassing; provided, however, that Executor is not herein releasing any rights which are expressly provided for within this Agreement.

25. Denial of Liability. Neither the acceptance of the releases herein nor the payment of amounts hereunder shall constitute or be deemed to be an admission of liability on the part of any of the parties, such liability being expressly denied.

26. Interpretation of Agreement. The Parties acknowledge that they and their respective attorneys have reviewed Agreement, and have participated in drafting this Agreement. The Parties agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any exhibit thereto.

27. Entire Agreement. This Agreement contains the entire agreement between the Parties

With respect to the subject matter of the settlement agreement they have reached, and no oral statements or prior written matters not specifically incorporated herein shall be effective. No amendments, modifications or changes to this Agreement shall be binding upon any party unless set forth in a written document executed by all Parties.

28. Parties Bound. The provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective heirs, successors, assigns, agents, representatives, attorneys, personal representatives, executors and administrators.

29. Specific Performance: Attorneys' Fees. The provisions of this Agreement shall be enforceable by decree of specific performance. If any party breaches his or her obligations under this Agreement, then, in addition to any actual damages or other relief available to the prevailing party in a suit to enforce this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and related expenses from the

breaching party, notwithstanding release given pursuant to the provisions of this Agreement.

30. Standing to Enforce. It is understood and agreed that all Parties have legal standing to enforce all provisions of this Agreement.

31. Effective Date. The effective date of this Agreement is the date on which the Agreement has been signed by all Parties.

32. Governing Law. This Agreement has been drafted in the State of Texas and is to be performed in this state. All questions concerning the validity, interpretation or performance of this Agreement shall be governed by the laws of this state.

33. Multiple Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute an original for all purposes. Each of the Parties hereto shall be entitled to receive an executed counterpart containing the signatures of all Parties.

34. Execution of Documents. The Parties agree to execute, acknowledge and deliver all documents that may reasonably be required to effect the provisions of this Agreement.

35. No Donative Intent. All transfers of property pursuant to the provisions of this Agreement are made to compromise and settle disputed claims. The Parties expressly deny the existence of any donative intent in connection with such transfers, it being expressly understood and agreed that transfers of property under this Agreement do not constitute gifts by any party.

36. Time of Essence. Time is of the essence in performing the provisions of this Agreement.

37. Venue. The venue of any cause of action arising out of the performance or breach of any provision of this Agreement is in Travis County, Texas.

38. Nature of Settlement Payments and Distributions. The distributions of property required by this Agreement (i) are being made to settle bona fide claims that the Parties have to recover property of Decedent's estate by bequest, devise, inheritance, or gift, and (ii) fairly represent the nature and value of property interests and rights that the Parties could have received if the litigation involving the proper distribution of Decedent's estate had been resolved by a trial on the merits. Consequently, the value of properties that are distributed to the Parties under this Agreement are excludible from gross income under Section 102(a) of the Internal Revenue Code.

AGREED:

[signature pages and exhibits omitted]

EXHIBIT E

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This Mutual Release and Settlement Agreement (“**Agreement**”), executed by the Parties as of the dates set forth in the acknowledgments hereto but effective from and after _____, 2014 (“**Effective Date**”), is by and among Son1 (“**Son1**”), Daughter1 (“**Daughter1**”), Son2 (“**Son2**”) and Granddaughter1 (“**Granddaughter1**”), each in the capacities reflected below in their signature lines, (individually, a “**Party**” and together, the “**Parties**”).

RECITALS:

WHEREAS, Mother (“**Mother**”) executed the Mother Revocable Trust Agreement on _____, 2005, amended by the First Amendment to the Mother Revocable Trust Agreement on _____, 2005, and amended by the Second Amendment to the Mother Revocable Trust Agreement on _____, 2006 (as amended, the “**Trust Agreement**”), creating the Mother Revocable Trust (the “**Trust**”);

WHEREAS, Mother died on _____, 2007, leaving surviving her three children, Son1, Daughter1 and Son2 and her granddaughter, Granddaughter1;

WHEREAS, the Trust Agreement provides that after the death of Mother, the Trustee shall distribute the Trust property in three equal shares to Child’s Trusts for the benefit of each of Son1, Daughter1 and Son2 for their respective lives, and then for the benefit of Granddaughter1 (“**Child’s Trusts**”);

WHEREAS, the Child’s Trusts provide for a 5% annual unitrust payment to each of Son1, Daughter1 and Son2 for their respective lives;

WHEREAS, each of Son1, Daughter1 and Son2 is a Manager of Pretend Partners GP, L.L.C. (“**GP**”), the General Partner of Pretend Partners, Ltd. (“**Partnership**”);

WHEREAS, the GP owns .7500% of the Partnership, the Trust owns 84.5949% of the Partnership, Son1, Daughter1 and Son2 each own 4.5517% of the Partnership, and Granddaughter1 owns 1.00% of the Partnership;

WHEREAS, the Partnership owns, among other assets, (i) the Something Ranch located in _____ County and _____ County, New Mexico (“**Something Ranch**”), and (ii) a Promissory Note and Pledge Agreement dated _____, 2008 made by the Trust to the Partnership in the principal amount of \$ _____ (“**Promissory Note**”);

WHEREAS, disagreements have arisen among Son1, Daughter1 and Son2 with respect to (i) the sale of Something Ranch, (ii) distributions from the Child’s Trusts, (iii) the dates of

distributions by the Partnership, (iv) appropriate investments for the Trust and the Partnership, and (v) the repayment of the Promissory Note;

WHEREAS, on _____, 2010, Son1, Daughter1, Son2 and Granddaughter1 executed a Memorandum in Contemplation of Settlement Agreement (“**Settlement Memorandum**”) wherein the parties agreed to resolve certain matters, as provided therein, and to promptly enter into this Agreement;

WHEREAS, the Parties, by execution and delivery of this Agreement, wish (i) to amicably resolve all disagreements and disputes among themselves, (ii) to settle all claims and matters in controversy which any Party asserted or could have asserted against any other Party, and (iii) to buy their peace,

NOW, THEREFORE, for and in consideration of the execution and delivery of this Agreement, the recitals, the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows.

