NAVIGATING SUDDEN DEATH: A ROADMAP FOR GUIDING CLIENTS THROUGH UNEXPECTED TRAGEDY

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CHAPTER 29

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I. INTRODUCTION

As a probate attorney, it is the very nature of our practice to represent and assist individuals through the process of handling the financial affairs and last wishes of a deceased individual. And aside from the professional fiduciary, these clients were often close enough to the decedent to be chosen and entrusted with a great obligation out of love and affection. It is in these instances we sit in the splash zone of tears of grief and, at times, in the cross hairs of displaced anger. Raw emotional responses to grief are ubiquitous to our practice; however, these can be particularly intense when the client (or clients) are suffering from a sudden tragic loss. When representing a client through the estate administration process who is in the mist of the emotional turmoil of unexpected loss, there are some additional considerations both as attorney and counselor which will allow us to better represent the client. The hope of this outline is to provide some insight into the unique role we can play in both roles while representing the client who is experiencing transformational grief.

II. LAWYER'S ROLE AS COUNSELOR

"Lawyering culture, more than any other, epitomizes a lack of comfort with – and distaste for – emotional vulnerability."[1] Our profession has all too often trained our successors in fierce rationality and emotionally sterile analysis. "Lawyers are hired to fix problems because they are perceived to be infallible and invulnerable; there is a significant amount of pressure to hide emotions in the name of maintaining a professional demeanor.[2] However, assisting clients with the process of probate necessarily requires us to interact with the clients emotions given that their need for representation is often the direct result of the passing of a loved one.

This realization is not new. In 1978 the Real Estate, Probate and Trust Law Section of the State Bar of Texas adopted a Statement of Principles Concerning the Responsibilities of the Estate Planning Attorney in Texas[3] and a Statement of Principles Concerning the Responsibilities of an Attorney in the Administration of a Decedent's Estate.[4] Though both were quickly 'repealed,'[5] the language is useful to review in contemplating the issue of 'counselor' to a grieving client.

> "In order for an individual to hold himself out to the public as an estate planner [or probate attorney for the purposes herein], he must be thoroughly skilled in the law pertaining to wills, trusts, property rights and estates; he must be capable of concise and unambiguous draftsmanship; he must understand the broad trends and the applicable rules of income, estate, inheritance and gift taxation; he should be acquainted with the practices and customs of the professional fiduciaries in his area; he should be schooled in the law of business entities and prepared to continue, dispose of, or dismember a business; he should be familiar with the essentials pertaining to pension and profit sharing plans and deferred compensation arrangements; he must have knowledge and experience and be familiar with the basic essentials of investments, insurance and accounting, and the sources of specialized advice in those areas; he should have a good understanding of the basic principles of business operations and financing; *he should be a counselor with a good understanding of psychology*; and finally he should be willing to cooperate with the other members of the estate planning team in creation and implementation of the estate plan."[6] [*Emphasis added*].

Tucked in with all the technical knowledge which we have worked to hone as necessary skills of our craft and tools of our trade is an admonishment that we are to be a counselor with a good understanding of psychology. No, this assuredly does not mean that we are to replace the therapist, but it does mean that our ability to issue spot and to guide a client in understanding of their own emotions (and reactions thereto) to the extent that they affect the legal representation is as important as our understanding of the Texas Estates or Internal Revenue

[1] Cover, Danielle, *Good Grief*, NYU Clinical Law Review, Vol 22:55, citing Nancy R. Hooyman & Betty J. Kramer, *Living Through Loss: Interventions Across The Life Span* 78 (2006).

[2] *Id*, citing Paul Brenner, When Caregivers Grieve, in LIVING WITH GRIEF: AT WORK, AT SCHOOL, AT WORSHIP 81 (Joyce Davidson and Kenneth J. Doka eds., 1999).

[3] Bandy, pg. 169, TEXAS BAR JOURNAL (February 1978).

[4] Pg. 42, TEXAS BAR JOURNAL (January 1978).

