

**WHO WOULD HAVE THOUGHT:
CHARITABLE TRUSTS AS A VIABLE ENTITY**

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WHO WOULD HAVE THOUGHT: CHARITABLE TRUSTS AS A VIABLE ENTITY¹

I. INTRODUCTION

In the modern era of exempt organizations, the overwhelming majority of organizations are formed as nonprofit corporations. In 2005 it was estimated that of 650,000 recognized charities only 12,422 were trusts. See Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?*, 80 Chicago-Kent L. Rev. 641, n. 1 (2005). This paper will focus on this more rare choice of form, the charitable trust, answering a series of questions in order to address the laws that govern charitable trusts, drafting considerations, filing requirements, and procedures for modifying, converting, and terminating charitable trusts.

The focus of this paper will be on the viability of charitable trusts. The Merriam – Webster online dictionary defines viability in this context as “capable of working, functioning, or developing adequately” as in a “viable alternative.” The focus then of this paper will be when the charitable trust is an alternative capable of working for the creators and of developing in a way that benefits the charitable purpose. This paper will not spend a great deal of time distinguishing charitable trusts from nonprofit corporations. For discussion in that regard, the reader is encouraged to see Terry Lynn Helge’s paper “Charitable Trusts v. Nonprofit Corporations” presented to the 2011 Nonprofit Organizations Institute at the University of Texas School of Law. This paper seeks to build upon the paper presented by Shannon Guthrie at the State Bar of Texas Governance of Nonprofit Organizations course in 2008 entitled “Charitable Trusts—the Good, the Bad and the Not So Ugly.” Readers are encouraged to consult Ms. Guthrie’s paper for additional information regarding charitable trusts.

A. Definition

At its simplest, a charitable trust is a fiduciary relationship with respect to property whereby property is held in trust for charitable purposes. The Restatement of Trusts describes it as a “fiduciary relationship with respect to property arising as a result of the manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.” Restatement of Trusts § 348. Texas law defines a charitable trust as “a charitable entity, a trust the stated purpose of which is to benefit a charitable entity, or an inter vivos or testamentary gift to a charitable entity.” Tex. Prop. Code § 123.001(2). Charitable trusts are the oldest form of nonprofit

“entity” tracing their roots back to the Statute of Charitable Uses of 1601. 43 Elizabeth, Chapter 4 (England 1601).

This paper will refer to charitable trusts as an “entity” and discuss using the charitable trust “form.” However, a charitable trust is not, in truth, an entity for state law purposes. Rather, it is a fiduciary relationship with respect to property. This becomes clear in the litigation context where the trust is not a proper party to litigation; rather, the trustee is the proper party. See *Huey v. Deshazo*, 922 S.W.2d 920, 926 (Tex. 1996). Likewise, as will be discussed below, the trustee does not owe duties to the trust in the way that a director owes duties to a corporation. Instead, the trustee owes duties to the charitable purpose and to the beneficiaries (either specified or the public). See *Alpert v. Riley*, 274 S.W.3rd 277, 291 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); Tex. Prop. Code § 113.051.

Section 4947(a)(1) of the Internal Revenue Code of 1986 (the “Code”) speaks to a specific type of charitable trust referred to as a nonexempt trust. This type of charitable trust is a trust which is not exempt from taxation under Section 501(a) of the Code, all of the unexpired interests of which are devoted to one or more of the purposes described in Section 170(c)(2)(b), and for which a deduction was allowed for income, estate, or gift tax purposes. See IRC § 4947(a)(1). Such a nonexempt trust is treated as an organization described in Section 501(c)(3) and categorized as a private foundation. See *id.* Nonexempt charitable trusts will be discussed in Section I. C. below.

B. As Distinguished from Private Trusts

Charitable trusts are distinguishable from private trusts under Texas law on a couple of significant bases. First, unlike private trusts, charitable trusts are created for charitable purposes with the beneficiaries constituting specific named charities or charitable purposes as opposed to private individuals. Unlike private trusts, charitable trusts are not required to have an ascertainable beneficiary. Charitable trusts may have a specific and ascertainable beneficiary (a specific charitable organization with a charitable trust operating as a supporting organization); however, if no specific beneficiary is named, then the public is the beneficiary. See *Eldridge v. Marshall Nat. Bank*, 527 S.W.2d 222, 228–29 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref’d n.r.e).

In addition to the difference in character of beneficiaries, charitable trusts differ from private trusts under Texas law in that the rule against perpetuities does not apply to charitable trusts. See Tex. Prop. Code § 112.036. Whereas private trusts are limited by the rule against perpetuities (an interest is not good unless it must vest, if at all, not later than 21 years after

¹ The author wishes to thank Megan A. Cunningham for her assistance on portions of this paper.

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some life in being at the time of the creation of the interest, plus a period of gestation), charitable trusts are excluded from application of the rule against perpetuities. *See id.* This freedom from application of the rule against perpetuities allows charitable trusts to be formed for an indefinite and even perpetual duration. *See Boyd v. Frost Nat. Bank*, 196 S.W.2d 497 (Tex. 1946).

Finally, charitable trusts differ from private trusts in that private trusts are, for lack of a better term, more private. Charitable trusts seeking exemption under Section 501(c)(3) are required to file Form 1023. Charitable trusts that are formed as private foundations, whether under Section 501(c)(3) or Section 4947, must file Form 990-PF annually. Private trusts do not have such filing requirements, and the Form 1144 filed by private trusts is not open to public inspection unlike the Form 1023 and Form 990-PF for charitable trusts as will be discussed below.

C. Split Interest Trusts and Section 4947

Purely charitable trusts are trusts all of the interests of which are dedicated to charitable purposes. Split interest trusts include trusts such as charitable remainder trusts and charitable lead trusts which are split between charitable and private purposes. Such trusts are beyond the scope of this paper. For more information on charitable remainder trusts and charitable lead trusts the reader is encouraged to see *Charitable Lead Trust Reference Outline* and *Charitable Remainder Trust Reference Outline* available at www.bwwlaw.com/resources-seminars/resources-seminars-archives/. However, when all non-charitable interests have expired with respect to charitable remainder trusts, such trusts will become subject to Section 4947 of the Code as purely charitable trusts.

Purely charitable trusts may or may not be exempt. Section 4947 of the Code subjects certain nonexempt charitable trusts to the requirements and restrictions imposed on private foundations. *See* Treas. Reg. § 53.4947-1(a). These rules apply to trusts that are (1) not exempt under Section 501(a) of the Code, (2) all unexpired interests of which are dedicated to charitable purposes, and (3) for which a charitable deduction was allowed under the income tax, gift tax, or estate tax regime. *See id.* For purposes of Section 4947, unless proven otherwise, it will be presumed that such deduction was taken if it would be allowable under the Code. *See id.* Section 4947 typically applies to trusts in which all unexpired interests consist only of charitable income and remainder interest, or trusts in which all existing interests are charitable remainder interests were the trustee must hold all of those unexpired interests in trust for the benefit of a

charitable remainder beneficiary.² *See* Bruce R. Hopkins and Jody Blazek, *Private Foundations: Tax Law and Compliance* (John Wiley & Sons, Inc., 3rd Ed. 2008), p. 130.

The basic purpose of Section 4947 is to prevent nonexempt trusts from being used to avoid the requirements applicable to private foundations. *See* Treas. Reg. § 53.4947-1(a). To the extent of their charitable interests, nonexempt charitable trusts meeting the above points serve similar functions as private foundations and as such, unless a charitable trust qualifies as a public charity under Section 509 of the Code, the charitable trust will be treated as a private foundation, subject to the provisions of Sections 507 to 509 (except for the notification requirements of Section 508) and the excise taxes set forth in Chapter 42 of the Code. *See id.* Accordingly, nonexempt charitable trusts must file Form 990-PF, pay excise taxes on investment income under Section 4940(b), and file Form 1041 and pay normal income tax to the extent of any taxable income. *See* Treas. Reg. § 53.4947-7(b).

A charitable trust created by a will is considered a charitable trust under Section 4947 as of the date of death of the decedent-grantor. *See* Treas. Reg. § 53.4947-1 (2009). A revocable trust which becomes irrevocable upon the death of the decedent-grantor in which all unexpired interests are charitable and under the terms of the document, the trustee is to hold some or all of the net assets in trust after becoming irrevocable solely for charitable beneficiaries, is not considered a charitable trust under Section 4947 until a “reasonable period of settlement” after becoming irrevocable. *See id.* Likewise, a revocable trust becoming irrevocable upon the death of the decedent-settlor or a testamentary trust from which the trustee is required to distribute all of the net assets in trust for, or free of trust to, charitable beneficiaries is not considered a charitable trust under Section 4947 until a reasonable period of settlement after becoming irrevocable. *See id.*

If the donor to a charitable trust forgoes any type of income tax, gift tax, or estate tax deductions for the gift to the trust, the trust will escape the provisions of Section 4947(a)(1) and will not be subject to the

² Treas. Reg. § 53.4947-1 includes the following example: X creates an inter vivos trust under which two tax-exempt charities are benefited by the trust income for a period of 10 years, and the corpus is to be distributed to a third tax-exempt organization at the termination of the 10-year period. X is allowed an income tax deduction for what he places in the trust, but X as trustee does not seek qualification of the trust as a tax-exempt entity under Section 501(a). Therefore, the trust will be considered a charitable trust under Section 4947 from the date of its creation, invoking the requirements applicable to private foundations.

private foundation rules. *See* PLR 9726009; PLR 9209016. For example, where the grantor-decedent never took a charitable deduction under Section 170 for his gift to a purely charitable trust, and the estate took no deduction under Section 2955 or 642(c), the IRS found that the trust, otherwise meeting the description of a charitable trust under Section 4947, would not be treated as a private foundation under this provision. *See* PLR 9726009. Also, where two shareholders transferred all of their voting stock to a nonexempt trust, with a sole private foundation as its beneficiary, the IRS held the trust was not a charitable trust under Section 4947 because they did not take a gift tax deduction and no other person or entity had taken any type of deduction for the transfer of stock. *See* PLR 9209016. Therefore, the private foundation rules were held to be inapplicable to the purely charitable trust. *See id.* The IRS's decision in both of these instances was based upon the fact that no deductions had ever been taken, and upon condition that no deductions would be taken in the future by any person or entity. *See* PLR 9726009; PLR 9209016.

D. As Distinguished from Nonprofit Corporations

Charitable trusts have a multitude of differences for nonprofit corporations. For a more in-depth review of this subject, readers are encouraged to consult Terry Lynn Helge's paper "Charitable Trusts v. Nonprofit Corporations" presented at the University of Texas School of Law 2011 Nonprofit Organizations Institute. Generally speaking, charitable trusts are not subject to as detailed statutory norms as those contained in the Texas Business Organizations Code. Furthermore, the corporate formalities of business organizations are not applicable to charitable trusts. Charitable trusts are not required to file their organizing document with the Texas Secretary of State because they are not creatures of the state. In addition, if a nonprofit corporation wishes to change its domicile, it is free to do so. However, if a charitable trust wishes to move outside the State of Texas, the trustee must go through a process involving consultation with a living settlor, making a proposal to the attorney general, and filing an action in the district court or statutory probate court in the county of the trust situs seeking such permission. *See* Tex. Prop. Code § 113.030.

In addition to these issues, the application of the fiduciary law with respect to charitable trusts is widely considered to differ from nonprofit corporations. Despite the difference in choice of form, all decisionmakers have certain fiduciary duties to the organizations they serve. While both trustees and corporate directors owe fiduciary duties as a matter of law, Texas law provides that directors are not trustees and the duties owed by directors differ from those

owed by trustees. *See* Tex. Bus. Org. Code § 22.223. Although, this difference in application is generally true, because of the flexibility afforded to the settlor in drafting a charitable trust, the standards applicable to trustees can nevertheless be relaxed. For example, while the business judgment rule applies to directors of nonprofit corporations shielding such directors from liability for simple negligence, charitable trustees are generally liable for simple negligence, unless the trust instrument provides otherwise.

In addition to the difference in application of fiduciary duties, the duties of trustees in investing assets differ from the duties of directors of nonprofit corporations. More specifically, nonprofit corporations are generally subject to the Texas Uniform Prudent Management of Institutional Funds Act (TUPMIFA). On the other hand, charitable trusts are generally not subject to TUPMIFA, but rather are governed by the Uniform Prudent Investor Act and the Uniform Principal and Income Act. TUPMIFA applies to organizations that manage and invest "institutional funds" exclusively for charitable purposes. *See* Tex. Prop. Code § 163.003(4). However, TUPMIFA specifically excludes funds held by a trustee that is not an institution. The term "institution" is defined to include nonprofit corporations, unincorporated associations, and other types of entities organized exclusively for charitable purposes, including private foundations. As such, unless a charitable trust is governed by a charitable organization serving as the trustee, TUPMIFA will not apply. Stated differently, TUPMIFA does not apply to charitable trusts managed by corporate or individual trustees. Accordingly, the vast majority of charitable trusts (those having individual or corporate trustees) are not subject to TUPMIFA.

II. WHAT LAW GOVERNS CHARITABLE TRUSTS?

A. Texas Trust Code

Charitable trusts are governed by the Texas Trust Code which includes provisions specifically addressed to charitable trusts as well as provisions applying to all express trusts under Texas law. The Texas Trust Code is codified at Title IX, Subtitle B of the Texas Property Code. Importantly, the Texas Trust Code provides the applicable rules when the trust instrument is silent. Stated differently, the trust instrument controls provided that the terms of the trust may not limit the requirements imposed under Section 112.031 (providing that the terms of the trust may not require the trustee to commit a criminal or tortious act or an act that is contrary to public policy); may not limit the applicability of Section 114.007 (prohibiting

exculpation of a trustee of liability for a breach of trust committed in bad faith, intentionally, or with reckless indifference to the interests of the beneficiary or relieving a trustee of liability for any profit derived by the trustee from a breach of trust); may not limit the period of limitation for commencing judicial proceedings regarding the trust; may not limit a trustee's duty to respond to a demand for accounting or a trustee's duty to act in good faith and in accordance with the purposes of the trust; may not limit the power of the court, in the interest of justice, to take action or exercise jurisdiction including the power to modify or terminate a trust under Section 112.054, remove a trustee under Section 113.082, exercise jurisdiction under Section 115.001, or adjust or deny a trustee compensation in the event of a breach of trust; and may not limit the applicability of Section 112.038 (regarding forfeiture provisions). *See* Tex. Prop. Code § 111.0035(b). Aside from the foregoing list, the terms of the trust can be as flexible as desired by the settlor and will control over the Texas Trust Code.

B. UPIA

As referenced above, charitable trusts are subject to the Uniform Principal and Income Act and the Uniform Prudent Investor Act (sometimes referred to as the "UPIA Twins"). The Uniform Principal and Income Act is contained in Chapter 116 of the Texas Property Code, while the Uniform Prudent Investor Act is contained in Chapter 117 of the Texas Property Code. For purposes of charitable trusts, the Uniform Prudent Investor Act carries more significance. Generally, the Uniform Principal and Income Act has little relevance to purely charitable trusts as such trusts operate as private foundations under the Code and are thus required to distribute 5% of their net assets (regardless of how principal and income are allocated) and pay an excise tax on net investment income which is based upon the federal definition contained in Section 4940(c) of the Code. However, the Uniform Principal and Income Act could come into play with a purely charitable trust in the event the trust instrument makes specific use of the state definitions, such as requiring the annual distribution to be the greater of the minimum distribution amount under Section 4942 of the Code or trust income.