I AGREEMENTS

1.1 SALE OF SOMETHING RANCH. Son1, Daughter1 and Son2, in their capacity as a Manager of the GP, hereby authorize Son2, in his capacity as President of the GP, to cause the Partnership, by _____, 2010, to list Something Ranch for sale with a realtor selected by Son2, in accord with the provisions set forth in Exhibit “A” to this Agreement.

1.2 DETERMINATION OF DISCOUNT. The Parties hereby agree that for purposes of calculating the unitrust distribution of each of the three Child’s Trusts, the appropriate discount to be applied to each Child’s Trust’s ownership interest in the Partnership shall be stated in a letter appraisal to be provided by An Appraisal Company, and this discount shall be applied annually for the dates stated in the letter appraisal.

1.3 DISTRIBUTION OF PARTNERSHIP ASSETS. The Parties hereby agree that they will cause all assets of the Partnership other than (i) Something Ranch, (ii) the oil and gas properties, (iii) the limited partnership interests, (iv) \$100,000.00 cash, and (v) the Promissory Note, to be distributed not earlier than _____, 2015 nor later than _____, 2015. If Something Ranch has been sold by the date of the distribution, then the net proceeds from the sale thereof shall be included in the distribution.

The Parties further agree that all assets of the Partnership shall be distributed not later than _____, 2015. It is the intent of the parties that the Trustee of the three Child’s Trusts shall pay off the promissory note as soon as possible without violating the terms of the Note. The Partnership shall be dissolved within thirty-days of full satisfaction or other disposition of the Promissory Note.

If a contract for the sale of Something Ranch is pending on _____, 2015, then the sale shall be closed prior to distribution of Something Ranch or of the net sale proceeds. If the Trustee refuses to make the required unitrust distributions from the Trust until the Partnership is dissolved, then the Partnership shall be dissolved not later than _____, 2015.

1.4 RELEASE OF TRUSTEE. The Parties hereby agree that upon the occurrence of both of the (i) funding of each of the Child's Trusts, and (ii) distribution of the unitrust amounts owed for 2011, 2012, and 2013, they will execute and deliver a release of _____, as Trustee of the Trust, and Executor of the Estate of Mother, and a release of all persons acting for and on behalf of him in such capacities.

II RELEASE AND DISCHARGE

2.1 RELEASE AND DISCHARGE. Each Party, on behalf of himself/herself and his/her heirs, executors, administrators, representatives and assigns, hereby FULLY RELEASE, HOLD HARMLESS AND FOREVER DISCHARGE each other Party, of and from any and all claims, causes of action, controversies, losses, costs, fees (including without limitation, attorneys' fees), expenses, damages, judgments, executions and demands of any nature whatsoever, WHETHER FORESEEN OR UNFORESEEN, KNOWN OR UNKNOWN, DISCLOSED OR UNDISCLOSED, MATURED OR UNMATURED, whether at law, in equity or otherwise, which each Party has or had, and asserted or could have asserted that arise out of or relate to (i) the sale of Something Ranch, (ii) distributions from the Trust, (iii) the dates of distributions by the Partnership, (iv) appropriate investments for the Trust and the Partnership, (v) the repayment of the Promissory Note, and (vi) the use of a limited partnership and unitrust payout in the estate planning documents of Father and Mother (collectively herein, "Released Claims").

2.2 ENFORCEMENT OF RIGHTS UNDER AGREEMENT. The release and discharge of the Released Claims given in Paragraph 2.1 hereinabove does not impair the ability of any Party to enforce the rights afforded him/her under this Agreement nor shall the release and discharge be construed or operate to reduce or diminish the scope thereof.

III MISCELLANEOUS

3.1 EXECUTION AND DELIVERY. Each Party acknowledges and agrees, with respect to this Agreement, that (i) he/she has read it; (ii) he/she has discussed its terms, obligations and consequences with his/her legal counsel; (iii) he/she has the authority to execute it; (iv) he/she executes it freely and voluntarily of his/her own volition; and, (v) it is legally binding and enforceable.

Each Party further acknowledges and agrees that the terms of this Agreement are contractual and not mere recitals and that he/she is not executing this Agreement on the basis of any inducements, promises, statements, representations or warranties made by anyone, other than as set forth in this Agreement. All promises made by and among the Parties with respect to the subject matter of this Agreement are included in this Agreement. This Agreement constitutes the

entire agreement of the Parties with respect to the subject matter hereof and may not be modified, amended or terminated except by a written agreement signed by all of the Parties.

Each Party further acknowledges and agrees that this Agreement shall inure to the benefit of and be binding upon each Party hereto and his/her respective heirs, executors, administrators, representatives and assigns.

3.2 NO ADMISSION. Each Party acknowledges and agrees that no Party admits any liability, wrongdoing or fault, but to the contrary, expressly denies the same. This Agreement is made solely to resolve, settle and compromise the matters in dispute among the Parties and to avoid the cost, expense and effort of litigation.

3.3 GOVERNING LAW; VENUE; AND JURISDICTION. The relationship of the Parties and all claims arising out of or related to that relationship, including but not limited to the construction and interpretation of any written agreements, including this Agreement, are to be governed by the substantive laws of the state of Texas (without regard to conflicts of law principles).