[5] Apparently there was concern that the Statements would become a road map for legal malpractice claims. See Brink, Rhonda H., They Don't Call Me Counselor for Nothing – Adding Value to Your Product and Strengthening Your Client Relationships, 43rd Annual Estate Planning & Probate Course, TexasBarCLE, State Bar of Texas, Chapter 17.2, June 18-20, 2019, San Antonio.

[6] Bandy.

Codes. Unfortunately this acknowledgment of the obligation to recognize and navigate client emotions has generally not informed our legal education or professional training as much as it should.

With that in mind, a brief primer of the grief process will help enlighten our understanding and heighten out compassion to the grieving client. Then a contrast of the ways in which grief from sudden, unexpected loss may have a different presentation and, therefore, effect on the representation of a client experiencing the grief of sudden loss when compared to expected loss.

A The Grief Process

It is certainly fair to say that on an individual level the grief process from person to person can look significantly different (for example think of siblings mourning the loss of a shared parent). How grief and loss manifests itself depends on an individual's personality, relationship with a decedent, the age of the decedent, how the grieving individual came to learn of the passing (and whether or not that person witnessed the death or the scene shortly thereafter), and past experience with loss or death. Additionally, larger social constructs including religious and cultural beliefs can make a sigificant difference in the grieving process. But any individual response to grief is likely to manifest itself very differently if the individual is faced with expected versus unexpected death.

1. General Principles of the Grief Process

Most people are at least somewhat familiar with Elisabeth Kübler-Ross' Five Stages of Grief[7] (being Denial, Anger, Bargaining, Depression, and Acceptance) which has, as the earliest in depth work on the subject, become the most pervasive model. Given the relative familiarity, another framework which may provide a new understanding and context of the grief process is Colin Murray Parkes model which draws parallels to John Bowlby's forms of attachment. Parkes opines that any moment in the grieving process falls into one of four (non-linear) phases:

- **Shock and numbness**: Loss in this phase feels impossible to accept. One is overwhelmed when trying to cope with their emotions. Parkes suggests that there is physical distress experienced in this phase as well, which can lead to somatic (physical) symptoms.[8]
- **Yearning and searching**: As one processes loss in this phase, they may begin to look for comfort to fill the void the loved one has left. They may try to do so by reliving memories through pictures and by looking for signs from the person to feel connected to them. In this phase, they become very preoccupied with the person they have lost.[9]
- **Despair and disorganization**: One may find oneself questioning and feeling angry in this phase. The realization that their loved one is not returning feels truly real, and they can have a difficult time understanding or finding hope in the future. One may feel a bit aimless in this phase and find that they retreat from others as they process the pain.[10]
- **Reorganization and recovery**: In this phase, one feels more hopeful that their hearts and minds can be restored. As with Kübler-Ross's acceptance stage, sadness or longing for our loved one doesn't disappear; however, one move towards healing and reconnecting with others for support, finding small ways to reestablish some normalcy in their daily lives.[11]

Additionally, it is important to note that loss has a physiological effect on the brain. Traumatic loss is perceived as a threat to survival and, as a normal protective process, our brain defaults to protective survival mechanisms by engaging the fight/flight(/freeze/fawn) response.[12] The nervous system triggers the body to increase blood pressure and heart rate and release specific hormones in preparation of the survival response to the perceived life threatening situation.[13]

> "Grief and loss affect the brain and body in many different ways. They can cause changes in memory, behavior, sleep, and body function, affecting the immune system as well as the heart. It can also lead to cognitive effects, such as brain fog. The brain's goal? Survival."[14]

While low to moderate (and relatively intermittent) stress works to strengthen the brain through nerve growth and can improve memory, chronic stress causes

[7] Kubler-Ross, Elizabeth; On Death and Dying; Collier Books/Macmillan Publishing Co. (1970).
[8] Clarke, Jodi; *The Five Stages of Grief, Learning about emotions after loss can help us heal*, Updated February 21, 2021; https://www.verywellmind.com/five-stages-of-grief-4175361.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Healing Your Brain After Loss: How Grief Rewires the Brian, American Brain Foundation*, https://www.americanbrainfoundation.org/how-tragedy-affects-the-brain/, September 29, 2021 citing Shulman, Lisa M., *Before and After Loss: A Neurologist's Perspective on Loss, Grief and Our Brain,* John's Hopkins University Press (2018).
[13] *Id.*
[14] *Id.*

compression of the nervous system with significant time and energy devoted solely to survival.[15] Long term, grief can damage memory, decision making, and slow information processing.[16] These physical responses to grief provide an additional layer of concern in representing the grieving client.