On the other hand, the Uniform Prudent Investor Act (hereafter "UPIA"), adopted by Texas in 2004 governs the standard of investment of assets for trusts created in Texas, including purely charitable trusts. As with other sections of the Trust Code, UPIA is a default rule which may be expanded, restricted, eliminated, or otherwise altered by the provisions of the trust instrument. UPIA sets out a trustee's duty to beneficiaries providing that a trustee who invests and

manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set out in Texas Property Code Section 117.004. Because charitable trusts are not required to have ascertainable beneficiaries, this prudent investor rule, in the absence of an ascertainable beneficiary, is owed to the public in charity and thus enforceable by the Texas Attorney General. The prudent investor rule provides that a trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying such standard, the trustee is to exercise reasonable care, skill, and caution. *See* Tex. Prop. Code § 117.04(a).

The prudent investor rule provides that a trustee's investment and management decisions respecting individual assets are to be evaluated in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust as opposed to being evaluated in isolation. Among circumstances a trustee is to consider in investing and managing trust assets are the following to the extent same are relevant to the trust or its beneficiaries: (1) general economic conditions; (2) the possible effect of inflation or deflation; (3) the expected tax consequences of investment decisions or strategies; (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (5) the expected total return from income and the appreciation of capital; (6) other resources of the beneficiary; (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and (8) the assets' special relationship or special value, if any, to the purposes of the trust or to one or more the beneficiaries. *See* Tex. Prop. Code § 117.004(b)–(c). Clearly certain factors will have more significance to purely charitable trusts.

UPIA sets out specific obligations of trustees. For example, UPIA requires a trustee to make a reasonable effort to verify facts relevant to the investment and management of trust assets. *See* Tex. Prop. Code § 117.004(d). UPIA requires that a trustee who has special skills or expertise, or is named trustee in reliance on the trustee's representation that he has special skills or expertise, has a duty to use those special skills or expertise. *See* Tex. Prop. Code § 117.004(f). Trustees are further required to diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversification. *See* Tex. Prop. Code § 117.005. UPIA requires that within a reasonable time after accepting a trusteeship or receiving trust assets, a

trustee is to review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of Chapter 117. *See* Tex. Prop. Code § 117.006. A trustee is to invest and manage the trust assets solely in the interest of the beneficiaries (including the public and charity) acting exclusively for the beneficiaries as opposed to acting for the trustee's own interest or that of third parties. *See* Tex. Prop. Code § 117.007. Where a trust has two or more specifically ascertainable beneficiaries, the trustee is to act impartially in investing and managing the trust assets taking into account any differing interests of the beneficiaries. *See* Tex. Prop. Code § 117.008. In investing and managing trust assets, a trustee may only incur costs appropriate and reasonable in relation to the assets, the purpose of the trust, and the skills of the trustee. *See* Tex. Prop. Code § 117.009. Determination as to whether a trustee has complied with the foregoing rules is based on the facts and circumstances as they existed at the time the investment. *See* Tex. Prop. Code § 117.110.

UPIA allows a trustee to delegate investment management functions that a prudent trustee of comparable skills would properly delegate under the circumstances. *See* Tex. Prop. Code § 117.011. A trustee must exercise reasonable care, skill, and caution in selecting the agent, establishing the scope in terms of the delegation, consistent with the purposes and terms of the trust, and periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. *See id.* In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. *See id.* A trustee who complies with the requirements of exercising reasonable care, skill, and caution as addressed above will not be liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the functions were delegated unless the agent is an affiliate of the trustee, under the terms of the delegation the trustee or beneficiary of the trust is required to arbitrate disputes with the agent, or the period for bringing an action by the trustee or beneficiary of the trust with respect to an agent's actions is shortened from that which is applicable to trustees under Texas law. *See id.*

C. Common Law (especially law of cy pres, equitable deviation)

In addition to being subject to the statutory requirements addressed above, charitable trusts are also subject to common law. Most important among the common law rules applicable to charitable trusts are the

rules relating to modification of provisions of charitable trusts including the cy pres doctrine and the doctrine of equitable deviation. Cy pres is an equitable procedure used to reform a charitable trust in order to prevent the trust from failing when the purpose becomes impossible, inexpedient, or impracticable of fulfillment (or already accomplished). Cy pres allows for the substitution of another charitable purpose that is as close as possible to the original charitable purpose. Whereas cy pres applies to substitute a charitable purpose when the original charitable purpose becomes impossible, inexpedient, or impracticable of fulfillment, equitable deviation allows for the modification of an administrative provision of the trust when compliance with the administrative provision is impossible or illegal, or owing to circumstances not anticipated by the settlor, compliance with the terms substantially impede the completion of the purpose of the trust. Both of these common law doctrines have been codified as part of the Texas Trust Code. Section 112.054 covers judicial modification of charitable trusts (in addition to private trusts) and as such cy pres or equitable deviation actions are brought pursuant to Section 112.054. On the other hand, if a named charitable beneficiary of a trust fails (does not exist at the time of charitable entity's interest in the trust becomes vested, ceases to exist during the term of the trust, or ceases to be a charitable entity during the term of the trust) the trust instrument controls the naming of a successor charitable entity and in the event no provision exists for replacing a failed charitable beneficiary, the trustee of a trust may select one or more replacement charitable beneficiaries having the same or similar charitable purpose as the failed charitable beneficiary. *See* Tex. Prop. Code § 113.026. In such event, no judicial action is required; provided, however, to the extent the settlor is living and not incapacitated and the trustee and settlor cannot agree on the selection of replacement charitable beneficiary, notice is to be given to the attorney general who shall then refer the matter to the district court in the county in which the trust was created with the court to select a replacement charitable beneficiary. *See* Tex. Prop. Code § 113.026(g).

D. Chapter 123 Texas Property Code

In addition to investigative authority under various Texas statutes, Chapter 123 of the Texas Property Code specifically governs attorney general participation in proceedings involving charitable trusts. As referenced above, for purposes of Chapter 123 the term "charitable trust" means a charitable entity, a trust the stated purpose of which is to benefit a charitable entity, or an inter vivos or testamentary gift for a charitable entity. The phrase "proceeding involving a charitable trust"

means a suit or other judicial proceeding the object of which is to:

1. Terminate a charitable trust or distribute its assets to other than charitable donees;
2. Depart from the objects of the charitable trust stated in the instrument creating the trust, including a proceeding in which the doctrine of cy pres is invoked;
3. Construe, nullify, or impair the provisions of the testamentary or other instrument creating or affecting a charitable trust;
4. Contest or set aside the probate of an alleged will under which money, property, or another thing of value is given for charitable purposes;
5. Allow a charitable trust to contest or set aside the probate of an alleged will;
6. Determine matters relating to the probate and administration of an estate involving a charitable trust; or
7. Obtain a declaratory judgment involving a charitable trust. *See* Tex. Prop. Code § 123.001(3).

With respect to the very broad list of proceedings involving a charitable trust, Chapter 123 provides that the attorney general is a proper (although not necessary) party. Chapter 123 provides that the attorney general must receive notice and have a right to intervene on behalf of the public. While Chapter 123 does not provide any substantive rights to the attorney general, a judgment in a proceeding involving a charitable trust where the attorney general is not given notice of the proceeding as required by Chapter 123 is voidable and may be set aside on motion of the attorney general after the judgment is rendered. The same is true for a compromise, settlement agreement, contract, or judgment relating to a proceeding involving a charitable trust. To protect against the possible setting aside of a judgment, the party instituting a proceeding involving a charitable trust should ensure that notice is given as required by Chapter 123 and that the attorney general has declined in writing to be a party to the proceeding or has approved and joined in the compromise, settlement agreement, contract, or judgment. *See* Tex. Prop. Code § 123.004. Further discussion of Chapter 123 notice is included in Section VII below.

III. HOW ARE CHARITABLE TRUSTS GOVERNED?

Unlike nonprofit corporations which must have a minimum of three directors unless they are governed by members without a board of directors, charitable

trusts can be governed by any number of trustees, including a single trustee. Trustees may be individuals or corporate trustees and do not have to be Texas residents. However, if a trustee is corporation, it must have the power to act as a trustee in Texas. *See* Tex. Prop. Code § 112.008. Trustees may be related, as in case of an all family board of a family foundation.

In addition to providing flexibility in the character of the trustees (allowing corporate trustees as well as individuals) and number of trustees (allowing any number of trustees) charitable trusts also provide flexibility with respect to the functions of trustees.

In the corporate context directors individually owe fiduciary duties, but act as a board. In the context of charitable trusts, trustees owe individual fiduciary duties and may act individually within their assigned roles. The Texas Trust Code provides by default, that in the event there are multiple trustees, the trustees act by majority vote. However, this provision can be modified by the trust instrument. This allows for roles to be separated such that one or a group of trustees may be the management trustees, one or a group of trustees may handle administrative matters, and one or a group of trustees may handle operational issues such as trust distributions for charitable purposes (i.e. the grantmaking function).

Notwithstanding the number of trustees or the roles of such trustees, all trustees owe duties of care, loyalty, and obedience. To satisfy the duty of care, trustees are called upon to exercise care and skill that a person of ordinary prudence would exercise in dealing with that person's own profits. Unless otherwise provided by the trust instrument, trustees of charitable trusts are liable for simple negligence in the performance of their duties. The duty of care begins with the trustee assuming the duties of trustee (Texas Property Code § 117.006) and thereafter requires that the trustee administer the trust in good faith according to its terms, the Trust Code, and were not inconsistent, duties imposed on trustees of common law. *See* Tex. Prop. Code § 113.051. Trustees of have a duty to make the assets of the trust productive while properly managing, supervising, and safeguarding trust funds. *See InterFirst Bank Dallas v. Risser*, 739 S.W.2d 882, 900 (Tex. App.—Texarkana 1987, no writ). As addressed above, in a trust to which the UPIA applies, the performance of the entire portfolio should be considered rather than focusing only on individual investments when determining the productivity of assets of the trust. *See* Tex. Prop. Code § 117.004.

The duty of loyalty mandates that a trustee administer the trust property solely for the benefit of beneficiaries, avoiding any transaction that would benefit the trustee to the detriment of the beneficiaries. To ensure compliance with the strict duty of loyalty,

the law prohibits conflict of interest transactions even where such transactions are fair to beneficiaries, unless the trustee made full disclosure of the transaction and obtained the consent of the beneficiaries. *See* Tex. Prop. Code §§ 113.060; 117.007. The trustee bears the burden to demonstrate full disclosure and consent in such circumstances. If the trustee is unable to satisfy this burden, the transaction may be set aside regardless of its fairness to beneficiaries. A loan of trust funds to the trustee or a purchaser sale by the trustee of a trust property from or to (1) the trustee or an affiliate; (2) a director, officer, or employee of the trustee or an affiliate; (3) a relative of the trustee; or (4) the trustee's employer, partner, or other business associates may be set aside irrespective of disclosure. *See* Tex. Prop. Code §§ 113.052; 113.053. Notwithstanding the foregoing, a settlor may allow self-dealing transactions through the terms of the trust instrument.

The third duty, often overlooked, is the duty of obedience. The duty of obedience is the duty to adhere to the terms of the trust and ensure charitable assets are not diverted to non-charitable purposes. To satisfy the duty of obedience it is imperative that the trustees know and understand the trust's charitable purposes, the terms of the trust, and that the trustees oversee the trust to ensure that such purposes and terms are fulfilled.

IV. WHEN IS A CHARITABLE TRUST PARTICULARLY VIABLE (OR NOT)?

A. Grantmakers, Endowments, and Other Non-Operating Entities

Nonprofit organizations can be formed as unincorporated associations, charitable trusts, nonprofit corporations, and in some circumstances limited liability companies. Typically, the unincorporated association is utilized for small organizations or churches and the limited liability company is utilized for subsidiary organizations. Therefore the question arises, when is a charitable trust appropriate, as opposed to a nonprofit corporation. As addressed above, the overwhelming majority of nonprofit entities are formed in the corporate form. However, charitable trusts should be considered in certain circumstances. In particular, charitable trusts should be considered for non-operating entities such as grantmaking foundations (both private foundations as well as community foundations), entities holding endowment assets or land when the assets come from sources outside of the beneficiary³ or in other situations in which there is a specific desire to operate in the trust form to provide

for added rigidity of structure in assurance to the settlor that the purposes he or she has established will be followed or to provide for additional privacy.

B. Operating Entities

On the other hand, operating entities are generally formed as nonprofit corporations to allow for greater flexibility in amendment, application of the business organization statutes under Texas law which provide for certain protections to directors including rights of indemnification, the business judgment rule, etc., and the ability to pay a lower tax rate on unrelated business taxable income. Nevertheless, aside from the unrelated business taxable income issue, the benefits of the corporate form can be carried over into the charitable trust form through creative drafting allowing for a charitable trust to be governed by a board of trustees who appoint officers of the trust thereby delegating certain activities to those officers, by calling for meetings, by providing for indemnification and exculpation rights, etc. While all of this is possible, it typically takes a greater level of detail in the drafting process and thus adds complexity and costs.

C. Tax Issues

A difference that can be overlooked with respect to choosing between a charitable trust and a nonprofit corporation is the amount of unrelated business taxable income expected. Charitable trusts pay the trust tax rate (35%) on unrelated business taxable income when net taxable income exceeds \$11,200. Nonprofit corporations (subject to corporate tax rates) do not reach the rate of 35% until taxable income exceeds \$10 million. As such, if high levels of unrelated business taxable income are expected, this difference should be considered.

V. HOW IS A CHARITABLE TRUST CREATED?

D. What Provisions Must Be Included?

A charitable trust is created by a property owner's declaration that the owner holds the property as trustee for another person; a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person; a property owner's testamentary transfer to another person as trustee for a third person; an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or a promise to another person whose rights under the promise are to be held in trust for a third person. *See* Tex. Fraud Code § 112.001. Generally, a charitable trust is created through the creation of a trust instrument known as a declaration of trust, whereby the trustee declares that

³ If the source of the funds is the beneficiary charity such assets will not be protected by spendthrift clause.

he, she, or it holds the property as trustee for another person (i.e. a charity) or for a charitable purpose. *See id.* at § 12.001(1). The declaration of trust must include the name of the trust, the name of the settlor, the names of the trustees, the beneficiaries (or charitable purposes), the period of duration (which may be perpetual), the method for selecting successor trustees, a statement of dedication of the assets to charitable purposes on termination, the information required by Section 508(e) of the Code,⁴ and a schedule of the property to be transferred into trust (generally attached as a schedule of assets). Attached to this paper as Appendix A is a sample declaration of trust promulgated by the Internal Revenue Service and included in Publication 557.

E. What Provisions Should Be Considered?

Beyond the basic provisions that must be included above, the drafter of the charitable trust instrument has great flexibility to be as creative as necessary to draft the trust instrument in a tailored fashion to meet the needs and wishes of the settlor. The first consideration must be the goals of the settlor in creating the charitable trust. What is the settlor trying to accomplish? Is the overriding goal to keep the mission or charitable purpose intact? Is the overriding goal to keep the family members working together in the future and to attempt to create a working environment that allows for a functioning charity even where there may be disharmony among the family? Is the overriding goal to allow family to serve in the grantmaking role while providing for professional management and administration? Is the overriding goal to provide flexibility to the beneficiaries to control when assets are provided from an endowment? Is the overriding goal to ensure assets remain invested in a certain fashion? Each of the answers to these questions may lead to different provisions being considered and included in the trust instrument. Set out below is a discussion of some provisions that the author has found useful in drafting charitable trusts.