This Agreement is performable in Travis County, Texas. The parties agree and consent to the jurisdiction of the state and federal courts located in Austin, Travis County, Texas and acknowledge that such courts shall constitute proper and convenient forums for the resolution of any actions between the Parties with respect to the subject matter hereof and agree that in such case, these courts shall be the sole and exclusive forums for the resolution of any actions between the Parties with respect to the subject matter hereof. The prevailing Party or Parties in any action to enforce this Agreement shall be entitled to recover all related costs of the suit, including reasonable attorneys' fees and other court costs.

3.4 CONSTRUCTION. This Agreement shall not be construed more or less favorably among the Parties by reason of authorship or origin of language.

3.5 HEADINGS AND CAPTIONS. The descriptive headings and captions of the provisions of this Agreement are intended to be used only for the convenience of the Parties, and shall not be deemed to affect the meaning or construction of any provision hereof.

3.6 EFFECT OF WAIVER OR CONSENT. No waiver or consent, express or implied, by any Party to or of any breach or default by any Party in the performance by such Party of his/her obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such Party of the same or any other obligations of such Party hereunder. Failure on the part of a Party to complain of any act of any Party or to declare any Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such Party of his/her rights hereunder until the applicable statute of limitation period has run.

3.7 ASSIGNMENT. This Agreement and any rights or duties hereunder shall not be assigned.

3.8 ENTIRE AGREEMENT. This Agreement contains the entire agreement of the Parties and supersedes all other agreements, oral or written, heretofore made with respect to the subject matter hereof.

3.9 RECITALS. Each recital in this Agreement is incorporated by reference herein and is made a part hereof.

3.10 EXHIBIT. The exhibit to this Agreement is incorporated by reference herein and is made a part hereof.

3.11 SEVERABILITY. Any provisions of this Agreement prohibited by, or unlawful or unenforceable under, any applicable law of any jurisdiction shall be ineffective as to such jurisdiction, without affecting any other provision of this Agreement, or shall be deemed to be severed or modified to conform with such law, and the remaining provisions of this Agreement shall remain in force, provided that the purpose of this Agreement can be effected. To the full extent, however, that the provisions of such applicable law may be waived, they are hereby waived to the end that this Agreement be deemed to be a valid and binding agreement enforceable in accordance with its terms.

3.12 COUNTERPARTS. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. As used herein, "counterparts" shall include full copies of this Agreement signed and delivered by facsimile or electronic (e-mail) transmission, as well as photocopies of such facsimile or electronic (e-mail) transmission.

*[Balance of page intentionally left blank.
Signature pages follow.]*

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth in the acknowledgment and in all instances EFFECTIVE FROM AND AFTER the Effective Date.

SON1

Son1, individually, as Manager and owner of Pretend Partners GP, L.L.C., as limited partner of Pretend Partners, Ltd., and as beneficiary of the Estate of Mother and of the Child's Trusts

DAUGHTER1

Daughter1, individually, as Manager and owner of Pretend Partners GP, L.L.C., as limited partner of Pretend Partners, Ltd., and as beneficiary of the Estate of Mother and of the Child's Trusts

SON2

Son2, individually, as Manager and owner of Pretend Partners GP, L.L.C., as limited partner of Pretend Partners, Ltd., and as beneficiary of the Estate of Mother and of the Child's Trusts

GRANDDAUGHTER1

Granddaughter1, individually, as limited partner of Pretend Partners, Ltd., and as beneficiary of the Estate of Mother and of the Granddaughter1 Trust

TRUSTEE'S NAME executes this Mutual Release and Settlement Agreement in his capacity as Trustee of the Mother Revocable Trust and as Independent Executor of the Estate of Mother to acknowledge the provisions hereof.

TRUSTEE'S NAME

STATE OF NEW MEXICO §
 §
COUNTY OF _____ §

Before me, the undersigned authority, on this day personally appeared Son1, known to me to be the person whose name is subscribed to the foregoing Release and Settlement Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of October, 2014.

Notary Public in and for the State of New Mexico

How To Not Fund A Testamentary Trust

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared DAUGHTER1, known to me to be the person whose name is subscribed to the foregoing Release and Settlement Agreement and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of October, 2014.

Notary Public in and for the State of Texas

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared Son2, known to me to be the person whose name is subscribed to the foregoing Release and Settlement Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of October, 2014.

Notary Public in and for the State of Texas

How To Not Fund A Testamentary Trust

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared Granddaughter1, known to me to be the person whose name is subscribed to the foregoing Release and Settlement Agreement and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of October, 2014.

Notary Public in and for the State of Texas

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared TRUSTEE'S NAME, Trustee of the Mother Revocable Trust and Independent Executor of the Estate of Mother, known to me to be the person whose name is subscribed to the foregoing Mutual Release and Settlement Agreement and acknowledged to me that he executed the same for the purposes and consideration therein expressed in the capacity therein stated and as the act and deed of said trust and estate.

Given under my hand and seal of office this ____ day of October, 2014.

Notary Public in and for the State of Texas

EXHIBIT A
to
MUTUAL RELEASE AND SETTLEMENT AGREEMENT

PROVISIONS GOVERNING SALE OF SOMETHING RANCH

The listing price shall be \$_____. Any cash offer of at least \$_____ consistent with the Sales Terms shall be accepted, unless the prospective purchaser agrees to pay a larger amount, in which event the largest such offer shall be accepted. If by _____, the Property has not been sold i.e., an enforceable contract for its sale in accordance with the Sales Terms has been executed, any purchase offer acceptable to two of the siblings shall be accepted.

Sales Terms

Property: Surface estate of the Ranch only, together with seller's interest in any existing leases, and all personal property utilized in operation of the Ranch except cattle and any other animals.