2. Differences in Sudden Loss and Expected Loss

While grief almost universally accompanies loss, the manner in which loss occurs may have a profound effect on the emotional and physical response as well as on the process of healing and recovery. While a great deal of research has been performed on the grief process and even differences in the process when responding to expected or sudden loss, I anticipate that each reader can, in their own mind, juxtapose a personal relatively sudden loss with a more anticipated loss and how the reader was able to process on each. I can, in a particularly vivid example.

a. What is Expected Loss?

Expected loss is an anticipated death of a loved one. For example, the passing of an elderly relative or someone who has lost a long fight with a diagnosed disease. It could even be a tragic loss but not unexpected, as in the case of the addict who eventually succumbs to their disease through an overdose. These expected losses allow the grieving individual to being to experience anticipatory grief. Anticipatory grief provides family members with time to gradually absorb the reality of the loss.[17] Individuals are able to complete unfinished business with the dying person such as mending past wrongs with forgiveness or just expressing love and affection.[18] This anticipation allows the grieving individual to process earlier. They may experience little losses (such as the inability to share in a cherished past time) prior to the passing of the loved one and essentially have an opportunity to experience the emotional responses to grief prior to losing the individual. This additional time also allows for both the grieving and the dying to prepare for death and ensure that wishes are voiced and perhaps even a proper estate plan implemented taking the guess work and pressure off of the grieving to make the laundry list of decisions which follow the end of ones life like an epilogue. This is in no way meant to minimize the emotions of the grieving in response to the death of a loved one, but it is easy to see the ways in which a period of time to prepare for the passing of a loved one, prior to their last breath, can affect the emotional response (and associated physical manifestations) of the bereaved.

b. What is Sudden Loss?

In contrast, sudden loss is an immediate unexpected (often tragic) death. These can be caused my seemingly senseless acts of violence (homicide) or unfathomable acts of self-harm (suicide) or a tragic act of chance (an accident) or an unsolved riddle (an illness diagnosed too late). Whatever the circumstances creating the sudden loss, the emotional responses of the grieving process are often amplified. Sudden loss can be significantly more confusing and cause a flood of emotions. This could manifest itself in recurring thoughts or dreams or fears of similar occurrences. This may lead to a desire for answers, and seeking details about the how in the hopes of finding a why. The loss of someone young often leads to a sense that the loss, and perhaps life itself, lacks fundamental fairness. Sudden loss often elicits concerns over one's own mortality and fragility of life. Missed opportunities to share feelings or heal wounds are now beyond reach which may elicit guilt or shame. The shock and disbelief associated with the loss may be comparatively prolonged. As such the 'fog' of grief may be thicker and tougher to navigate as an attorney.

3. Ethical Rules for Attorney as Counselor and Intermediary

With this framework in mind, a review of the Texas Rules of Professional Conduct for specific guidance and limitations on our role as counselor and even intermediary can ensure that the ethically represent the client grieving sudden loss to the maximum extent possible.

a. Counselor

Rule 2.01 states "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."[19]

Comment 1 elaborates on the delivery of advice. "A client is entitled to straightforward advice expressing the lawyer's honest assessment."[20] However, the comments note that legal advice often involves unpleasant information that a client may be disinclined to confront; this is particularly true of one in the midst of grief.[21] In presenting such necessary advice, "a