1. Trust Protector

At its simplest, the trust protector is a person appointed to hold certain discretionary powers with respect to a trust. A trust protector may be given the right to approve amendments as opposed to requiring judicial approval. A trust protector may be required to approve any change to the distribution scheme or to the beneficiaries. A trust protector may be utilized to

⁴ While it is generally advisable to include the information required by Section 508(e) of the Code regarding the private foundation prohibitions, state law will deem such provisions to be included under Section 112.055 of the Texas Property Code.

avoid interested transactions that might otherwise arise. The goal of using a trust protector is to anticipate when it would be useful to have a third party (i.e. someone other than the trustees or beneficiaries) act or make a decision. Utilizing a trust protector gives the flexibility of avoiding judicial action as well as the need to involve the attorney general, as there would in such instance not be a “proceeding involving a charitable trust” subject to Chapter 123. Appendix B to this paper is a draft declaration of trust that includes a number of additional provisions including a provision regarding trust protector acting in the event of conflicts or interested transactions. Again, however, the role of trust protector can be as narrow or broad as is necessary under the circumstances.

2. Governance Options

As referenced above, a charitable trust may have any number of trustees. Unless otherwise provided in the trust instrument, the trustees act by majority decision though co-trustees can act without a co-trustee if such co-trustee is unavailable because of specified reasons set out in Texas Property Code Section 113.085. However, alternative governance options may be implemented. For example, the trust instrument may provide that there is to be a board of trustees that acts by majority decision based upon meetings when there is a quorum present (note that absent a provision in the trust instrument, trustees are not required to hold meetings). Provisions can be included as with corporations regarding meetings, notices of meetings, and acting by consent. On the other hand, the trust instrument may bifurcate the roles of trustees to give different categories of trustees different roles. In the declaration of trust attached at Appendix B, the roles of trustees are separated into management trustees, administrative trustees, and distribution trustees allowing for professional management and administration thereby allowing the family to focus on the grantmaking and distributive functions until such time as there is no longer descendants of the settlor or at which time the successor trustees oversee all aspects of the trust. After all family is gone, the independent trustees operate more like a board.

Another common governance option included in charitable trusts is a provision that allows trustees to convert from the charitable trust form to the nonprofit corporate form. Conversion will be discussed below in Section VIII.

3. Exculpation of Trustees

A common provision in trust instruments is a provision exculpating trustees from liability for certain breaches of trust. Importantly, Section 114.007 of the

Texas Property Code provides that the trust instrument cannot provide for exculpation of a trustee for acts taken intentionally, in bad faith, or with reckless indifference to the interests of a beneficiary. Likewise, an exculpation provision purporting to relieve a trustee of liability for profit derived by the trustee from a breach of trust is also unenforceable. *See* Tex. Prop. Code § 114.007. An exculpation clause that relieves a trustee of liability for simple negligence, however, will be valid. *See Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex. 2002). An exculpatory clause is included in the sample declaration of trust attached hereto as Appendix B.

4. Relaxation of Fiduciary Standards

In addition to including an exculpatory provision, a charitable trust may also relax the fiduciary standards. For example, a provision may expressly be included that allows for self-dealing by the trustee. Care should be given to the inclusion of any such provision as notwithstanding the ability to include such provision for state law purposes, self-dealing by a trustee will be a violation of Section 4941 of the Code to the extent the charitable trust is treated as a private foundation and there is no exception to the self-dealing transaction.

5. Indemnification Provisions

The Texas Trust Code does not contain a default indemnification provision. Section 114.063 of the Texas Property Code includes a general right to reimbursement but such provision does not go nearly as far as standard indemnification rights in corporate documents. Accordingly, to provide protection for trustees the settlor may wish to provide for indemnification and reimbursement of expenses to the trustees. Care should be taken in drafting such provisions to ensure that such indemnification constitutes non-compensatory indemnification under the Code or, if such indemnification is to constitute compensatory indemnification, that self-dealing will be avoided by ensuring the reasonableness of same (perhaps utilizing the trust protector to set reasonable compensation). The draft declaration of trust at Appendix B includes an indemnification provision that changes after family is no longer involved with the foundation.

6. Amendment Provisions

Because amendment of a charitable trust requires court action to judicially modify a trust, the drafter of a charitable trust may decide to include a provision allowing for amendment without court action. Amendment provisions may be narrowly tailored to allow for amendment of only certain provisions or to

prohibit amendments of certain provisions absent court approval. For example, a settlor may wish to make the purpose “unamendable” absent court action while providing for ease in amending investment provisions. Likewise, special provisions may be included in the amendment provision to require third party approval of only certain types of amendments or super majority votes or certain types of amendments. The declaration of trust attached as an Appendix B contains a tailored amendment provision that changes after family is no longer involved with the foundation.

7. Mandatory Distribution Provisions

Charitable trusts that are treated as private foundations must make a distribution equal to their minimum distribution requirement under Section 4940 of the Code to avoid an excise tax. This is generally considered to be roughly 5% of the net assets of the trust. However, there is no prohibition on providing for an increased level of distributions. For example, a charitable trust could provide that the trust will distribute the greater of its net income or its minimum distribution requirement. Likewise, a trust could provide that the trustees are to distribute all gifts received in a particular year from a settlor. In addition, such a provision allows trustees or successor trustees a level of flexibility to satisfy the charitable purposes while ensuring that the settlor’s role with respect to a particular charitable purpose or a particular charity will remain satisfied.⁵ The charitable trust instrument may provide that in addition to the minimum distribution requirement, a certain amount must be distributed specifically for a narrow charitable purpose or to a specific charity.

8. Resignation Provisions

The Texas Trust Code does not provide for resignation of a trustee absent resignation provisions being contained in the trust instrument. *See* Tex. Prop. Code § 113.081. As such, to avoid the need to go to court in order to resign the role of trustee, the declaration of trust should include a provision allowing a trustee to resign. Likewise, the declaration of trust may include a provision regarding removal of trustees. In such event, removal may be based on court action or some specified vote of the trustees or trust protector. The draft declaration of trust at Appendix B includes provisions regarding resignation and removal.

⁵ This might be particularly helpful in a situation in which the drafter knows that in future years the settlor will make contributions to the charitable trust and desire conduit treatment of such contributions thereby allowing for an enhanced tax benefit.

9. Termination

Finally, the drafter of the declaration of trust may wish to consider a termination provision to avoid the necessity of going to court to terminate the charitable trust upon the occurrence of a certain event (such as fulfillment of the charitable purpose) or upon decision of the trustees or trust protector. Pursuant to Section 112.052 of the Texas Trust Code, a trust can be caused to terminate by its terms. Likewise, the termination provision can be drafted as a “poison pill” causing termination to occur in the event a condition fails to occur (such as the making of distribution for a particular purpose).

10. Compensation

Many charitable trustees serve without compensation. However, the default rule under the Texas Trust Code is that trustees are entitled to reasonable compensation unless the terms of the trust direct otherwise. *See* Tex. Prop. Code § 114.061. As such, should a settlor wish to restrict trustees from the receiving compensation other than reimbursement for expenses incurred to fulfill their duties as trustees, the trust instrument should so provide. In the event compensation is to be provided to trustees, care should be taken in drafting the compensation provisions to ensure reasonableness of compensation and thereby the avoidance of a self-dealing transaction in the event the trust is treated as a private foundation. The draft declaration of trust at Appendix B contains compensation provisions.

The foregoing list of suggested provisions is by no means exhaustive. Rather, the list is intended to highlight certain provisions the author has found particularly useful in the drafting of charitable trusts and to spur the reader on to creative thinking in regard to what provisions would be most useful to a particular settlor.

VI. WHAT ARE THE FILING REQUIREMENTS OF CHARITABLE TRUSTS?

The charitable trust is not a creature of the state and is thus not required to file its declaration of trust with the Secretary of State to establish its existence. Furthermore, a charitable trust, because it is not a Code entity under the Business Organizations Code, is not subject to the Texas franchise tax and therefore does not need to file with the Texas Comptroller regarding franchise tax requirements.

The charitable trust does have filing requirements however at the federal level. First, the trust will be required to file Form SS-4 to obtain an employer identification number. Further, should the charitable trust wish to be recognized as exempt from taxation

under Section 501(c)(3) of the Code, the charitable trust will be required to file Form 1023 with the Internal Revenue Service. In such event, the declaration of trust will be attached to the Form 1023. In addition to filing the Form 1023, the charitable trust will be required to file a Form 990-PF (unless it is a public charity, in which event it will file the Form 990 or Form 990-EZ) on an annual basis. Further, the Form 990-PF must be filed with the Texas Attorney General.

Under Section 6104(d) of the Code, a tax-exempt organization, including a private foundation, must allow public inspection at its principal office (and as certain regional or district offices) and to comply with such request, made either in person or in writing, for copies of the organization’s Form 1023 and the organization’s three most recent annual information returns. An “annual information return” is defined to include any return that is required to be filed under Section 6033 of the Code including Form 990-PF and Form 4720 pertaining to private foundations. The private foundation must also, unlike other tax-exempt organizations, disclose to the general public the names and addresses of contributors, consistent with Section 6104(d)(3) the Code. The term “tax-exempt organization” means, for purposes of Section 6104(d) nonexempt private foundations and nonexempt charitable trusts described in Section 4947(a)(1) that are subject to the information reporting requirements of Section 6033 of the Code as well as charitable trusts that are classified as private foundations.

If a private foundation has \$1,000 or more of unrelated business taxable income, it must file a return (Form 990-T) and pay tax on such unrelated business taxable income. The foundation may be required to pay tax quarterly using Form 990-W, Estimated Tax on Unrelated Business Taxable Income. A private foundation must allow public inspection of its Form 990-T to the same extent as inspection of its Form 990-PF.

If the charitable trust is subject to excise taxes for prohibited transactions, it must file Form 4720. If the charitable trust is a nonexempt trust and has income, it must file Form 1041 with the IRS. Finally, if the charitable trust has employees, it will be required to file Form 941 as with any other employer.

VII. HOW IS A CHARITABLE TRUST

CONSTRUED, MODIFIED OR TERMINATED?⁶

Statutory authority to construe, modify, or terminate a trust arises under the Uniform Declaratory Judgments Act and the Texas Property Code.

A. Declaratory Judgment to Construe the Terms of a Trust

The Uniform Declaratory Judgments Act provides statutory authority for a court to construe the terms of a trust. Section 37.005 of the Texas Civil Practice and Remedies Code provides that “a person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate: (1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; (2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; (3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or (4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.” In the case of a purely charitable trust, it will most often be the trustee(s) who bring a construction action. The declaration sought from the court should be limited to one of the enumerated areas.

In construing an instrument purporting to create a trust, the rules for the interpretation of deeds, wills, and other written instruments are followed. See *Blieden v. Greenspan*, 742 S.W.2d 93 (Tex. App. Beaumont 1987), judgment rev'd on other grounds, 751 S.W.2d 858 (Tex. 1988). The cardinal principle in construing a trust is the ascertainment of the settlor's intention with the view of effectuating that intent. See *Parrish v. Mills*, 101 Tex. 276, 106 S.W. 882 (1908). The intention of the settlor at the time of the trust's creation is determinative. See *Cutrer v. Cutrer*, 345 S.W.2d 513, 519 (Tex. 1961). The intent of the settlor must be ascertained from the four corners of the trust instrument. See *Moody v. Pitts*, 708 S.W.2d 930 (Tex. App.—Corpus Christi 1986, no writ). Thus, a court

does not focus on what the grantor intended to write but the meaning of the words actually used. See *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000).

When there is no dispute about the meaning of words used in an instrument, extrinsic evidence will not be received to show that the settlor intended something outside the words used. See *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687, 688 (Tex. 1984). If, on the other hand, the meaning of words used in an instrument is uncertain or reasonably susceptible to more than one meaning, the instrument is ambiguous. See *Davis v. Shanks*, 898 S.W.2d 285, 286 (Tex. 1995). There are, therefore, two separate analyses depending upon whether the instrument is unambiguous or ambiguous.

If the language of the instrument is unambiguous and expresses the intent of the settlor, it is unnecessary to construe the instrument because it speaks for itself. See *Sorrel v. Sorrel*, 1 S.W.3d 867 (Tex. App.—Corpus Christi 1999, no pet.). Where the trustee's powers are unambiguously conferred by the trust instrument, neither the trustee nor the courts can add to or take away from those powers. See *Moody*, 708 S.W.2d at 935. Extrinsic evidence may not be introduced to show that the settlor intended something outside of the words used. See *San Antonio Area Found.*, 35 S.W.3d at 639.

If, on the other hand, the meaning of the instrument is uncertain or “reasonably susceptible to more than one meaning,” the instrument is ambiguous. See *Eckels v. Davis*, 111 S.W.3d 687, 694 (Tex. App.—Fort Worth 2003, pet. denied). An ambiguity can be either patent or latent. A patent ambiguity arises on the reading of the trust from the words themselves. See *id.* at 695. A latent ambiguity exists when the trust appears to convey a sensible meaning on its face but cannot be carried out without further clarification. See *id.* While extrinsic evidence may not be introduced if there is no ambiguity, a court may admit extrinsic evidence to show the settlor's intent where there is a latent or patent ambiguity. See *id.* at 696.

B. Judicial Modification or Termination of a Trust

Modification and/or termination of a trust is governed by the Texas Property Code (specifically, the Texas Trust Code). When drafting a petition to modify or terminate a trust, the practitioner must comply with Section 112.054 (or if the trust is uneconomical, Section 112.059) of the Property Code.

Section 112.054 provides as follows:

(a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or

⁶ Portions of this section are excerpted with permission from “Document Drafting and Trust Construction, Termination and Modification Proceedings,” David J. Goodman, Gregory B. Fancher, Michael V. Bourland, presented to the 21st Annual Estate Planning and Probate Drafting Course, State Bar of Texas.

permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:

- (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
 - (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;
 - (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration;
 - (4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions; or
 - (5) subject to Subsection (d):
 - (A) continuance of the trust is not necessary to achieve any material purpose of the trust; or
 - (B) the order is not inconsistent with a material purpose of the trust.
- (b) The court shall exercise its discretion to order a modification or termination under Subsection (a) in the manner that conforms as nearly as possible to the intention of the settlor. The court shall consider spendthrift provisions as a factor in making its decision whether to modify or terminate solely because the trust is a spendthrift trust.
- (c) The court may direct that an order described by Subsection (a)(4) has retroactive effect.
- (d) The court may not take the action permitted by Subsection (a)(5) unless all beneficiaries of the trust have consented to the order or are deemed to have consented to the order. A minor, incapacitated, unborn, or unascertained beneficiary is deemed to have consented if a person representing the beneficiary's interest under Section 115.013(c) has consented or if a guardian ad litem appointed to represent the beneficiary's interest under Section 115.014 consents on the beneficiary's behalf.

A petition under the Texas Property Code to modify or terminate a trust may only be brought by a trustee or a beneficiary. It is necessary to include one of the enumerated reasons in Section 112.054 within the petition, as the court is under no obligation to

modify or terminate a trust simply because it is requested. It should be noted that the Texas Property Code provides that a court *may* order such relief. Therefore, the practitioner should undertake to plead and prove facts to show the merit/benefit/purpose of the requested relief.

Texas law also permits the termination of a trust that has become uneconomical to maintain due to its paucity of assets. Section 112.059 of the Texas Property Code provides that after providing notice to beneficiaries who are distributees or permissible distributees of the trust or who would be distributees or permissible distributees if the interest of the distributees or the trust were to terminate and no powers of appointment were exercised, the trustee of a trust with a total value of less than \$50,000 may terminate the trust if the trustee concludes after considering the purpose of the trust and the nature of the trust assets that the value of the trust property is insufficient to justify the continued cost of administration.