Terms: Cash

Sales Expenses

Payable by Seller: Real estate commission, not to exceed 5% of the sales price, and other expenses customarily paid by sellers of ranches in the subject area. Listing contract to specify that the obligation to pay commission is conditioned on actual closing and payment of the purchase price. No commission shall be due or payable in any event unless actual closing occurs.

Contract Terms: Sale to be "AS IS" for all purposes without representation or warranty other than as to title as contained in the deed. Conveyance shall be by special warranty deed. Should any personal property be included in the sale, such shall also be "AS IS" and without warranty as to condition or otherwise, except as to title, as contained in a bill of sale with special warranty. Buyer shall covenant that his purchase of the Property and his determination to pay the purchase price are based solely on his inspections and evaluations of the Property and not upon any representation by seller, seller's broker, or anyone else on behalf of seller. Current taxes and rentals shall be prorated.

Additional

Understandings: It is also contemplated that Son2 shall employ an attorney in New Mexico to handle drafting and negotiation of any sales contract, and that such form shall be submitted to his siblings for review prior to its acceptance.

EXHIBIT F-1

NO. P-__-__

IN THE MATTER OF THE
ESTATE OF DAD,
DECEASED

§
§
§
§
§

IN THE COUNTY COURT OF
LAW NO. 2 OF
WEBB COUNTY, TEXAS

MOTION TO PERMIT NON-FUNDING OF QUALIFIED DOMESTIC TRUST

To The Honorable Judge Of This Court:

NOW COMES Mom ("Movant"), Executor of the Estate of Dad and shows the court as follows:

1. Dad ("my husband") died on _____, leaving a Will dated _____ that was admitted to probate by this court on _____. A copy of the Will is attached as Exhibit A.
2. Movant was appointed Executor of the Estate of Dad on _____.
3. The Will provides that the Dad Marital Trust is to be established for my benefit, as Dad's surviving spouse, and for the ultimate benefit of his descendants.
4. The Will provides that the Trust is to qualify pursuant to Internal Revenue Code ("IRC") § 2056A. IRC § 2056A applies to distributions to resident aliens in the form of a qualified domestic trust ("QDOT").
5. At the time of my husband's death, I was a resident alien. I have since applied to become a United States citizen. My application is pending before the Immigration and Naturalization Service. A copy of my application is attached as Exhibit B.
6. IRC § 2056A has no application to distributions to United States citizens. Once I become a

citizen there will be no need for a QDOT Trust, since distributions to me from my husband's Estate will qualify for the marital deduction without any need for a QDOT Trust.

7. I believe that were it not for the anticipated adverse tax consequences of distributing property directly to a non-citizen spouse, my husband would have directed in his Will that his assets pass to me outright, free of Trust.

8. Neither at the time he signed the Will nor at the time of his death did my husband know that I would become a citizen of the United States. My becoming a citizen is a change in circumstances that would defeat or substantially impair my husband's purposes in establishing the Marital Trust.

9. The persons of full age who have an interest in the Trust are Mom (nominated Trustee, surviving spouse and lifetime beneficiary); Daughter1 (contingent remainder beneficiary); Daughter2 (contingent remainder beneficiary); Daughter3 (contingent remainder beneficiary); and Daughter4 (contingent remainder beneficiary). Each of the above persons has executed an Agreement as to Trust Funding and Release, which is attached as Exhibit C. In the Agreement each person consents that the Trust not be funded and all assets that otherwise would be held in the Trust shall be distributed outright to Mom. Each person also waives citation or any other notice of a court proceeding such as this motion.

10. The minor descendants of Dad who each hold contingent remainder interests in the Trust are _____.

11. For the foregoing reasons, I request that the Court authorize the funds that would otherwise be in the Trust to be distributed from the Estate directly to me, free of Trust.

WHEREFORE, Movant prays (1) that citation issue to all persons interested in the Trust who have not waived citation by signing the Agreement; (2) that an attorney-ad-litem be appointed to represent the interests of the unborn and minor descendants each of whom is a contingent remainder beneficiary of the Trust; (3) that the Court authorize the funds that otherwise would be held in the Trust to be distributed outright and free of Trust to Mom once her U.S. citizenship application is granted; and (4) that the court terminate the Dad Marital Trust pursuant to Texas Trust Code § 112.054.

Respectfully submitted,

Mom

Attorney Name
Attorney Address
Attorney Phone
State Bar No. _____
ATTORNEY FOR MOVANT

STATE OF TEXAS §
 §
COUNTY OF WEBB §

Before me, the undersigned Notary Public, on this day personally appeared Mom, who, after being duly sworn, stated under oath that she is the Movant in this proceeding; that she had read the above Motion To Permit Non-Funding Of Qualified Domestic Trust; and that every statement contained in the motion is within her personal knowledge and is true correct.

Mom

SUBSCRIBED AND SWORN TO BEFORE ME by the said Mom, Movant, on this ____ day of _____, 20__ to certify which witness my hand and seal of office.

[seal]

Notary Public, State of Texas

EXHIBIT F-2

NO. P-__ - ____

IN THE MATTER OF THE	§	IN THE COUNTY COURT OF
ESTATE OF DAD,	§	LAW NO. 2 OF
DECEASED	§	WEBB COUNTY, TEXAS

**ORDER GRANTING MOTION TO PERMIT
NON-FUNDING OF QUALIFIED DOMESTIC TRUST**

Having considered the Motion to Permit Non-Funding of Qualified Domestic Trust filed by Mom on _____, together with its accompanying Exhibits, and having considered the testimony given by Mom and by _____ as attorney-ad-litem for the minor and unborn descendants of Dad who are contingent remainder beneficiaries of the Trust, I find as follows:

1. Dad would not have directed that the Dad Marital Trust be established had he known that his wife would become a United States citizen.
2. Once Mom becomes a United States citizen IRC § 2056A will have no application and therefore the Marital Trust will serve no purpose.
3. Mom and all of the adult children of Dad interested in the Trust have consented to the non-funding of the Trust and to payment of the assets that would otherwise be in the Trust directly to Mom, outright.
4. All required citations were properly served, no other appearances were made, and this court has jurisdiction over this matter.