[15] *Id.*
[16] *Id.*
[17] National Cancer Institute. Grief, Bereavement, and Coping With Loss (PDQ®) – Health Professional Version. http://www.cancer.gov/about-cancer/advanced-cancer/caregivers/planning/bereavement-hp-pdq#section/_164.
[18] *Id.*
[19] Tex. Disciplinary R. Prof. Conduct, (1989) reprinted in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995)(State Bar Rules art X, §9), Rule 2.01.
[20] Cmt 1, Rule 2.01.
[21] *Id.*

lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits."[22] While we are admonished in the comments not to be deterred from giving candid advice based upon the prospect that the advice will not be well received that doesn't mean that we are not obligated to deliver such news in the best way possible. Providing the information and advice from the standpoint of a neutral party or even the attorney's own experience may help provide necessary legal information in a manner less likely to directly touch exposed emotional nerves.

Comment 2 reminds us that advice, when couched in narrowly legal terms may be of little value to a client and may be inadequate given the circumstances.[23] "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."[24] While we are not moral advisors, such considerations are extremely relevant to most legal questions and may decisively influence how the law will be applied. Here social norms on morality, or even shared spirituality may provide context to the client's experience which can be utilized to provide information necessary to the representation.

Comment 3 states that "[a] client may expressly or impliedly ask the lawyer for purely technical advice."[25] It continues that we may accept such requests as stated from clients experienced in such legal matters (for example the financial advisor who is now serving as the executor of her mother's will); however, if the client lacks such relevant experience, we may be obligated to provide information that there may be more than purely legal considerations involved.[26]

Important in handling clients dealing with grief, Comment 5 reminds us that matters that go beyond strictly legal questions may also be in the domain of another profession. In this instance, trained counselors, therapists, and psychologists may be necessary to provide the client with mental health support to work through the grieving process. "Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."[27] However, if the duty of the lawyer consists of recommending a course of action which is contrary to other experts, we are obligated to provide that information,[28] but should proceed to provide it in the most constructive manner possible.

On the issue of offering unsolicited advice, Comment 6 states "[i]n general, a lawyer is not expected to give advice until asked by the client."[29] However, if you know that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client's course of action is related to the representation.[30] While, a lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated in unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest."[31] This may mean providing an opportunity for discussion of how the client is doing emotionally. You may be surprised at the openness and honesty in response.

b. Intermediary

When dealing with several interested grieving individuals, it is sometimes useful for an attorney to act as an intermediary. When grief of sudden loss is involved, it may prove the best way to help the interested individuals move forward and hope to avoid the secondary emotions of anger or resentment. Rule 1.07 provides the limitations of such a course of action. Generally, an attorney may not serve as an intermediary without first consults with each client regarding the advantages and risks involved and obtains written consent, the lawyer reasonably believes the matter can be resolved without the necessity of contested litigation and that the common representation can be undertaken without improper effect on any other responsibility of the lawyer.[32] Further, while acting as an intermediary, the lawyer shall consult each client on relevant considerations to any decisions made.[33]

Serving as an intermediary can be particularly helpful in trying to resolve issues between siblings at odds with one another in the probate of mothers will, or in divorced parents in the administration of the estate of their teenage child to be distributed by intestate succession. Comment 1, specifically contemplates just such an occurrence in probate/administration matters.[34] As an intermediary "[t]he lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests."[35]

Comment 4 provides practical consideration for when an attorney may appropriately serve as an intermediary. Specifically, "[i]n considering whether to

[22] *Id.*
[23] Cmt 2, Rule 2.01, Tex. Disciplinary R. Prof. Conduct.
[24] *Id.*
[25] Cmt 3, Rule 2.01.
[26] *Id.*
[27] Cmt 5, Rule 2.01.
[28] *Id.*
[29] Cmt 6, Rule 2.01.
[30] *Id.*
[31] *Id.*
[32] Rule 1.07.
[33] *Id.*
[34] Cmt 1, Rule 1.07 ("For example, . . . in arranging a property distribution in settlement of an estate or in mediating a dispute between clients.").
[35] *Id.*

act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination."[36] In some situations, the high probability that intermediation would fail makes the option impossible, specifically, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.[37]

4. Maintaining Boundaries in the Role as Counselor

In order to properly operate within our ethical rules and for the benefit of the client, a few broad tools and healthy boundaries are useful to support the emotional journal of the grieving client and provide legal representation in a manner which they need and frankly deserve.