C. Parties Who May Bring a Construction, Modification or Termination Action

Section 112.054 provides that a trustee or beneficiary may commence an action under that section. The term "beneficiary" is extremely broad under the Texas Property Code. Section 111.004 of the Texas Property Code defines "beneficiary" as a person for whose benefit property is held in trust, regardless of the nature of the interest. As such, contingent or remainder beneficiaries may bring an action to modify or terminate a trust. Any interested person may commence an action under Section 115.011, the general jurisdictional statute for trusts in the Texas Property Code. With respect to charitable trusts, the trustee(s) will be proper parties to bring an action as will be the attorney general on behalf of the public interested charity. To the extent there is an ascertainable beneficiary, the beneficiary will also be a proper party to commence an action. Otherwise, purely charitable trusts do not have other "interested persons". Importantly, when drafting a construction and/or modification petition, the trust should not be a party. The trust does not have capacity to sue or be sued because term "trust" refers not to a separate legal entity, but rather to the fiduciary relationship governing the trustee with respect to the trust's property. *See Huey v. Deshazo*, 922 S.W.2d 920, 926 (Tex. 1996). Rather, suits against a trust are to be brought against its legal representative, the trustee. *See The Ray Malooly Trust v. Juhl*, 186 S.W.3rd 568, 570 (Tex. 2006).

D. Necessary Parties That Must Be Joined

Section 115.001(b) of the Texas Property Code identifies necessary parties to proceedings concerning trusts. That statute provides that the trustee and the beneficiary will always be necessary parties. This is true even if the beneficiaries are not receiving distributions at the time the action is filed; provided, however, contingent beneficiaries that are designated as a class are not necessary parties. In addition, Sections 115.011(c) and 123.002 of the Texas Property Code provide that the attorney general as a proper party may intervene in proceedings involving a charitable trust as discussed above. As such, while the attorney general is not a “necessary party,” the attorney general must be given notice and the option to intervene in the proceeding to avoid the running the risk of having a settlement agreement or judgment set aside.

Section 123.003(a) of the Property Code provides that when a charitable trust is involved, the party initiating the proceeding “shall give notice of the proceeding to the attorney general by sending to the attorney general, by registered or certified mail, a true copy of the petition or other instrument initiating the proceeding involving a charitable trust within 30 days of the filing of such petition or other instrument, but no less than 25 days prior to a hearing in such a proceeding.” An example of such notice is included at Appendix C.

The practitioner should also be aware that 123.003(b) requires additional notice to the attorney general if an amended pleading is filed “which adds new causes of action or additional parties to a proceeding involving a charitable trust in which the attorney general has previously waived participation or in which the attorney general has otherwise failed to intervene.” In such an event, the notice requirements in Section 123.003(a) must be met.

The party or the party's attorney shall execute and file in the proceeding an affidavit stating the facts of the notice and shall attach to the affidavit the customary postal receipts signed by the attorney general or an assistant attorney general. Tex. Prop. Code Ann. § 123.003(c). An example of this affidavit is included at Appendix D.

Unlike suits to construe, modify or terminate private trusts, it is not typically necessary to have ad litem appointed or utilize the doctrine of virtual representation in most circumstances when dealing with charitable trusts. It is unusual to have a need for a guardian ad litem or the application of the doctrine of virtual representation with respect to purely charitable trusts, as the office of the attorney general represents the public interested charity (i.e. unascertainable beneficiaries) and there are no beneficiaries who would be a minor, incapacitated, unborn, or unascertained

individual. However, with respect to split interest trusts, there could be instances in which an ad litem could be appropriate or virtual representation could apply. In such instances, the practitioner should consult Section 115.013 (virtual representation) and Section 115.014 (ad litem).

E. Jurisdiction

A court must have jurisdiction over the subject matter and the parties before it can act. In the trust construction, modification, or termination context, jurisdiction is conferred by the Property Code and the Probate Code. The Property Code, as detailed below, provides that district courts have exclusive jurisdiction over trust issues. The Texas Probate Code gives the statutory probate courts concurrent jurisdiction with the district court in all actions involving inter vivos trusts, charitable trusts and testamentary trusts and now grants jurisdiction upon county courts in counties with no statutory probate courts to hear matters involving the interpretation and administration of an inter vivos or testamentary trust so long as the matter is related to a probate proceeding.

1. Jurisdiction Under the Property Code

Section 115.001 of the Property Code provides that a district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts, including proceedings to: (1) construe a trust instrument; (2) determine the law applicable to a trust instrument; (3) appoint or remove a trustee; (4) determine the powers, responsibilities, duties, and liability of a trustee; (5) ascertain beneficiaries; (6) make determinations of fact affecting the administration, distribution, or duration of a trust; (7) determine a question arising in the administration or distribution of a trust; (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle; (9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and (10) surcharge a trustee.

However, the Property Code points out that this list is not exhaustive. A district court has exclusive and original jurisdiction over a proceeding by or against a trustee or a proceeding concerning a trust whether or not the type of proceeding is specifically listed in Section 115.001. Section 115.001(d) of the Property Code sets out that the exceptions to a district court's exclusive jurisdiction are: (1) when jurisdiction has been conferred by law on a statutory probate court; (2) a court that creates a trust under Section 867 of the Probate Code; (3) a court that creates a trust under Section 142.005 of the Property Code; (4) a justice court under Chapter 27 of the Government Code; or (5)

a small claims court under Chapter 28 of the Government Code.

2. Jurisdiction Under the Probate Code

The 2009 Legislature undertook a complete rewrite of the Probate jurisdiction statutes. Sections 4, 5, and 5A of the Texas Probate Code were repealed and replaced with new Sections 4A, 4B, 4C, 4D, 4E, 4F, 4G, and 4H. Additionally, jurisdiction is now based on whether a matter is a “probate proceeding” or a “matter related to a probate proceeding.” Nevertheless, jurisdiction under the Probate Code still provides broad authority to statutory probate courts by allowing such courts to hear matters involving any trust. The significant change under the sections is that now constitutional county courts and county courts at law in counties with no statutory probate courts may hear trust matters but only if the trust matters relate to a probate proceeding.

a. *Jurisdiction of Statutory Probate Court*

Section 4G of the Probate Code now provides that in a county in which there is a statutory probate court, the statutory probate court has jurisdiction of: (1) an action by or against a trustee; (2) an action involving an inter vivos trust, testamentary trust, or charitable trust; (3) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and (4) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

Section 4H of the Probate Code now provides that a statutory probate court has concurrent jurisdiction with the district court in: (1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative; (2) an action by or against a trustee; (3) an action involving an inter vivos trust, testamentary trust, or charitable trust; (4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate; (5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and (6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

b. *Jurisdiction of Constitutional County Courts and County Courts at Law*

As noted above, constitutional county courts and county courts at law in counties with no statutory probate courts may now hear trust matters if the matters relate to a pending probate. Section 4A of the

Probate Code provides that all probate proceedings must be filed and heard in a court exercising original probate jurisdiction. Also, Section 4A provides the court exercising original probate jurisdiction with jurisdiction of all matters “related to the probate proceeding” as specified in Section 4B of the Code. With the addition of this language, the definition of “probate proceeding” and “related to the probate proceeding” become important when determining jurisdiction.

Section 3(bb) of the Probate Code provides that a “probate proceeding” means “a matter or proceeding related to the estate of a decedent and includes: (1) the probate of a will, with or without administration of the estate; (2) the issuance of letters testamentary and of administration; (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances; (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent; (5) a claim arising from an estate administration and any action brought on the claim; (6) the settling of a personal representative's account of an estate and any other matter related to the settlement, partition, or distribution of an estate; and (7) a will construction suit.

Section 4B defines what a “matter related to a probate proceeding” is based upon the court system within a particular county (i.e. whether the county has a statutory probate court, county court at law exercising original probate jurisdiction, or no statutory probate court and no county court at law exercising original probate jurisdiction). Additionally, a recent decision by the Corpus Christi Court of Appeals has held that the same analysis that applies to determine if a lawsuit is “incident” to an estate applies to determine if a lawsuit is “related” to an estate. *See In re Frank Schuster Farms, Inc.*, 2010 WL 2638481, *6 (Tex. App.—Corpus Christi 2010, no pet. his.).

The revisions to the Probate Code now allow trust construction/modification to be heard in the same court as a probate proceeding in certain circumstances. While constitutional county courts and county courts at law may now hear a trust construction/modification action so long as it is related to a probate proceeding; only a statutory probate court may hear matters involving a trust whether or not it is related to a pending probate proceeding.

F. *Federal Tax Issues Related to Termination*

In the event a charitable trust that is classified as a private foundation is to be terminated, the practitioner should pay particular attention to the federal tax issues involved. Specifically, Section 507(c) of the Code

imposes a termination tax equal to the lesser of the “aggregate tax benefit” (i.e., all tax benefits accruing to the organization and its contributors) resulting from its Section 501(c)(3) status or the net fair market value of its assets. Clearly the termination tax is to be avoided at all costs. In order to avoid the imposition of the termination tax, the private foundation may make a grant of all of its assets to an organization which has been classified as a public charity for a continuous sixty (60) month period, convert the private foundation into a public charity (this involves giving notice to the IRS of the intent to do same) or transfer assets to another private foundation, a supporting organization, or a newly created public charity (i.e. one that has not been in existence for a continuous sixty (60) month period). With respect to the latter option, the foundation must undertake a two-step process, first distributing its assets and second (the day after the transfer or sometime thereafter) notifying the IRS of its intention to terminate. So long as the notice is given when the foundation has no assets, there will be a tax of zero. The practitioner will want to consult Revenue Ruling 2002–28, 2002–1 C.B. 941 as well as Revenue Ruling 2003–13, 2003–1 C.B. 305 in regard to termination.

VIII. HOW IS A CHARITABLE TRUST CONVERTED?

A. Conversion of a Corporation to a Trust

Section 10.101(a) of the Texas Business Organizations Code provides that a domestic entity may convert into a different type of domestic entity or a non-code organization by adopting a plan of conversion. Section 1.002(56) defines “non-code organization” is an organization other than a “domestic entity” (which in turn is defined as an organization formed under, or the internal affairs of which are governed by, the Business Organizations Code). As such, Section 10.101(a) allows a nonprofit corporation (a domestic entity) to convert into a charitable trust (a non-code organization). An argument could be made that the phrase “non-code organization” nevertheless requires an “organization”, a term defined at Section 1.002(62) of the Business Organizations Code that does not include trusts (other than business trusts and REITs). While a charitable trust is not an “entity” in a formal sense, it is often treated as an entity under Texas law. The definition of “person” in the Business Organizations Code includes the phrase “or other organization” following a list that includes a trust, implying that a trust is, in fact, an “organization.” See BOC § 1.002(69–(b)). Section 10.101(d) provides a conversion may not take effect if conversion is prohibited by or inconsistent with the laws of the

converted entity’s jurisdiction of formation. Accordingly, the conversion must be allowable by the Texas Trust Code. The Texas Trust Code does not prohibit such a conversion and, as referenced above, it is a common provision to allow for a conversion from the trust form to the corporate form. As such, it is not inconsistent with trust law to see conversions, though it is unique to see a conversion from a corporate form to the trust form. In conversations with the Texas Secretary of State’s office, the author has been advised that office reached the conclusion that a charitable trust is considered a non-code organization allowing for a conversion to take place. The practitioner would be well advised to consult with the office of the Texas Secretary of State and seek preclearance of any certificate of conversion before taking any steps to effectuate the filing of certificate of conversion. Attached to this paper as Appendix E is a draft certificate of conversion from a corporation to a trust.

B. Conversion of a Trust to a Corporation

More common in conversions is to see a conversion of trust to corporation. Unless the trust instrument allows for such a conversion, the conversion must be effectuated only after approval of the court under Section 112.054. To gain such approval the petitioner must be able to show the court the circumstances that have arisen unforeseen to the settlor that necessitate the need to convert to corporate form. See Tex. Prop. Code § 112.054. In the event the court agrees to allow the conversion (and the attorney general waives intervention or agrees to same), the conversion is effectuated under Section 10.102 of the Business Organizations Code. Section 10.102(a) provides that a non-code organization may convert into a domestic entity by adopting a plan of conversion as provided by Section 10.102. Because in this circumstance the converted entity will be a filing entity (a nonprofit corporation), a certificate of formation must be included with the plan of conversion and be filed with the certificate of conversion. See BOC § 10.155(a). Likewise, the converted entity, as a filing entity, will be subject to the Texas franchise tax until such time as exemption is granted (typically exemption is applied for following receipt of a determination letter from the IRS). Section 10.103 contains the required provisions for a plan of conversion. Section 10.154 of the Business Organizations Code contains the required provisions for the certificate of formation which must be filed as the nonprofit corporation, a filing entity, is a party to the conversion.

IX. CONCLUSION

Charitable trusts are unique in that they allow for great latitude in creativity in their creation while providing for a rigid structure if so desired. However, not all operations are appropriate for the trust form. Careful scrutiny should always be applied to ensure that the right choice of form is used for the client's desires. Nevertheless, practitioners having an understanding of the charitable trust form are able to offer a unique alternative to their philanthropically-minded clients.

APPENDIX A: SAMPLE DECLARARTION OF TRUST (IRS FORM)

The _____ Charitable Trust. Declaration of Trust made as of the day of _____, 20____, by _____, of _____, and _____, of _____, who hereby declare and agree that they have received this day from _____, as Donor, the sum of Ten Dollars (\$10) and that they will hold and manage the same, and any additions to it, in trust, as follows:

First: This trust shall be called “The _____ Charitable Trust.”

Second: The trustees may receive and accept property, whether real, personal, or mixed, by way of gift, bequest, or devise, from any person, firm, trust, or corporation, to be held, administered, and disposed of in accordance with and pursuant to the provisions of this Declaration of Trust; but no gift, bequest, or devise of any such property shall be received and accepted if it is conditioned or limited in such manner as to require the disposition of the income or its principal to any person or organization other than a “charitable organization” or for other than “charitable purposes” within the meaning of such terms as defined in Article Third of this Declaration of Trust, or as shall, in the opinion of the trustees, jeopardize the federal income tax exemption of this trust pursuant to Section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

Third:

- a) The principal and income of all property received and accepted by the trustees to be administered under this Declaration of Trust shall be held in trust by them, and the trustees may make payments or distributions from income or principal, or both, to or for the use of such charitable organizations, within the meaning of that term as defined in paragraph C, in such amounts and for such charitable purposes of the trust as the trustees shall from time to time select and determine; and the trustees may make payments or distributions from income or principal, or both, directly for such charitable purposes, within the meaning of that term as defined in paragraph D, in such amounts as the trustees shall from time to time select and determine without making use of any other charitable organization. The trustees may also make payments or distributions of all or any part of the income or principal to states, territories, or possessions of the United States, any political subdivision of any of the foregoing, or to the United States or the District of Columbia but only for charitable purposes within the meaning of that term as defined in paragraph D. Income or principal derived from contributions by corporations shall be distributed by the trustees for use solely within the United States or its possessions. No part of the net earnings of this trust shall inure or be payable to or for the benefit of any private shareholder or individual, and no substantial part of the activities of this trust shall be the carrying on of propaganda, or otherwise attempting to influence legislation. No part of the activities of this trust shall be the participation in, or intervention in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office.
- b) The trust shall continue forever unless the trustees terminate it and distribute all of the principal and income, which action may be taken by the trustees in their discretion at any time. On such termination, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. The donor authorizes and empowers the trustees to form and organize a nonprofit corporation limited to the uses and purposes provided for in this Declaration of Trust, such corporation to be organized under the laws of any state or under the laws of the United States as may be determined by the trustees; such corporation when organized to have power to administer and control the affairs and property and to carry out the uses, objects, and purposes of this trust. Upon the creation and organization of such corporation, the trustees are authorized and empowered to convey, transfer, and deliver to such corporation all the property and assets to which this trust may be or become entitled. The charter, bylaws, and other provisions for the organization and management of such corporation and its affairs and property shall be such as the trustees shall determine, consistent with the provisions of this paragraph.
- c) In this Declaration of Trust and in any amendments to it, references to “charitable organizations” or “charitable organization” mean corporations, trusts, funds, foundations, or community chests created or organized in the United States or in any of its possessions, whether under the laws of the United States, any

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state or territory, the District of Columbia, or any possession of the United States, organized and operated exclusively for charitable purposes, no part of the net earnings of which inures or is payable to or for the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which do not participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of or in opposition to any candidate for public office. It is intended that the organization described in this paragraph C shall be entitled to exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

- d) In this Declaration of Trust and in any amendments to it, the term “charitable purposes” shall be limited to and shall include only religious, charitable, scientific, literary, or educational purposes within the meaning of those terms as used in section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, but only such purposes as also constitute public charitable purposes under the law of trusts of the State of _____.