5. The attorney ad litem has determined that non-funding of the Trust will be in the long term best interest of the minor and unborn contingent remainder beneficiaries since the elimination of the QDOT Trust will save attorneys' fees, accounting fees, and in all likelihood, estate taxes.

6. The Texas Trust Code permits in § 112.054 judicial termination of a Trust if circumstances not known to the settlor defeat or substantially impair the purpose of the Trust. I find that Mom's becoming a citizen of the United States defeats or substantially impairs the purpose of the Marital Trust which Dad established in his Will. That his wife would become a United States citizen was not known to Dad when he signed his Will or at the time of his death.

WHEREFORE IT IS HEREBY ORDERED that Mom is permitted not to fund the Dad Marital Trust;

AND IT IS FURTHER ORDERED that assets that would otherwise be placed in the Trust be distributed outright directly to Mom, free of Trust;

AND IT IS FURTHER ORDERED that the Dad Marital Trust is hereby terminated pursuant to Texas Trust Code § 112.054.

Signed this ____, day of _____.

JUDGE

EXHIBIT G-1

CAUSE NO. _____

IN THE MATTER OF	§	IN THE DISTRICT COURT OF
	§	
THE FAMILY 1999 CHARITABLE	§	
REMAINDER UNITRUST WITH MAKEUP,	§	
MOM, INCOME BENEFICIARY;	§	
	§	
THE FAMILY 2000 CHARITABLE	§	
REMAINDER UNITRUST WITH MAKEUP,	§	TRAVIS COUNTY, TEXAS
MOM INCOME BENEFICIARY; AND	§	
	§	
THE FAMILY 2003 CHARITABLE	§	
REMAINDER UNITRUST WITH MAKEUP,	§	
MOM, INCOME BENEFICIARY	§	
	§	
	§	
	§	_____ JUDICIAL DISTRICT

PETITION FOR DECLARATORY JUDGMENT

PERMITTING ASSIGNMENT OF THE PRESENT VALUE OF EACH UNITRUST INTEREST TO INCOME BENEFICIARY, ASSIGNMENT OF THE PRESENT VALUE OF EACH REMAINDER INTEREST TO CHARITABLE REMAINDER BENEFICIARY, AND TERMINATION OF TRUSTS

TO THE HONORABLE JUDGE OF SAID COURT:

Come now (i) Mom, in her capacity as Donor and as the lifetime income beneficiary of a unitrust amount of each of the following three charitable remainder unitrusts (a) The Family 1999 Charitable Remainder Unitrust With Makeup (the “1999 Trust”) created under Agreement dated _____, 1999 (the “1999 Trust Agreement”, attached as **Exhibit A**), (b) The Family 2000 Charitable Remainder Unitrust With Makeup (the “2000 Trust”) created under Agreement dated _____, 2000 (the “2000 Trust Agreement”, attached as **Exhibit B**), (c) The Family 2003

Charitable Remainder Unitrust With Makeup (the “2003 Trust”) created under Agreement dated _____, 2003 (the “2003 Trust Agreement”, attached as **Exhibit C**); (ii) Friend, in his capacity as Trustee of the 1999 Trust, the 2000 Trust, and the 2003 Trust; and (iii) The Pretend Foundation, a Texas non-profit corporation that is the remainder beneficiary of the 1999 Trust, the 2000 Trust, and the 2003 Trust, and collectively file this Petition for Declaratory Judgment Permitting Assignment of the Present Value of Each Unitrust Interest to Income Beneficiary, Assignment of the Present Value of Each Remainder Interest to Charitable Remainder Beneficiary, and Termination of Trusts (the “Petition”). These parties collectively shall be referred to as “Applicants.” The 1999 Trust, the 2000 Trust and the 2003 Trust collectively shall be referred to as the “Trusts.” The 1999 Trust Agreement, the 2000 Trust Agreement, and the 2003 Trust Agreement collectively shall be referred to as the “Trust Agreements.” Applicants file this Petition to distribute the present value of the unitrust interest of each of the Trusts to the income beneficiary, to distribute the present value of the charitable remainder interest of each of the Trusts to the charitable remainder beneficiary, and to terminate each of the Trusts early. In support of this Petition, Applicants show the Court the following:

I. PARTIES

The following persons are interested parties in this matter:

1. Mom (“Mom”) is the Donor and lifetime income beneficiary of each of the Trusts. Mom is an adult who is domiciled in Williamson County and who resides at _____. There is no necessity to serve Mom with process at this time.
2. The Pretend Foundation is a Texas non-profit corporation that is the remainder beneficiary of each of the Trusts. The registered agent of The Pretend Foundation is

_____ whose address is _____. There is no necessity to serve The Pretend Foundation with process at this time.

3. Friend (“Friend”) is the Trustee of each of the Trusts. Friend is an adult who is domiciled in Travis County and who resides at _____. There is no necessity to serve Friend with process at this time.

4. The Attorney General of the State of Texas (the “Texas Attorney General”) is a proper party under Section 123.002 of the Texas Trust Code. TEX. PROP. CODE ANN. § 123.002 (Vernon 2010). Notice has been given to the Texas Attorney General pursuant to and in the manner required by Section 123.003 of the Texas Trust Code. TEX. PROP. CODE ANN. § 123.003 (Vernon 2010). The notice to the Texas Attorney General was delivered to the Office of the Attorney General, Consumer Protection Division, Charitable Trust Section, Attention: _____, P.O. Box 12548, Austin, Travis County, Texas 78711-2548. There is no necessity to serve the Texas Attorney General with process.