Fourth: This Declaration of Trust may be amended at any time or times by written instrument or instruments signed and sealed by the trustees, and acknowledged by any of the trustees, provided that no amendment shall authorize the trustees to conduct the affairs of this trust in any manner or for any purpose contrary to the provisions of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code. An amendment of the provisions of this Article Fourth (or any amendment to it) shall be valid only if and to the extent that such amendment further restricts the trustees’ amending power. All instruments amending this Declaration of Trust shall be noted upon or kept attached to the executed original of this Declaration of Trust held by the trustees.

Fifth: Any trustee under this Declaration of Trust may, by written instrument, signed and acknowledged, resign his office. The number of trustees shall be at all times not less than two, and whenever for any reason the number is reduced to one, there shall be, and at any other time there may be, appointed one or more additional trustees. Appointments shall be made by the trustee or trustees for the time in office by written instruments signed and acknowledged. Any succeeding or additional trustee shall, upon his or her acceptance of the office by written instrument signed and acknowledged, have the same powers, rights, and duties, and the same title to the trust estate jointly with the surviving or remaining trustee or trustees as if originally appointed.

None of the trustees shall be required to furnish any bond or surety. None of them shall be responsible or liable for the acts or omissions of any other of the trustees or of any predecessor or of a custodian, agent, depository, or counsel selected with reasonable care.

The one or more trustees, whether original or successor, for the time being in office, shall have full authority to act even though one or more vacancies may exist. A trustee may, by appropriate written instrument, delegate all or any part of his or her powers to another or others of the trustees for such periods and subject to such conditions as such delegating trustee may determine.

The trustees serving under this Declaration of Trust are authorized to pay to themselves amounts for reasonable expenses incurred and reasonable compensation for services rendered in the administration of this trust, but in no event shall any trustee who has made a contribution to this trust ever receive any compensation thereafter.

Sixth: In extension and not in limitation of the common law and statutory powers of trustees and other powers granted in this Declaration of Trust, the trustees shall have the following discretionary powers.

- a) To invest and reinvest the principal and income of the trust in such property, real, personal, or mixed, and in such manner as they shall deem proper, and from time to time to change investments as they shall deem advisable; to invest in or retain any stocks, shares, bonds, notes, obligations, or personal or real property (including without limitation any interests in or obligations of any corporation, association, business trust, investment trust, common trust fund, or investment company) although some or all of the property so acquired or retained is of a kind or size which but for this express authority would not be considered proper and although all of the trust funds are invested in the securities of one company. No principal or income, however, shall be loaned, directly or indirectly, to any trustee or to anyone else, corporate or otherwise, who

has at any time made a contribution to this trust, nor to anyone except on the basis of an adequate interest charge and with adequate security.

- b) To sell, lease, or exchange any personal, mixed, or real property, at public auction or by private contract, for such consideration and on such terms as to credit or otherwise, and to make such contracts and enter into such undertakings relating to the trust property, as they consider advisable, whether or not such leases or contracts may extend beyond the duration of the trust.
- c) To borrow money for such periods, at such rates of interest, and upon such terms as the trustees consider advisable, and as security for such loans to mortgage or pledge any real or personal property with or without power of sale; to acquire or hold any real or personal property, subject to any mortgage or pledge on or of property acquired or held by this trust.
- d) To execute and deliver deeds, assignments, transfers, mortgages, pledges, leases, covenants, contracts, promissory notes, releases, and other instruments, sealed or unsealed, incident to any transaction in which they engage.
- e) To vote, to give proxies, to participate in the reorganization, merger, or consolidation of any concern, or in the sale, lease, disposition, or distribution of its assets; to join with other security holders in acting through a committee, depository, voting trustees, or otherwise, and in this connection to delegate authority to such committee, depository, or trustees and to deposit securities with them or transfer securities to them; to pay assessments levied on securities or to exercise subscription rights in respect of securities.
- f) To employ a bank or trust company as custodian of any funds or securities and to delegate to it such powers as they deem appropriate; to hold trust property without indication of fiduciary capacity but only in the name of a registered nominee, provided the trust property is at all times identified as such on the books of the trust; to keep any or all of the trust property or funds in any place or places in the United States of America; to employ clerks, accountants, investment counsel, investment agents, and any special services, and to pay the reasonable compensation and expenses of all such services in addition to the compensation of the trustees.

Seventh: The trustees' powers are exercisable solely in the fiduciary capacity consistent with and in furtherance of the charitable purposes of this trust as specified in Article Third and not otherwise.

Eighth: In this Declaration of Trust and in any amendment to it, references to "trustees" mean the one or more trustees, whether original or successor, for the time being in office.

Ninth: Any person may rely on a copy, certified by a notary public, of the executed original of this Declaration of Trust held by the trustees, and of any of the notations on it and writings attached to it, as fully as he might rely on the original documents themselves. Any such person may rely fully on any statements of fact certified by anyone who appears from such original documents or from such certified copy to be a trustee under this Declaration of Trust. No one dealing with the trustees need inquire concerning the validity of anything the trustees purport to do. No one dealing with the trustees need see to the application of anything paid or transferred to or upon the order of the trustees of the trust.

Tenth: This Declaration of Trust is to be governed in all respects by the laws of the State of _____.

- Trustee _____
- Trustee _____

APPENDIX B: SAMPLE DECLARATION OF TRUST (BWW)

DECLARATION OF TRUST
OF
THE CRAWLEY FAMILY FOUNDATION

W I T N E S S E T H

NOW, THEREFORE, Robert Crawley, Cora Crawley, Mary Crawley, Edith Crawley, Sybil Crawley, Richard Carlisle and Charles Carson (all of the foregoing individuals hereafter referred to as the “Trustees”), and George Murray (hereafter referred to as the “Trust Protector”), hereby declare and agree that they will hold and manage the property of the Foundation, and any additions to it, in trust, in accordance with the following provisions. The trust created by this Declaration of Trust (hereafter referred to as the “Trust Agreement”) shall be irrevocable. The terms and conditions applicable to such trust may be amended only as permitted by Article VIII hereof.

ARTICLE I
NAME, PURPOSES, POWERS AND OFFICES

Section 1.1. Name. The name of this charitable trust is The Crawley Family Foundation.

Section 1.2. Purposes.

(a) The Foundation is organized and shall be operated exclusively for religious, charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, in its current version and as amended or superseded thereafter (the “Code”) including, but not limited, to the making of grants to other organizations which are organized and operated exclusively for one or more of such purposes, and to conduct, accomplish and carry on its objectives, functions and purposes or any part thereof set forth in the governing documents of the Foundation as amended from time to time, within or without the State of Texas (“General Charitable Purpose”). The assets and property of the Foundation are hereby pledged for use in performing its charitable purposes.

(b) The Foundation is additionally organized to promote, encourage, and foster any other similar religious, charitable, educational or nonprofit activities; to accept, hold, invest, and reinvest and administer any gifts, legacies, bequests, devises, funds and property of any sort or nature, and to use, expend, or donate the income or principal thereof for, and to devote the same to, the foregoing purposes of the Foundation; and to do any and all lawful acts and things which may be necessary, useful, suitable, or proper for the furtherance of accomplishment of the purposes of this Foundation; provided, however, no act may be performed which would violate Section 501(c)(3) of the Code.

Section 1.3. Powers. The Foundation is a charitable trust. The Trustees shall have those powers, duties, authorizations and responsibilities as provided in the Texas Trust Code and as limited and/or modified by this Trust Agreement; provided, however, the Trustees shall neither have nor exercise any power, nor engage directly or indirectly in any activity, that would invalidate the Foundation’s status as a trust that is exempt from federal income tax as an organization described in Section 501(c)(3) of the Code.

Section 1.4. Offices. The Foundation may have, in addition to its registered office, offices at such places, both within and without the State of Texas, as the Trustees of the Foundation may from time to time determine or as the activities of the Foundation may require.

Section 1.5. Duration. The duration of the Foundation shall be perpetual.

ARTICLE II
TRUSTEES

Section 2.1. Trusteeship.

(a) *Class A Trustee.* The initial and only Class A Trustee shall be Richard Crawley. Richard Crawley shall serve as the Class A Trustee until the earlier of his death, resignation or removal from office. At such time as Richard Crawley is no longer serving in the position of Class A Trustee, there shall no longer be a Class A Trustee.

(b) *Class B Trustee.* The initial and only Class B Trustee shall be Cora Crawley. Cora Crawley shall serve as the Class B Trustee until the earlier of her death, resignation or removal from office. At such time as Cora Crawley is no longer serving in the position of Class B Trustee, there shall no longer be a Class B Trustee.

(c) *Class C Trustee.* The initial Class C Trustees shall be Mary Crawley, Edith Crawley and Sybil Crawley, (collectively the “Crawley Children” and individually, a “Crawley Child”). The individuals comprising the Class C Trusteeship shall hereafter sometimes be referred to collectively as the Class C Trustees and individually as a Class C Trustee.

- (i) *Class C Succession.* For purposes of this Trust Agreement, “Family Group” shall mean, for each Crawley Child, such Crawley Child and his or her Lineal Descendants. A “Lineal Descendant” means a person’s biological children and other lineal descendants of any degree whether currently living or later born. A child in gestation who is born alive shall be considered a child throughout the period of gestation. If a Crawley Child should die, resign or be unable or unwilling to serve or continue to serve as a Class C Trustee, such Crawley Child may appoint (in a written instrument signed by such Crawley Child) his or her successor Class C Trustee from among such Crawley Child’s Family Group. If such Crawley Child does not appoint a successor Class C Trustee, then the eldest living Lineal Descendant of such Crawley Child, so long as such individual is at least twenty-five (25) years old and willing to serve, shall automatically (and without any further action being necessary) be appointed to serve as the Class C Trustee for the Family Group of such Crawley Child. In the event there is no living member of such Crawley Child’s Family Group willing and able to serve, and subject to Section 2.1(d)(iii) below, the right of succession for such Family Group shall terminate.
- (ii) Any successor Class C Trustee to a Crawley Child shall have the power to appoint his or her successor, provided such successor is a member of the same Family Group and is a member of the appointing Class C Trustee’s same generational level (unless there are no members of such generational level, whereupon such appointment may be made from the members of the next generational level). If such successor Class C Trustee fails to appoint his or her successor, then the eldest living member of such Family Group, so long as such individual is at least twenty-five (25) years old and willing to serve, shall automatically as of the effective date of the vacancy in the position of Class C Trustee for such Family Group, and without any further action being necessary, serve as successor Class C Trustee for the Family Group.
- (iii) If, at the time of the appointment under (i) or (ii) above, or at the time of any subsequent vacancy in the position of Class C Trustee for a Family Group, as applicable, the eldest living member of the Family Group has not yet attained age twenty-five (25), then a successor shall be appointed to serve as Class C Trustee for such Family Group (each an “Appointed Class C Trustee”). An Appointed Class C Trustee shall be treated as a Class C Trustee in all respects under this Trust Agreement. The then-serving Trustees shall make such appointment by majority vote. The Appointed Class C Trustee shall serve until the earlier of his or her death, resignation, removal from office or until a member of such Family Group attains twenty-five (25) years of age and is willing to serve; at which time, (A) such member of such Family Group will automatically, and without any further action being necessary, be appointed as a Class C Trustee in full and immediate replacement and substitution of the Appointed Class C Trustee and (B) the Appointed Class C Trustee will be deemed to have resigned. Notwithstanding the foregoing, in the event the last living member of such Family Group dies prior to attaining age twenty-

five (25), the right of succession for such Family Group shall terminate and the Appointed Class C Trustee will be deemed to have resigned.

- (iv) If a Family Group's right of succession terminates pursuant to this subsection (c), then the remaining individuals serving as Class C Trustee (or their successors) representing the Family Groups of the other Crawley Children will continue to serve as Class C Trustee(s).

(d) *Class D Trustee.* The initial Class D Trustee shall be Richard Carlisle. The Class D Trustee shall be the Management Trustee and shall be the sole Trustee responsible for management of the Investment Assets (as such term is defined in Section 7.5) of the Foundation. The Class D Trustee may, in his discretion, elect at any time to (i) delegate all or a portion of such management responsibility to a third party delegee, or (ii) cause the Foundation to engage a third party to provide asset management services to the Foundation, and in either case such delegee or third party service provider may be, but is not required to be, an affiliate of the Class D Trustee, and shall act as delegee or service provider on such terms and conditions as the Class D Trustee shall approve (but subject to the reasonable compensation limitations set forth in Section 2.12 and Section 5.2(l)). The Class D Trustee shall not have the power to appoint his or her successor. The Class D Trustee shall serve until the earlier of his death, resignation or removal from office. If a vacancy in the Class D Trusteeship occurs, the Trustees then serving in Classes A, B, and C shall appoint a successor Class D Trustee to fill such vacancy by unanimous decision. If unanimity cannot be achieved within forty-five (45) days of the vacancy, the Administrative Trustee shall petition one of the district courts or statutory probate courts of Tarrant County, Texas to appoint a successor Class D Trustee to fill such vacancy. In the event the vacancy is submitted to a statutory probate court, such court shall make such appointment from those individuals with respect to whom the Trustees could not reach the required vote; provided, however, such individuals must meet the qualifications set forth in this Section 2.1(e). In the event none of the individuals in consideration by the Trustees meet the qualifications set forth in this Section 2.1(e), the court shall choose an otherwise qualified individual to serve in such role. The individual serving as Class D Trustee must possess at least similar or greater educational level, financial credentials, skill and sophistication as the initial Class D Trustee.

(e) *Class E Trustee.* The initial Class E Trustee shall be Charles Carson. The Class E Trustee shall be the Administrative Trustee and shall be responsible for the administrative functions of the Foundation as more fully described in Section 2.4 below. The Class E Trustee shall not have the power to appoint his or her successor. The Class E Trustee shall serve until the earlier of his death, resignation or removal from office. If a vacancy in the Class E Trusteeship occurs, the Trustees then serving in Classes A, B, and C shall appoint a successor Class E Trustee to fill such vacancy by unanimous decision. If unanimity in such decision cannot be reached within fifteen (15) business days of the vacancy, the Management Trustee shall petition one of the district courts or statutory probate courts of Tarrant County, Texas to appoint a successor Class E Trustee to fill such vacancy from those individuals with respect to whom the Trustees could not reach unanimity; provided, however, such individuals must meet the qualifications set forth in this Section 2.1(f). In the event none of the individuals in consideration by the Trustees meet the qualifications set forth in this Section 2.1(f), the court shall choose an otherwise qualified individual to serve in such role. The individual serving as Class E Trustee must possess at least similar or greater educational level, experience, skill and sophistication as the initial Class E Trustee.

(f) *Independent Trustees.* Upon the death, resignation, or removal of the last surviving Trustee serving in any of Classes A, B, or C, the Management Trustee and Administrative Trustee shall petition one of the district courts or statutory probate courts of Tarrant County, Texas to appoint a successor trustee. To be qualified to fill such position under this Section 2.1(f), an individual must possess at least similar or greater educational level, financial credentials, skill and sophistication as the initial Class D Trustee. Upon such successor's appointment, the three (3) then-serving Trustees shall be Trustees for all purposes and shall act by majority vote. At such time, there shall no longer be classes of Trustees. These Trustees shall be referred to as the Independent Trustees. Upon the death, resignation, or removal, or in the event of the inability or unwillingness to serve or continue to serve, of any such Trustee (or their successors), the remaining Trustees shall choose a replacement subject to the qualifications set forth in this section. In the event the remaining Trustees fail to choose under such circumstances, a statutory probate court of Tarrant County, Texas shall make such appointment, in accordance with the qualifications set forth herein, upon the petition of any remaining Trustee.

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(g) *Resignation of Trustee.* Any Trustee may resign at any time by giving sixty (60) days written notice to the other Trustees, unless notice is waived in writing by all persons entitled thereto, in which event no such notice shall be required. In the event a Trustee chooses to resign after receiving notice under Section 2.3(e), the Trustee must give notice of that resignation within the thirty (30) day notice period provided for in that section, and the transition plan will provide for the resignation's effective date. Any resignation shall be effective on the earlier to occur of sixty (60) days from the time written notice is provided or when a successor is chosen to fill the vacancy, where applicable.

Section 2.2. Trustee Liability and Indemnification. No Trustee shall be required to furnish any bond or surety. No Trustee shall be responsible or liable for the acts or omissions of any other of the Trustees or any predecessor trustee. For purposes of clarity and specificity, the Class D Trustee is responsible for investment management as set forth in Section 2.1(e) above, and the Class E Trustee is responsible for administrative functions as set forth in Section 2.4(a) below, and the Class A, Class B, and Class C Trustees are responsible for conducting due diligence with respect to the distributions that they are entitled to direct under this Trust Agreement; provided, that, notwithstanding the foregoing, such individual Trustees shall have access to and be supported by the resources of the Administrative Agent (under Section 5.1) or such other resources as may be provided by the Administrative Trustee to assist in the conduct of such due diligence. The Program-Level Expenses (as such term is defined in Section 6.4) incurred, or facilitated on behalf of the Foundation, by the Administrative Agent in assisting with such due diligence shall be allocated to and reimbursed from the funds over which the applicable Trustee has distribution discretion. No Trustee shall have responsibility or liability with respect to the discretionary decisions made by another Trustee within the scope of its, his, or her role. Each Trustee (and any agent of such Trustee) in carrying out his, her or its powers in performing his, her, or its duties may act in his, her, or its discretion and shall be personally or corporately liable only for a breach of fiduciary duty committed in bad faith, intentionally, or with reckless indifference. No Trustee, however, shall have personal or corporate liability for making or failing to make any discretionary distributions as provided herein or any election under any tax law. Except as otherwise provided in Section 117.011 of the Texas Property Code, no Trustee shall be personally or corporately liable for any act or omission of any custodian, agent, depository, attorney, employee or third party service provider of such Trustee unless such Trustee has acted in bad faith in the selection and retention of such custodian, agent, depository, attorney, employee or third party service provider. Each Trustee, in addition to any other right of indemnity conferred by law or otherwise, shall be entitled in the exercise of the duties and discretions of the Foundation hereunder to be indemnified from the Foundation against all expenses, liabilities, costs, proceedings, and actions except any that arise from such Trustee's breach of fiduciary duty committed in bad faith, intentionally, or with reckless indifference; provided however, that no such indemnity shall apply that would give rise to an act of self-dealing under Section 4941(d) of the Code and the Regulations thereunder. In the event a Trustee meets the standard for indemnification under this Section 2.2, the Trustee shall be entitled to reimbursement or direct payment of reasonable and necessary attorneys' fees incurred in defending any action brought against the Trustee for actions taken in his role as Trustee. Any indemnification provided hereunder shall be classified as an Entity-Level Expense as such term is defined in Section 6.4.

Section 2.3. Removal.

(a) *Power to Remove.* A Trustee or Trust Protector may only be removed in accordance with the provisions of this Section 2.3.

(b) *Removal without Cause.* Only the Class D and E Trustees and the Trust Protector shall be subject to removal without cause. Removal of a Class D or E Trustee or the Trust Protector without cause shall require the unanimous vote of the Trustees then serving in Classes A, B, and C.

(c) *Removal for Cause.* Any Trustee or the Trust Protector is subject to removal for cause by one of the district courts or statutory probate courts of Tarrant County, Texas. For purposes of this Section 2.3(c), "for cause" shall mean clear and convincing evidence of any of the following:

- (i) The willful misconduct, gross negligence, or fraud of a Trustee or the Trust Protector in the performance of such Trustee's or Trust Protector's duties under this Trust Agreement, or under state or federal statute;
- (ii) The Bankruptcy or insolvency of a Trustee or the Trust Protector or an affiliate of a Trustee that is exercising delegated powers of the Trustee under this Trust Agreement; or

- (iii) A Trustee or the Trust Protector becomes completely and permanently unable to discharge his or her duties by reason of accident, physical or mental illness (including progressive physical or mental deterioration), or other similar cause. Such decision shall be based upon medical examination by at least two (2) physicians appointed by the court.
- (iv) The Class D Trustee may be removed at any time by one of the district courts or statutory probate courts of Tarrant County, Texas in the event that such court determines that either the Class D Trustee, and any affiliate or third party delegee of the Class D Trustee that is managing assets of the Foundation pursuant to an investment management agreement as permitted by Section 5.2(1), have collectively failed to manage such assets of the Foundation in a manner consistent with the then-applicable Foundation Statement of Investment Policy and Guidelines.

(d) *Procedure for Removal.* To initiate a proceeding to remove a Trustee or Trust Protector under Section 2.3(c), a majority of the individuals then serving as Trustee of Class A, B, or C must jointly petition one of the district courts or statutory probate courts of Tarrant County, Texas to remove the subject Trustee or Trust Protector; provided, however, in the event there are only two (2) Trustees serving, initiation of such a proceeding shall require only one (1) Trustee. The court, based upon an evidentiary hearing, shall determine whether there is a basis for removal under Section 2.3(c). In the event the court finds a basis for removal exists, the court shall make such declaration and the subject Trustee or Trust Protector shall immediately (and without further action necessary) be removed from his or her position as Trustee or Trust Protector subject to a reasonable transition period as determined by the statutory probate court. In the event a Trustee or Trust Protector is removed, the vacancy in such position shall be dealt with under the provisions of Section 2.1 or 2.11 of this Trust Agreement, as applicable to the class of Trustee or Trust Protector removed.

(e) *Reappointment as Trustee.* A Trustee who is removed under Section 2.3(c)(iii) is eligible for reinstatement upon a determination by the court that removed such Trustee that such Trustee has regained the necessary capacity to serve as Trustee. Such decision shall be based upon medical examination by at least two (2) physicians appointed by the court.

(f) *Definition of Bankruptcy.* “Bankruptcy” means with respect to any Trustee or the Trust Protector or an affiliate of a Trustee that is exercising delegated powers of the Trustee under this Trust Agreement, (i) filing a voluntary bankruptcy petition; (ii) becoming the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceedings; (iii) filing a petition or answer seeking a reorganization, liquidation, dissolution, or similar relief under any law; (iv) filing an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the Trustee or affiliate in a proceeding of the type described in subclauses (i) through (iii) above; or (v) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of the Trustee or affiliate or of all or any substantial part of the Trustee’s or affiliate’s properties; and with respect to item (ii) above, one hundred twenty (120) days have expired without dismissal thereof.

Section 2.4. Governance/Administration. The Administrative Trustee (Class E) shall have authority to make all decisions regarding administration of the Foundation except as to matters specifically reserved by this Trust Agreement (i) to other Trustees (e.g., the Management Trustee shall be the sole Trustee responsible for management of the Investment Assets of the Foundation), (ii) to the Trust Protector, (iii) to one of the district court or statutory probate courts of Tarrant County, Texas, or (iv) to the Administrative Agent. As set forth in Section 5.1, day-to-day matters of the Foundation, other than investment matters and those matters specifically assigned to another Trustee, may be administered by an Administrative Agent pursuant to an administrative services agreement. The role of the Administrative Trustee shall be one of centralized compliance, coordination, and verification. The Administrative Trustee shall provide oversight with respect to the Administrative Agent, verifying compliance with the terms of this Trust Agreement (by way of example and not of limitation, verifying Distribution Trustees are aware of their allocable distributive share and verifying such share is not exceeded) and the legal obligations of the Foundation (by way of example and not of limitation verifying appropriate due diligence is performed to satisfy requirements of the Code and Regulations with respect to gifts and grants from private foundations so as to avoid the imposition of excise tax penalties), verifying that the various day-to-day matters of the Foundation are coordinated, and verifying that such administrative matters are being accomplished.

Section 2.5. Meetings. No meetings of the Trustees shall be required. However, meetings of the Trustees may be called upon the written request of at least two (2) Trustees. Written notice of the place (which may be within or without the State of Texas), date, time and purpose of each meeting of the Trustees shall be given to each Trustee not less than five (5) business days nor more than thirty (30) calendar days prior to the date thereof. No business shall be transacted at a meeting of the Trustees except as stated in the notice of such meeting.

Section 2.6. Consent of Trustees. Any action requiring the approval of more than one (1) Trustee may be taken without a meeting if a consent in writing setting forth the action to be taken shall be signed by the number of Trustees whose approval of the action is required under this Trust Agreement. Each written consent must bear the date and signature of each person signing it. A consent signed by less than all the Trustees having voting rights with respect to the action to be taken is not effective to take the intended action unless consents signed by the required number of persons whose approval of the action is required under this Trust Agreement are delivered to the Foundation within sixty (60) days after the date of the earliest dated consent delivered to the Foundation. Delivery must be made by hand, by certified or registered mail, return receipt requested, or by email. Delivery must be made to the Foundation's agent having custody of the books and records of the Foundation. The Foundation, acting through the Administrative Trustee will give prompt notice of the action taken to Trustees who do not sign the consents. Any photographic, photostatic, facsimile, or similar reliable reproduction of a consent in writing by a Trustee may be substituted or used instead of the original writing for any purpose for which the original writing could be used, if the reproduction is a complete reproduction of the entire original writing.

Section 2.7. Electronic Meetings. Subject to the provisions of applicable law and this Trust Agreement regarding notice of meetings, in the event the Trustees choose to hold a meeting, the Trustees may, unless otherwise restricted by statute or by this Trust Agreement, participate in and hold any meeting of the Trustees by using conference telephone or similar communications equipment, or another suitable electronic communications system, including videoconferencing technology or the Internet, or any combination, if the telephone or other equipment system permits each person participating in the meeting to communicate with all other persons participating in the meeting. If voting is to take place at the meeting, reasonable measures must be implemented to verify that every person voting at the meeting by means of remote communications is sufficiently identified and a record must be kept of any vote or other action taken. Participation in a meeting pursuant to this Section 2.7 shall constitute presence in person at such meeting, except when a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting was not lawfully called or convened.

Section 2.8. Distribution Trustees.

(a) The Class A Trustee, Class B Trustee, and the Class C Trustees (collectively the "Distribution Trustees" and individually a "Distribution Trustee") shall have the sole responsibility for directing the charitable distributions of the Foundation until such time as the Independent Trustees are appointed. All distributions under this Section 2.8 must be distributions made in furtherance of the Foundation's purposes under Section 1.2(a). Distributions may be made in the form of gifts, grants, direct charitable expenditures, or program-related investments and may be made to any organization as long as the making of such distribution is permitted for a private foundation. Distributions shall be directed in accordance with the following terms:

(b) *Class A Trustee.* The Class A Trustee shall direct distribution of one third (1/3) of the Foundation's Statutory Requirement (as defined in Article VII) for the year in which such distribution is made ("Class A Distribution Amount").

(c) *Class B Trustee Distribution Amount.* The Class B Trustee shall direct one third (1/3) of the Foundation's Statutory Requirement for the year in which such distribution is made ("Class B Distribution Amount").

(d) *Class C Trustee Distribution Amount.* The Class C Trustees shall direct one third (1/3) of the Foundation's Statutory Requirement for the year in which such distribution is made ("Class C Distribution Amount"). Distributions of the Class C Distribution Amount shall be directed in accordance with the following provisions.

While the Crawley Children are serving as Class C Trustee(s), then each Crawley Child shall direct distribution of a fraction of the Class C Distribution Amount, the numerator of such fraction being one and the denominator being the total number of Crawley Children and/or Crawley Family Groups.

- (i) If a Crawley Child (or his or her successor(s)) should die, resign or is otherwise unable or unwilling to serve or continue to serve as Class C Trustee, and a successor has not been appointed, and there are no remaining members of such Crawley Child's Family Group, then the direction amount allocated to such Crawley Child or such Crawley Child's Family Group shall be allocated equally among the remaining Crawley Children or the remaining Crawley Children's Family Groups, as applicable.
- (ii) In the event that no Crawley Child or Lineal Descendant is serving as a Class C Trustee, then the Class C Distribution Amount shall be made by a majority of the then-serving Trustees.

(e) *Responsibilities of Distribution Trustees.* In addition to being responsible for directing distributions in the amounts set forth in this Section 2.8, each Distribution Trustee shall have responsibility for all due diligence and tax compliance matters with respect to the amounts to be directed by him or her (such due diligence and tax compliance matters being subject to review of the Administrative Trustee as set forth in Section 2.4. It is anticipated that the Distribution Trustees will have use of an Administrative Agent (pursuant to Section 5.1 hereof) to assist in such tasks. To the extent permitted by applicable law, a Distribution Trustee shall not have authority, responsibility, or liability with respect to another Distribution Trustee's distribution decisions.

(f) *Failure to Direct Maximum Distribution.* In the event a Distribution Trustee fails to direct the maximum allowable distribution as set forth in Section 2.8(d)-(e) above, as applicable and such failure results in the imposition of a tax on the Foundation for failure to distribute the required amount under Section 4942 of the Code, such tax shall be allocated to and payable from the distributive share of such Trustee in the year such tax is imposed. To avoid imposition of such tax, a Distribution Trustee is encouraged to consider the use of a donor advised fund complying with the requirements set forth in Section 2.9 in the event he or she is unable to finalize the directing of distributions in the applicable amount for any year.

(g) *Distributions In Excess of Statutory Requirement.* The Foundation may make distributions in accordance with the purposes set forth in Section 1.2 in any one year that exceed the amounts set forth in Section 2.8(b)-(d) only with the unanimous consent of the Trustees then serving in Classes A, B, and C. Notwithstanding anything to the contrary, neither the consent of the Class D Trustee nor the consent of the Class E Trustee shall be required to make distributions in excess of the Statutory Requirement for the year. The Independent Trustees shall be limited on an annual basis to distributing no more than the Foundation's Statutory Requirement for the year's distributions.

(h) *Advisory Privileges with Respect to Donor Advised Funds.* In the event the Foundation becomes advisor to a donor advised fund, the right to exercise such advisory privileges shall belong to the Distribution Trustees in the proportion that a Distribution Trustee has directed funds to such donor advised fund. For example, in the event a Class C Trustee directs funds to a donor advised fund meeting the requirements of Section 2.9, such Class C Trustee shall have the right to exercise advisory privileges on behalf of the Foundation as to the amount of funds such Distribution Trustee directed to the donor advised fund. Further, the successive scheme set forth in this Section 2.8 shall apply to any portion of the donor advised fund remaining when such Distribution Trustee is no longer a Distribution Trustee.

Section 2.9. Prohibited Distributions and Pledges. Notwithstanding anything to the contrary, the Foundation and its Trustees are prohibited from making a distribution that would satisfy a Trustee's personal pledge or obligation and are prohibited from making multi-year pledges or commitments. Further, no distributions may be directed to a donor advised fund held by a sponsoring organization unless such donor advised fund names the Foundation as donor advisor and prohibits substitution of the donor advisor without approval of the Foundation.