Mom, The Pretend Foundation, and Friend are all the necessary parties in this matter under Section 115.011 of the Texas Trust Code. TEX. PROP. CODE ANN. § 115.011 (Vernon 2010).

II. JURISDICTION AND VENUE

This suit is brought by Applicants under and pursuant to the terms, provisions, and requirements of the Texas Uniform Declaratory Judgments Act, Chapter 37 of the Civil Practice and Remedies Code of Texas. TEX. CIV. PRAC. & REMEDIES CODE ANN. §37.005 (Vernon Supp. 2010).

This Court has jurisdiction over this matter under Section 115.001(a) of the Texas Property Code (TEX. PROP. CODE ANN. §115.001(a) (Vernon 2010), and Section 112.054 of the Texas Property Code (TEX. PROP. CODE ANN. §112.054 (Vernon 2010)). This Court has venue to hear this matter under Section 115.002 of the Texas Trust Code since the situs of the administration of each of the Trusts is maintained in Austin, Travis County, Texas. TEX. PROP. CODE ANN. §115.002 (b)(2) (Vernon 2010). The Trustee also resides in Travis County, Texas.

III. FACTS

1. Mom, as Donor, created each of the Trusts. A copy of each of the Trust Agreements is attached as **Exhibits A, B, and C** and incorporated for all purposes.

2. Dad was appointed as the initial Trustee of each the Trusts. For health reasons, Dad resigned as Trustee of each of the Trusts on July 2, 2008. On that date, Mom, in her capacity as Trustee Appointer of each of the Trusts, appointed Friend as successor Trustee of each of the Trusts. Friend continues to serve as Trustee of each Trust. A copy of the Resignation of Trustee and Appointment of Successor Trustee for each of the Trusts is attached as **Exhibits D, E, and F** and incorporated for all purposes.

3. Under the terms of the 1999 Trust, Mom is entitled during her lifetime to receive the *lesser* of (i) the 1999 Trust income for the taxable year (as defined in Section 643(b) of the Internal Revenue Code (the “Code”)), and (ii) nine percent (9%) of the net fair market value of the assets of the 1999 Trust valued as of the first day of each taxable year of the 1999 Trust (the “1999 Trust Valuation Date”), plus any amount of the 1999 Trust income for such year that is in excess of the 9% of the net fair market value of the 1999 Trust assets valued for such year to the extent that the aggregate of all amounts paid to Mom in prior years was less than the aggregate

amount computed as 9% of the net fair market value of the 1999 Trust assets on the 1999 Trust Valuation Date. Such lifetime income payment to Mom is referred to in Article III of the 1999 Trust Agreement as the “unitrust amount”.

4. Under the terms of the 2000 Trust, Mom is entitled during her lifetime to receive the lesser of (i) the 2000 Trust income for the taxable year (as defined in Section 643(b) of the Code), and (ii) seven and one-half percent (7.5%) of the net fair market value of the assets of the 2000 Trust valued as of the first day of each taxable year of the 2000 Trust (the “2000 Trust Valuation Date”), plus any amount of the 2000 Trust income for such year that is in excess of the 7.5% of the net fair market value of the 2000 Trust assets valued for such year to the extent that the aggregate of all amounts paid to Mom in prior years was less than the aggregate amount computed as 7.5% of the net fair market value of the 2000 Trust assets on the 2000 Trust Valuation Date. Such lifetime income payment to Mom is referred to in Article III of the 2000 Trust Agreement as the “unitrust amount”.

5. Under the terms of the 2003 Trust, Mom is entitled during her lifetime to receive the lesser of (i) the 2003 Trust income for the taxable year (as defined in Section 643(b) of the Code), and (ii) six percent (6%) of the net fair market value of the assets of the 2003 Trust valued as of the first day of each taxable year of the 2003 Trust (the “2003 Trust Valuation Date”), plus any amount of the 2003 Trust income for such year that is in excess of the 6% of the net fair market value of the 2003 Trust assets valued for such year to the extent that the aggregate of all amounts paid to Mom in prior years was less than the aggregate amount computed as 6% of the net fair market value of the 2003 Trust assets on the 2003 Trust Valuation Date. Such lifetime income payment to Mom is referred to in Article III of the 2003 Trust Agreement as the “unitrust amount”.

6. As of _____, 2010, the assets of the 1999 Trust have a total cash value of \$_____, and consist of (i) a Variable Annuity with a cash value of \$_____; (ii) a Variable Annuity with a cash value of \$_____; and (iii) cash in the amount of \$_____. As of _____, 2010, the assets of the 2000 Trust have a total cash value of \$_____, and consist of (i) a Variable Annuity with a cash value of \$_____; (ii) a Variable Annuity with a cash value of \$_____; and (iii) cash in the amount of \$_____. As of _____, 2010, the assets of the 2003 Trust have a total cash value of \$_____, and consist of (i) a Variable Annuity with a cash value of \$_____; and (ii) a Variable Annuity with a cash value of \$_____.

7. The Trusts shall terminate on the date of Mom's death. After the death of Mom, the entire remaining amount in each of the Trusts is to be distributed to the charitable remainder beneficiary named in each of the respective Trust Agreements. In both the 1999 Trust Agreement and the 2000 Trust Agreement, Mom originally named The _____ Fund Program of _____ Foundation of Austin, Texas (a donor-advised fund) as the charitable remainder beneficiary. In the 2003 Trust Agreement, Mom originally named the Religious Charity (also known as the _____ Ministries) as the charitable remainder beneficiary. However, Article VI.A of each of the Trust Agreements authorizes Mom to remove the charitable remainder beneficiary named in each of the Trust Agreements and select a replacement charity as the charitable remainder beneficiary. On _____, 2009, pursuant to a separate Change in Remainder Beneficiary for each of the Trusts, Mom removed each of the charitable remainder beneficiaries originally named in the Trust Agreements and selected The Pretend Foundation as the replacement charity to be the charitable remainder beneficiary of the 1999 Trust, the 2000 Trust, and the 2003 Trust. Therefore, upon Mom's death, the entire remaining amount in each of the Trusts is to be distributed to The Pretend Foundation. The Pretend Foundation is an Austin-

based donor advised fund. A copy of the Change in Remainder Beneficiary for each of the Trusts is attached as **Exhibits G, H, and I** and incorporated for all purposes.

8. At the time she created the Trusts, Mom did not anticipate the economic downturn that began in 2008 and continues today. As a result of the poor economic conditions, The Pretend Foundation and those charities Mom intends to ultimately benefit, like many charitable organizations, are struggling financially and has a current need for additional revenue. The economic conditions have also negatively impacted the financial condition of Mom's business. As a result of the economic downturn, Mom is not currently receiving any salary, draw, or lease payments from her business. Moreover, in the investment environment that has existed since 2008, the rates of return described in each Trust Agreement are difficult to attain. For these reasons, Mom desires to accelerate the distribution of all the trust assets from each of the Trusts to the charitable remainder beneficiary and the lifetime income beneficiary and terminate each of the Trusts. Therefore, due to these unexpected circumstances, Mom seeks, as provided in Section 112.054 of the Texas Trust Code, (i) judicial modification of the Trusts authorizing the Trustee of each of the Trusts to distribute to Mom 72% of the current assets of each of the Trusts (which percentage shall equal the present value of the income beneficiary's interest in the assets of each of the Trusts) and to distribute to The Pretend Foundation 28% of the current assets of each of the Trusts (which percentage shall equal the present value of the charitable remainder beneficiary's interest in the assets of each of the Trusts); and (ii) judicial termination of each of the Trusts following the distribution of all of the assets of each of the Trusts to Mom and The Pretend Foundation.

9. Mom arguably is entitled to 86% of the remaining assets, since that is the true value of her life interest as computed under IRS Regulations using the Leimberg & LeClair software

program known as NumberCruncher. This petition requests a lower percentage since if the three trusts were created today, the maximum payout to Mom would be 5% annually. Interest rates have dropped to the point that charitable remainder trusts do not qualify as such if created in October 2010 at payouts above 5%. At a 5% payout rate, the present value of Mom's interest is 58% of the assets of the trusts. It seems inequitable to ignore the terms of the agreements, but yet also inequitable to imply that the payout rates called for in the agreements are easily obtainable. For this reason, we have averaged the 58% payout with the 86% payout, and request here a 72% payout to Mom, with the balance to charity. Mom does not anticipate any income tax deduction associated with the 14% increase in what the charity will receive. The details of this calculation are attached as **Exhibit J**.

10. Additionally, the parties request approval of a non-prorata distribution of assets. The trusts presently own annuities. Two of the annuities have surrender charges. Pretend Foundation has agreed to receive these two annuities and hold them until there is no surrender charge. Having the charity receive the annuities is advantageous from a tax perspective since the charity will not pay income tax on what it receives from the annuities. A non-prorata division results in a maximum payout for all involved. **Exhibit J** shows the proposed distribution to each of Mom and the charity.

11. For several reasons, the accelerated distribution of the assets of the Trusts and the early termination of the Trusts will not be detrimental to the charitable remainder beneficiary. First, Mom's physician, Dr. Somebody, has recently conducted a physical examination of Mom and has signed a letter stating, that to the best of his knowledge and belief, Mom does not have any medical condition that is expected to result in a shorter-than-average longevity under Table V of Section 1.72-9 of the Treasury Regulation for an individual of Mom's age. Mom has also

signed a similar letter. Therefore, the income beneficiary is not expected to receive a greater allocation of Trusts' assets than she would during the full term of the Trusts. Copies of Dr. Somebody's letter and Mom's letter are attached as **Exhibits K and L** and incorporated for all purposes.

12. Second, Article VI.A of each of the Trust Agreements authorizes Mom to remove the charitable remainder beneficiary named in each of the Trust Agreements and select a replacement charity as the charitable remainder beneficiary. As a result, The Pretend Foundation might receive more assets as part of the accelerated distribution and early termination of the Trusts.

13. Third, the values of the present interests of the income beneficiary and the charitable remainder beneficiary of each of the Trusts have been determined using the discount rate in effect under Section 7520 of the Code on the date of termination of the Trusts, and using the methodology under Section 1.664-4 of the Treasury Regulations for valuing interests in charitable remainder trusts.

14. Finally, the desired acceleration of the distributions and early termination of the Trusts are consistent with Internal Revenue Service Private Letter Rulings 200548023, 200543061, and 200208039 (collectively, the "Letter Rulings"). Copies of the Letter Rulings are attached as **Exhibits M, N and O** and incorporated for all purposes.

15. The accelerated distributions desired by Mom are also consistent with the terms of the Trust Agreements. Pursuant to Article VI.B of each of the Trust Agreements, the Trustee may, during the term of the Trust, accelerate charitable remainder distributions by distributing a portion of the Trust assets, as determined by the Trustee, to one or more charities selected by the Donor. In addition, the spendthrift provision in Article XVI of each of the Trust Agreements

specifically permits Mom to assign income or principal distributions from the Trusts to the remainder beneficiary, The Pretend Foundation.