Section 2.10. Trustee Compensation. Each Trustee shall be reimbursed from the Foundation for any attorney's fees or other necessary expenses incurred in relation to its, his, or her engagement or service as Trustee. All Trustees shall be entitled to compensation for its, his or her services in its, his or her respective role(s) provided such compensation must be reasonable. In no event shall any compensation or reimbursement received by a Trustee under this Trust Agreement (after also taking into account any compensation or reimbursement received by an agent or affiliate of such Trustee under an investment management agreement (in the case of the Management Trustee or any Independent Trustee) or administrative services agreement (in the case of the Administrative Trustee or any Independent Trustee)) exceed that permitted under the provisions of Treasury Regulation Section 53.4941(d)-3(c). In

order to ensure that such compensation and reimbursement does not exceed the foregoing limitation set forth in the Regulations, the following provisions shall be observed:

(a) *Establishing compensation.* A determination of reasonable compensation under this Agreement shall be made by the Trustees, acting by majority vote, and shall require consideration of independent third party materials as set forth in Section 2.12(b) below. If a majority decision cannot be achieved within thirty (30) days of receipt of the Market Survey (under Section 2.12(b)(i) below) or opinion as to reasonableness (under Section 2.12(b)(ii) below), the Administrative Trustee shall petition one of the district courts or statutory probate courts of Tarrant County, Texas to make such determination.

(b) *Procedures for establishing reasonableness of compensation.* In determining the reasonableness of compensation under this Trust Agreement, the Trustees shall consider the most appropriate third party materials as set out below.

- (i) *Market Survey.* The Trustees may obtain a market survey to assist in establishing reasonable compensation. For purposes of this Section 2.12(b)(i), a “Market Survey” means a compensation study referencing the published fees of asset management firms and administrative services firms, as applicable. Any Market Survey pursuant to this Agreement should be performed by a firm regionally or nationally recognized to provide information regarding the effective conduct of and reasonable compensation for the various duties of (or relevant delegated portions thereof) the Management Trustee, Administrative Trustee, Distribution Trustees, or Independent Trustees, as applicable. All Market Surveys, to the extent commercially reasonable, should take into account: (1) the geographic location(s) from which Foundation property is to be managed or administered, as applicable, (2) the character of the Foundation assets, including the type of industry of the various businesses in which the Foundation has an ownership interest, (3) the size of the portfolio, and (4) the knowledge and experience required for the position of Management Trustee, Administrative Trustee, Distribution Trustee, or Independent Trustee, as applicable. If a Market Survey is obtained hereunder, in no event shall the compensation of the Management Trustee (or any agent or affiliate thereof) or Administrative Trustee (or any agent or affiliate thereof) exceed the 75th percentile of the Market Survey.
- (ii) *Third Party Opinion.* In recognition of the fact that a Market Survey may not be readily available or easily obtained with respect to the scope of services provided by the Trustees having authority to set compensation pursuant to Section 2.12 may, acting by majority vote, resolve to seek an opinion of an independent third party to assist in establishing reasonable compensation. In such event the Trustees shall submit a fee proposal with an explanation of the reasons supporting such proposal to an independent consultant chosen by the Trustees with expertise in compensation matters relevant to the subject scope of services to provide a written opinion as to whether the proposal is considered reasonable in the circumstances. In the event the alternative procedure under this Section 2.12(b)(ii) is relied upon, the Trustees shall not pay compensation that such consultant fails to confirm as reasonable.

(c) *Compensation Received by Affiliates or Agents; Proportionate Reduction.* Notwithstanding anything to the contrary in this Trust Agreement, in the event an affiliate of the Management Trustee is receiving compensation pursuant to an investment management agreement, as permitted pursuant to Section 5.2(1), or in the event an affiliate of the Administrative Trustee is receiving compensation pursuant to an administrative services agreement, (1) such compensation shall be determined in the same manner as the compensation for the Management Trustee and Administrative Trustee is determined pursuant to Section 2.12(b), and (2) the compensation of such Management Trustee or Administrative Trustee, as applicable, hereunder, shall be reduced dollar for dollar by the amount paid to the delegee pursuant to such investment management agreement or administrative services agreement. At such time as there are only Independent Trustees serving, if any Independent Trustee has an affiliate that is receiving compensation pursuant to an investment management agreement or an administrative services agreement, (1) such compensation shall be determined in the same manner as the compensation for the Management Trustee and Administrative Trustee is determined pursuant to Section 2.12(b) and (2) the compensation of such Independent

Trustee hereunder shall be reduced dollar for dollar by the amount paid to the delegee pursuant to such investment management agreement or administrative services agreement.

Section 2.11. Trust Protector. The initial Trust Protector shall be George Murray. The role of the Trust Protector shall be to represent the interests of the Foundation when the Foundation is engaging in a transaction with one of the Trustees. The Trust Protector shall have the sole authority to execute and deliver documents on behalf of the Foundation, as he or she may approve, in lieu of the subject Trustee in the event of an interested transaction. A potential interested transaction must be brought to the Trust Protector for determination by the Trustees then serving in Class A, B, and C (for purposes of this Section 2.11, the “Conflicts Committee”) by means of a Conflict Notice (as hereinafter defined). The Conflicts Committee, by a vote of any two (2) of its members, shall have the authority to provide written notice to the Trust Protector (“Conflict Notice”) that clearly sets forth: the facts and circumstances relating to the transaction which the Conflicts Committee has determined may constitute a conflict of interest; an analysis of the specific provisions of this Trust Agreement which the Conflicts Committee believes support its belief that a conflict of interest has arisen which warrants the Trust Protector to act on behalf of the Foundation; and the actions that such Trustees request the Trust Protector to undertake on behalf of the Foundation.

The Trust Protector shall have the right to access other information of the Foundation as reasonably necessary for the Trust Protector to carry out its, his or her duties (for the avoidance of doubt, excluding any privileged information relating to the representation of any Trustee by his or her individual counsel). The Trust Protector shall be afforded rights of indemnification and reimbursement of expenses (which shall be Entity-Level Expenses under Section 6.4) as set forth in an Indemnification and Expense Reimbursement Agreement to be executed between the Trust Protector and the Foundation. Any indemnification provided thereunder shall be subject to the limitations of Chapter 42 of the Code, as applicable. In addition, it is acknowledged that the initial Trust Protector may in his discretion utilize the services of partners, officers, employees and affiliates (collectively, “Related Parties”) in connection with the performance of duties of Trust Protector. Subject to the provisions of Chapter 42 of the Code, the initial Trust Protector shall be entitled to be reimbursed for the reasonable general and administrative costs and expenses of any such Related Parties allocable to their time spent in the performance of such services, (to the same extent and pursuant to the same procedures as are applicable to other reimbursable third-party costs) and such Related Parties when acting in such capacity, shall be entitled to the indemnification afforded to the initial Trust Protector under such Indemnification and Expense Reimbursement Agreement. The Trust Protector shall not have the power to appoint his or her successor. The Trust Protector shall serve until the earlier of his or her death, resignation or removal from office or until such time as there are only Independent Trustees. The Trust Protector may resign at any time upon providing written notice to the Trustees, which resignation shall be effective on the 60th day following such notice without regard to whether a successor Trust Protector shall have been appointed to fill such vacancy. If a vacancy in the role of Trust Protector occurs, the Trustees then serving in Classes A, B, and C shall appoint a successor to fill such vacancy by majority decision. If the required vote cannot be achieved within forty-five (45) days of the vacancy, the Administrative Trustee shall petition one of the district courts or statutory probate courts of Tarrant County, Texas to fill such vacancy. In the event the vacancy is submitted to a court, such court shall make such appointment from those individuals with respect to whom the Trustees could not reach the required vote; provided, however, such individuals must meet the qualifications set forth in this Section 2.11. In the event none of the individuals in consideration by the Trustees meet the qualifications set forth in this Section 2.11, the court shall choose an otherwise qualified individual to serve in such role. The individual serving as the Trust Protector must possess at least similar or greater educational level, financial credentials, skill and sophistication as the initial Class D Trustee. Removal of a Trust Protector shall require the same vote as the filling of a vacancy in the role of Trust Protector. The Trust Protector shall act in good faith in exercising his or her responsibilities as Trust Protector, but shall not owe fiduciary duties.

ARTICLE III ADVISORY BOARDS OR COMMITTEES

Section 3.1. Advisory Boards or Committees. Any Trustee having authority over distributions under Section 2.8 shall have the ability to establish an advisory board or committee to assist such Trustee in the due diligence associated with directing such distributions. The Trustee (or where multiple Trustees are working together, Trustees) shall appoint the members of such advisory boards or committees and may remove any such members when, in the judgment of the appointing Trustee(s) the best interest(s) of the Foundation shall be served by such removal. Any such advisory boards or committees shall not have and shall not exercise the authority, responsibility or duties of the Trustees as governing

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persons of the Foundation. Any expenses (reimbursements or otherwise) associated with any advisory board or committee shall be treated as Program-Level Expenses and allocated to the distributable amount of the Trustee(s) that commissioned such advisory board or committee.

Section 3.2. Term of Office. Each member of an advisory board or committee shall continue as such until the earlier of his or her death, resignation, or removal from such position or until the board or committee is terminated.

Section 3.3. Chairman. Unless otherwise designated by this Trust Agreement, one or more members of each advisory board or committee shall be appointed chairman, or co-chairman, by the person or persons authorized to appoint the members thereof.

Section 3.4. Vacancies. Vacancies in the membership of any advisory board or committee may be filled by appointments made in the same manner as provided in the case of the original appointments.

Section 3.5. Quorum; Manner of Acting. A majority of the whole advisory board or committee shall constitute a quorum, and the act of the majority of the members present at a meeting at which a quorum is present shall be the act of the board or committee.

Section 3.6. Rules. Each advisory board or committee may adopt rules for its own government not inconsistent with this Trust Agreement or with rules adopted by the Trustees.

**ARTICLE IV
NOTICES**

Section 4.1. Manner of Giving Notice. Whenever, under the provisions of any law or this Trust Agreement, notice is required to be given to any Trustee or committee member of the Foundation, and no provision is made as to how such notice shall be given, it shall not be construed to require personal notice, but any such notice may be given in writing by hand delivery, by facsimile transmission, by electronic mail transmission, or by certified mail, postage prepaid, addressed to such Trustee or committee member at such person's address as it appears on the records of the Foundation. Any notice required or permitted to be given by mail shall be deemed to be delivered five (5) business days after deposited in the United States mails, as aforesaid. Any notice required or permitted to be given by facsimile transmission or electronic mail transmission shall be deemed to be delivered upon successful transmission of such facsimile or electronic mail.

Section 4.2. Waiver of Notice. Whenever any notice is required to be given to any Trustee or committee member of the Foundation under the provisions of any law or this Trust Agreement, a waiver thereof in writing signed by the person or persons entitled to such notice whether signed before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

**ARTICLE V
ADMINISTRATIVE AND INVESTMENT
POWERS AND DUTIES**

Section 5.1. Administration of Day to Day Matters. The Administrative Trustee shall have exclusive authority over the day-to-day administrative activities of the Foundation, as set forth in Section 2.1(e). The Administrative Trustee may delegate such matters to administrative agent ("Administrative Agent" or "Administrator") pursuant to a written administrative services agreement. To the extent there is a conflict between any provision of any administrative services agreement and this Trust Agreement, the provisions of this Trust Agreement shall control.

Section 5.2. Investment Activities. The Management Trustee shall have exclusive authority over the day-to-day investment activities of the Foundation as set forth in Section 2.1(e). The Management Trustee shall have all the management, investment, administrative powers granted to a trustee by the Texas Trust Code as it is now written and as it may be hereafter amended, and by related common law insofar as such powers relate to making and monitoring investments of the Foundation. Except as expressly provided to the contrary, the powers granted to the Management Trustee, or his delegee, under this Trust Agreement expand or are additions to the powers granted to a trustee under the Texas Trust Code and related common law; provided, however, in the event of any conflict between such Code,

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including the Texas Uniform Prudent Investor Act, the Texas Uniform Principal and Income Act and the terms of this Trust Agreement, the terms of this Trust Agreement shall control provided such terms do not constitute a violation of any applicable law. Unless otherwise noted herein, the powers listed in this Section 5.2 shall be vested solely in the Management Trustee or Independent Trustees or his/their delegee(s). Notwithstanding anything to the contrary in this Section 5.2, all powers exercised by the Management Trustee or Independent Trustees or his/their delegee(s) are expressly subject to the prohibited transaction rules applicable to private foundations as set forth in Sections 4940 – 4945 of the Internal Revenue Code. All references to the Management Trustee in this Section 5.2 shall include the Independent Trustees during their time of service.

(a) *Broad Powers of Investment.* The Management Trustee is authorized to invest and reinvest the Foundation's Investment Assets (as such term is defined in Section 7.5) in such property, real and personal, tangible and intangible, as the Management Trustee may deem proper or suitable for the investment of the Investment Assets, without being restricted to the type of investments which a trustee is or hereafter may be entitled by law to make. The Management Trustee may convert realty into personalty or personalty into realty, or to otherwise change the character of the Investment Assets, at public or private sale or otherwise for cash or other consideration or on credit, and upon such terms and conditions as the Management Trustee may deem proper or suitable for the investment of Investment Assets.

(b) *Reinvestment of Assets.* The Management Trustee is not under a duty to reinvest immediately the funds that may come into the Management Trustee's hands, but may withhold those funds from reinvestment until such time as the Management Trustee may deem appropriate to reinvest such funds, and the Management Trustee may keep on hand any sum of money that the Management Trustee may deem appropriate.

(c) *Retention of Assets.* The Management Trustee may retain, without regard to diversification of investments and without liability for any depreciation or loss resulting from the retention, any property that constitutes the initial corpus of the Foundation or that is added to the Investment Assets of the Foundation.

(d) *Wasting Assets.* The Management Trustee is authorized to retain or to acquire wasting assets. The Management Trustee is not required to sell wasting assets or to apportion any of the income therefrom to corpus. The Management Trustee may, if, in the Management Trustee's sole discretion, the Management Trustee deems it necessary to prevent injustice, transfer income or proceeds from wasting assets to corpus under such formulae as the Management Trustee deems equitable.

(e) *Oil, Gas and Other Mineral Interests.* The Management Trustee is authorized to hold, buy, sell or exchange oil and gas or other mineral properties, including interests in deposits of other natural resources; to execute leases on the properties; to execute subleases, farmout agreements, bottom-hole agreements and dry-hole agreements; to carve out or reserve any mineral interests that the Management Trustee may deem advisable or expedient; to execute unitization agreements, pooling agreements and joint operating agreements; to exchange undivided interests in mineral properties for interests in other properties; to renew existing loans or to refinance debts; and to borrow money and to pledge mineral properties.

(f) *Non-Income Producing Assets.* The Management Trustee is authorized to retain or acquire property returning no income or slight income and to retain any such property so long as the Management Trustee shall think appropriate without that property being in any way chargeable with income or the proceeds thereof in case of sale being in any part deemed income.

(g) *Undivided Interests.* The Management Trustee is authorized to acquire and hold undivided interests in property with other trusts, corporations, partnerships, joint ventures, or with other legal entities or parties.

(h) *Investment in Securities.*

(i) The Management Trustee is authorized to invest and reinvest the Investment Assets in the loans, bonds, mutual funds, options, investment Trust shares, stocks, common or preferred, or other securities of corporations, investment trusts or investment companies, including of any corporate trustee. The Management Trustee is expressly authorized to invest in mortgages, mortgage participations, certificates

of deposit, savings or demand deposits, including interests in common trust funds of any trustee bank or other financial institution.