16. All beneficiaries of the Trust are parties to this action.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, Applicants pray that the Court find that there is no need for appointment of an attorney ad litem since all beneficiaries of the Trust are parties to this action; that the Attorney General be served; and that upon final hearing, this Court enter its final judgment as follows:

(1) providing that the Trustee of each of the Trusts shall distribute 72% of the current assets of each of the Trusts to Mom and 28% of the current assets of each of the Trusts to The Pretend Foundation;

(2) providing that each of the Trusts shall terminate pursuant to Section 112.054 of the Texas Trust Code as of the effective date of the document by which the Trustee of each of the Trusts distributes 72% of the total assets of the Trusts to Mom and 28% of the total assets of the Trusts to The Pretend Foundation; and

(3) granting such other and further relief, both legal and equitable, to which Applicants may be justly entitled.

Respectfully submitted,

DuBOIS, BRYANT & CAMPBELL, LLP
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Austin, TX 78701
(512) 457-8000
(512) 457-8008 (Facsimile)

By: _____

Michele A. Mobley
State Bar No. 14238250
William S. Rhea
State Bar No. 16807100

ATTORNEYS FOR APPLICANTS

[EXHIBITS OMITTED]

Charitable Remainder Unitrust With Makeup (the “2000 Trust”) created under Agreement dated December 27, 2000, and (c) The Family 2003 Charitable Remainder Unitrust With Makeup (the “2003 Trust”) created under Agreement dated December 17, 2003; (ii) Friend, in his capacity as Trustee of the 1999 Trust, the 2000 Trust, and the 2003 Trust; and (iii) The Pretend Foundation, a Texas non-profit corporation that is the remainder beneficiary of the 1999 Trust, the 2000 Trust, and the 2003 Trust (which are collectively referred to as the “Trusts”).

The Court, having considered the Petition, the evidence, and the submission by the Texas Attorney General finds that (i) this Court has jurisdiction and venue over this matter; (ii) all interested parties, proper parties, and beneficiaries of the Trusts are parties to this action or have been give proper notice of this action; (iii) there is no need for the appointment of an attorney ad litem since all beneficiaries of the Trusts are parties to this action; (iv) the Texas Attorney General has been properly notified of this action; (v) all interested parties and proper parties agree that it is in the best interest of the Trusts to grant the Petition; and (vi) the Petition should be GRANTED.

IT IS THEREFORE ORDERED that:

(1) the Trustee of each of the Trusts shall distribute seventy-two percent (72%) of the total assets of the Trusts to Mom and twenty-eight (28%) of the total assets of the Trusts to The Pretend Foundation;

(2) shall distribute each annuity that has a surrender charge in-kind to The Pretend Foundation as part of its 28% share; and

(3) each of the Trusts shall terminate pursuant to Section 112.054 of the Texas Trust Code as of the effective date of the document by which the Trustee of each of the Trusts distributes the assets as directed in this Order.

SIGNED this _____ day of _____, 2010

JUDGE PRESIDING

APPROVED AS TO FORM AND CONTENT:

Mom, in her capacity as Donor and as the lifetime income beneficiary of a unitrust amount of the 1999 Trust, the 2000 Trust, and the 2003 Trust

Friend, in his capacity as Trustee of the 1999 Trust, the 2000 Trust, and the 2003 Trust

The Pretend Foundation, as the remainder beneficiary of the 1999 Trust, the 2000 Trust, and the 2003 Trust

By: _____

Its President

EXHIBIT H

Attached to and made a part of
United States Estate (and Generation-Skipping Transfer)
Tax Return (Form 706)
MOM
Social Security Number: ____-____-____

STATEMENT REGARDING UNFUNDED FAMILY TRUST CREATED UNDER THE WILL OF MOM

The Last Will and Testament of Mom (the “Decedent”) was executed on _____, 2010 and was admitted to Travis County Probate Court Number One of Travis County, Texas in Cause No. C-1-PB-12-_____. Mom died on July 29, 2012. Prior to the Decedent’s death, on _____, 2010, Decedent and her husband, Dad, amended and restated the Family Community Trust which was created under agreement dated July 31, 1980, and changed the name of the Family Community Trust to the Dad and Mom Trust. Mom’s husband, Dad died on _____, 2012, less than three months after the Decedent.

Article IV of the Decedent’s Will provides that the Decedent’s remaining property passes to the Dad and Mom Trust. Article 4 of the Dad and Mom Trust provides that, after Decedent’s death, a pecuniary gift of the Tax Sheltered Amount (defined in the Dad and Mom Trust Agreement) shall be allocated to the Family Trust. The provisions for administration and distribution of the Family Trust are described in Article 7 of the Dad and Mom Trust Agreement, and provide that at the death of the surviving spouse, the Family Trust terminates and after payment of debts and expenses, distributes to beneficiaries named in the Trust Agreement.

Because Dad’s death occurred less than three months after Mom’s death, the Family Trust created under the Dad and Mom Trust had not yet been created or funded prior to Dad’s death. The Executor has administered the estate and has reported the distributions shown on the Decedent’s estate tax return as they would have been reported if the Family Trust had been created and then distributed as described upon the later death of Dad as the surviving spouse. In an effort to simplify the administration of Decedent’s estate, the Executor plans to omit the formal creation of the Family Trust, funding of the assets directed by Decedent’s will to pass to the Family Trust, but has allocated the tax-free amount as instructed by the terms of the Family Trust upon the death of Dad, and has allocated the GST Exempt Amount directly to the trusts created upon termination of the Family Trust, since the Family Trust is GST Exempt.

Copies of the Decedent’s Will and the Mom and Dad Trust are attached to this return.