- (ii) The Management Trustee is authorized to cause stock and securities to be registered in the name of the Trustees' nominee, or to take and keep the stock and securities unregistered and to retain them or any part thereof in such condition that they will pass by delivery; to vote all stock and securities held by the Trustees, either in person or by proxy, general or special, with full power of substitution; to participate in or consent to any voting trust, reorganization, dissolution, liquidation, merger, or other action affecting any shares of stock or any corporation that has issued the stock or securities; and to pay any and all assessments, subscriptions and other sums of money as the Management Trustee may deem appropriate for the protection of the Investment Assets, and to take advantage of any right to subscribe to bonds, stocks, and other securities; and to exercise any options available for conversion of stocks, bonds or other securities into other stocks, bonds, securities and investments.

(i) *Continuation of Businesses.* The Management Trustee is authorized to continue to operate any business interest that becomes part of the Investment Assets of the Foundation; to delegate all or part of the management thereof; to invest other funds of the Foundation therein; to convert the business from one form (e.g., proprietorship, partnership, corporation) to another form.

(j) *Sale or Exchange of Property.* The Management Trustee is authorized to sell, grant an option to sell, exchange, partition or otherwise distribute or dispose of any and all property or property interest, real or personal, in which the Management Trustee is authorized to invest on such terms as the Management Trustee may deem appropriate.

(k) *Execution of Instruments.* The Management Trustee is authorized to execute and deliver deeds, conveyances, assignments, leases, contracts, stock or security transfer powers, or any other written instrument of any character appropriate to any of the powers or duties herein conferred upon the Management Trustee.

(l) *Engagement of Agents.* The Management Trustee is authorized to delegate authority to agents, with full power of substitution, and to act through those agents; to engage or cause the Foundation to engage attorneys, investment counsel, real estate agents, or other agents that the Management Trustee may deem appropriate, and to pay reasonable compensation out of Foundation assets to any person or firm so engaged. Compensation of any affiliate or agent of the Management Trustee who is receiving compensation pursuant to an investment management agreement shall be determined in accordance with Section 2.12(b). For the avoidance of doubt, no compensation paid under this Section 5.2(l) shall exceed that permitted under the provisions of Treasury Regulation Section 53.4941(d)-3(c).

(m) *Formation of Corporations.* The Management Trustee is authorized to organize or cause to be organized any corporation or limited liability company that may be necessary or proper for the investment, administration or handling of any portion of the Foundation's Investment Assets; to transfer any Foundation property to one or more corporations or limited liability companies for all or part of their capital stock or other securities; to participate in the management of any other corporation or limited liability company whose securities are a part of the Investment Assets of the Foundation; to dissolve any corporation or limited liability company whose securities are a part of the Investment Assets of the Foundation; and to hold or dispose as part of the Investment Assets of the Foundation any property received upon such a dissolution.

(n) *Partnerships.* The Management Trustee is authorized to enter into any partnership, limited or general, with any person, corporation or other entity, including a Trustee under any other trust; to transfer any property of the Foundation to one or more partnerships for interests in the partnerships; to act as a partner in any partnership, limited or general, or with respect to any property, any part of which may be or become part of the assets of the Foundation originally or later; to participate in the management of the partnerships, limited or general; to dissolve any partnership, limited or general, in which the Management Trustee acts as a partner; and to hold or dispose as part of the Foundation any property received upon a dissolution.

(o) *Borrowing Money.* The Management Trustee is authorized to borrow money for the advantageous administration of the Foundation, to pledge any of the Investment Assets of this Foundation and to grant and execute liens on any Foundation property to secure such loans.

(p) *Ancillary Trustee for Certain Out-of-State Property.* In the event any of the property that is or may become a part of the Investment Assets of the Foundation is situated in any state or states other than the State of Texas, and in which the Management Trustee is not qualified to act as Trustee or does not choose to act in as Trustee, the Management Trustee is authorized to name an individual or corporate trustee qualified to act in the state in connection with the property situated in that state as ancillary trustee of the property and require such security as may be designated by the Management Trustee. The ancillary trustee so appointed shall have all the rights, powers, discretions and duties as are delegated to it by the Management Trustee, but shall exercise these powers, discretions, and duties subject to the limitations or further directions of the Management Trustee specified in the instrument evidencing its appointment. The ancillary trustee shall answer to the Management Trustee herein appointed for all moneys, assets, and other property that may be received by it in connection with the administration of the property. The Management Trustee hereunder may remove the ancillary trustee and appoint a successor at any time or from time to time as to any or all of the assets.

ARTICLE VI CONTRACTS, CHECKS, DEPOSITS AND FUNDS

Section 6.1. Contracts, Gift Agreements and Grant Agreements. Other than the Management Trustee who shall have such authority as outlined in Section 5.2 above, only the Administrative Trustee (or subsequently the Independent Trustee) shall have authority to enter into any contract, grant agreement or gift agreement on behalf of the Foundation. The Administrative Trustee's authority under this Section 6.1 is intended to ensure centralization of contracting on behalf of the Foundation in order to allow the Administrative Trustee to fulfill his role and is not to imply a power on the part of the Administrative Trustee to refuse to enter into a contract, grant agreement or gift agreement requested by a Distribution Trustee unless such request exceeds the authority of the requesting Distribution Trustee (by way of example and not of limitation requesting a gift that would result in prohibited self-dealing, requesting approval of a pledge that would exceed the allocable share of the Distribution Trustee, or requesting a grant agreement that would result in a taxable expenditure). The Trustee(s) having authority under this Section 6.1 may authorize any agent or agents of the Foundation to enter into any contract, grant agreement or gift agreement or execute and deliver any instrument in the name of and on behalf of the Foundation, and such authority may be general or confined to specific instances.

Section 6.2. Checks, Drafts or Orders for Payment. All checks, drafts or orders for the payment of money, notes or other evidences of indebtedness issued in the name of the Foundation shall be signed by such agent or agents of the Foundation and in such manner as shall from time to time be determined by the Trustee(s) having administrative authority under Section 2.4.

Section 6.3. Deposits. Subject to the provisions of the then-applicable Investment Management Agreement, all funds of the Foundation shall be deposited from time to time to the credit of the Foundation in such banks, trust companies or other depositories as the Management Trustee may select.

Section 6.4. Allocation of Expenses. Expenses incurred by the Foundation shall be classified as Program-Level Expenses or Entity-Level Expenses. Program-Level Expenses shall be those expenses that have been specifically requested, commissioned, or approved by one or more Distribution Trustees for the conduct of such Distribution Trustee(s)' distributive activities under Section 2.8 including, but not limited to, legal fees and other expenses reimbursed under Section 2.12. Entity-Level Expenses are expenses of the Foundation that are not classifiable as Program-Level Expenses but rather apply broadly across the Foundation's activities. Program-Level Expenses shall be allocated to and payable from the distributive share of the Distribution Trustee(s) requesting, commissioning, or approving such expenses. Entity-Level Expenses shall be allocated to the Foundation and payable first from the year's income of the Foundation, and second, if necessary, from Foundation corpus. Taxes imposed on the Foundation under Chapter 42 of the Code (other than the net investment income tax) shall be treated as Program-Level Expenses allocable to the Distribution Trustee(s) whose action or inaction resulted in the imposition of such tax.

ARTICLE VII DEFINITIONS AND MISCELLANEOUS

Section 7.1. The Code and Regulations. The "Code" shall mean the Internal Revenue Code of 1986, in its current version and as amended or superseded thereafter, and "Regulations" shall mean the corresponding Treasury Regulations.

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Section 7.2. The Foundation's Statutory Requirement. The "Foundation's Statutory Requirement" shall mean the annual distributable amount as defined in Section 4942(d) of the Code and corresponding Regulations.

Section 7.3. Investment Assets. The term "Investment Assets" shall mean all assets of the Foundation other than exempt function assets as described in Section 53.4942(a)-2(c)(3) of the Treasury Regulations.

Section 7.4. Loans to Trustees Prohibited. No loans shall be made by the Foundation to its Trustees.

Section 7.5. Fiscal Year. The fiscal year of the Foundation shall be fixed by decision of the Management Trustee or Independent Trustees, as applicable.

Section 7.6. Gender. Words of either gender used in this Trust Agreement shall be construed to include the other gender, unless the context requires otherwise.

Section 7.7. Invalid Provisions. If any part of this Trust Agreement shall be held invalid or inoperative for any reason, the remaining parts, so far as is possible and reasonable, shall remain valid and operative.

Section 7.8. Headings. The headings used in this Trust Agreement are for convenience only and do not constitute matter to be construed in the interpretation of this Trust Agreement.

**ARTICLE VIII
AMENDMENTS**

Section 8.1. Amendments. While there are still Trustees serving in any of Classes A, B, or C, Articles I and II, and this Section 8.1 may only be amended or repealed with the unanimous vote of the Trustees then serving in Classes A, B and C; however, any other provision may be amended or repealed, or new provision adopted with the majority vote of the Trustees then serving in Classes A, B and C. Failing such unanimous or majority vote, as applicable, any amendment, repeal, or adoption of a new provision shall require a decision of a district court or statutory probate court of Tarrant County, Texas under the provisions of the Texas Trust Code (or successor statute) and Texas common law applicable to amending the provisions of a charitable trust. When there are only Independent Trustees serving (i.e. at such time that there are no longer classes of Trustees), provisions of this Trust Agreement may only be amended or repealed, or new provision adopted by decision of a district court or statutory probate court of Tarrant County, Texas under the provisions of the Texas Trust Code (or successor statute) and Texas common law applicable to amending the provisions of a charitable trust. While there are at least two (2) individuals serving in Classes A, B, or C, collectively, initiation of a proceeding to seek amendment, repeal or adoption of a new provision of this Trust Agreement shall require the petition of two (2) or more Trustees serving in Classes A, B, or C. When there is one or zero individuals serving in Classes A, B, or C, collectively, initiation of such proceeding shall require the petition of any one or more of the then-serving Trustees.

**ARTICLE IX
OPERATION**

Section 9.1. Nonprofit Operation. The Foundation is organized and operated primarily for the purposes set forth under Article One of this Trust Agreement. It is to be operated in such a way that it does not result in the accrual of distributable profits, realization of private gain resulting from payment of compensation in excess of a reasonable allowance for salary or other compensation for services rendered or realization of any other form of private gain.

Section 9.2. Distribution of Assets. The Foundation pledges its assets for use in performing the Foundation's charitable functions. It directs that on discontinuance of the Foundation by dissolution or otherwise, the assets are to be transferred to a charitable, religious, educational, or similar organization(s) that qualifies under Section 501(c)(3) of the Code and is not a private foundation. The decision as to recipients of any such transfer shall be made in accordance with the distribution provisions of Section 2.8.

Section 9.3. Decision Making Authority. Decisions regarding or in any way involving the dissolution, merger and consolidation of the Foundation and decisions regarding the sale of substantially all of the Foundation's assets shall require the unanimous consent of the Trustees then serving in Classes A, B, and C to the extent there are Trustees serving

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in any of such classes. Notwithstanding the foregoing, decisions under this Section 9.3 during the Initial Period shall require the approval of a district court or statutory probate court of Tarrant County, Texas. To the extent there are only Independent Trustees serving, such decisions shall require the approval of a district court or statutory probate court of Tarrant County, Texas.

Section 9.4. Governing Law. This Trust Agreement shall be governed in all respects by the laws of the State of Texas and specifically the Texas Trust Code.

Robert Crowley, Class A Trustee

Cora Crowley, Class B Trustee

Mary Crowley, Class C Trustee

Edith Crowley, Class C Trustee

Sybil Crowley, Class C Trustee

Richard Carlisle, Class D Trustee

Charles Carson, Class E Trustee

George Murray, Trust Protector

APPENDIX C: SAMPLE NOTICE TO THE ATTORNEY GENERAL

CAUSE NO. _____

IN RE: § IN THE DISTRICT COURT
§
§ OF _____ COUNTY, TEXAS
[NAME OF TRUST §
§ _____ JUDICIAL DISTRICT

AFFIDAVIT

THE STATE OF TEXAS §
§
COUNTY OF _____ §

BEFORE ME, the undersigned Notary Public, personally appeared [attorney], who being by me first sworn, on oath states:

“This Affidavit is hereby given pursuant to Section 123.003 of the Texas Property Code.

I, _____, am the attorney of record for _____, Petitioner in the above styled and numbered cause. Notice of this proceeding was provided to Mr. Greg Abbott, Attorney General of the State of Texas, on _____, 2010, by certified mail, return receipt requested (hereinafter referred to as the “Notice”). Enclosed with the Notice was a copy of the Original Petition filed in cause no. _____ on _____, 2012.

A copy of the signed receipt from the Attorney General’s office is attached hereto.”

FURTHER, AFFIANT SAYETH NOT.

[attorney]

SUBSCRIBED AND SWORN TO before me by the above named affiant on this _____ day of _____, 2012.

Notary Public, State of Texas

APPENDIX D: SAMPLE AFFIDAVIT

[NOTICE LETTER TO ATTORNEY GENERAL]

_____, 2012

CERTIFIED MAIL NO.
RETURN RECEIPT REQUESTED

Mr. Greg Abbott
Attorney General of Texas
Price Daniel, Sr. Building
P.O. Box 12548
Austin, Texas 78711-2548

Re: Cause No. _____; In Re: [Name of Trust]; in the District Court of _____ County, Texas,
_____ Judicial District

Dear Mr. Abbott:

Please find enclosed a copy of an *Original Petition for Modification of Trust and for Declaratory Relief* (“Original Petition”) filed in Cause No. _____ on _____, 2012 in the District Court of _____ County, Texas, _____ Judicial District. This Original Petition is being sent to you via certified mail return receipt requested pursuant to Section 123.003 of the Texas Trust Code.

The purpose of this Original Petition is to _____.

If you find the enclosed Original Petition agreeable, we respectfully request that you file an Attorney General’s waiver declining to intervene in the proceeding in its current state.

Please do not hesitate to contact me in the event you have any questions or need any additional information.

Sincerely,

APPENDIX E: SAMPLE CERTIFICATE OF CONVERSION

**Certificate of Conversion
of a
Nonprofit Corporation
to a
Charitable Trust**

Converting Entity Information

The name of the converting nonprofit corporation is _____ Foundation.

The jurisdiction of formation of the nonprofit corporation is Texas.

The date of formation of the nonprofit corporation is _____, _____.

The file number issued to the nonprofit corporation by the Secretary of State is _____.

Converting Entity Information

The nonprofit corporation named above is converting to a charitable trust. The name of the charitable trust is _____ Foundation

The charitable trust will be formed under the laws of Texas.

Plan of Conversion

In lieu of providing the plan of conversion, the converting nonprofit corporation certifies that:

1. A signed plan of conversion is on file at the principal place of business of the nonprofit corporation, the converting entity. The address of the principal place of business of the nonprofit corporation is:

2. A signed plan of conversion will be on file after the conversion at the principal place of business of the charitable trust, the converted entity. The address of the principal place of business of the charitable trust is:

3. A copy of the plan of conversion will be furnished on written request without cost by the converting entity before the conversion or by the converted entity after the conversion to any governing person of the converting or converted entity.

Approval of the Plan of Conversion

The plan of conversion has been approved as required by the laws of the jurisdiction of formation and the governing documents of the converted entity.

Effectiveness of Filing

This document becomes effective when the document is accepted and filed by the Secretary of State.

Tax Certificate

In lieu of providing the tax certificate, the converted entity will be liable for the payment of any franchise taxes.

Execution

The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument. The undersigned certifies that the statements contained herein are true and correct, and that the person signing has the authority under the provisions of the Texas Business Organizations Code to execute the filing instrument.

Date: _____

_____ Foundation

By: _____, President