- **Avoid therapizing**. We have a role to play in the healing process of the client. Ours is focused on assisting with closure related to the legal process of probate in a manner that is supportive to the client's mental health. But most of us don't have any further mental health training (professionally speaking). It is not our place to heal their wound, nor is it appropriate to blur those lines by trying to provide medical advice.
- **Avoid rescuing or fixing**. The person who is grieving is working their process and is not in need of fixing. It is generally within cultural norms to use humor or even uplifting thoughts or comments to diffuse emotionally tense situations in an attempt to ease pain or discomfort. However, this can leave a client feeling as if their pain is not seen, heard, or worse, is somehow invalid. Instead, offer space for clients to process and grieve, specifically to listen and converse, if asked, even if it extends beyond the necessity of legal representation.
- **Avoid forcing unnecessary issues**. Similarly, our nature may drive us to seek to help the client feel better and lead us to encourage them to talk and process their emotions before there are mentally and emotionally prepared. This can further stress the nervous system and be an obstacle to healing. Of course, some questions and conversations are necessary from the stand point of legal representation and these should be handled delicately and allowing the client time to process not only the decision, but the importance of why it needs to be made in that moment rather than in their own time.
- **Avoid minimization and comparison of grief**. As noted above, the grief process is not linear and everyone's journey (and their emotional response in any phase) is unique. While personal anecdotes or information related to others may be useful to the grieving client, they can also feel like a form of comparison and minimization. Loss is loss. Grief is grief. Be careful to engage the client to ensure that any personal stories are illustrative of a legal point or issue without comparing emotional response.

III. LAWYER'S ROLE AS ATTORNEY AT LAW

Understanding the role of a counselor for the client dealing with sudden loss is important and should inform the conversations as the legal representation progresses through the standard process of estate administration. While these principles outlined below are not unique to the client suffering sudden loss, the heightened emotional state that may be triggered by sudden loss should encourage us to rely more heavily on these tools.

1. Be Patient

Often clients in the aftermath of sudden loss take one of two approaches to the legal issues of administration of the estate: it becomes a primary focus or a seemingly impossible burden. And sometimes, as in the case of parents who have lost a child, you may experience both responses simultaneously. Some clients seem to pour themselves into the process of putting the legal matter to bed as soon as possible. Perhaps it is the measure of control they have in the process and situation when so much of the facts leading to that moment were beyond their control. Other clients seem to view the probate process as an unnecessary form of torture in their present state. Perhaps they are not prepared to handle the realities that their loved one has passed or the process is a daily reminder of their painful truth. Whatever the reasons for these responses, it is important for us to provide advice to the client on items which need to be handled relatively quickly and those which can wait for any period of time. Both haste and delay have the potential to cause problems, but properly prioritizing and breaking down tasks will allow the client taking either response to methodically approach the administration and encourage reasoned rather than rash decisions in the legal process.

2. Be Persistent

Clients experiencing the stress of sudden loss can have a decline in cognitive function as discussed above. While providing the client room to process and contemplate actions, it is important to ensure the client is adequately informed. "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do

[36] Cmt 4, Rule 1.07.

[37] *Id.*

so."[38] The potential that clients may be less able to make well informed and reasoned decisions as readily as they might otherwise is reason to communicate important aspects of the representation more than once and potentially in various ways to ensure that the client has processed all relevant information in making a decision.

3. Be Prepared

Because a client in the shadow of sudden loss may be struggling with their own instrumentalities of daily life, there is a distinct possibility that you and your staff may be asked (or have) to take a more active role in the process of administration. This may mean having to garner more financial information from various institutions than might ordinarily be necessary or handle more contact with beneficiaries or heirs in order to minimize conflict in an already potentially tense situation. While these actions may not be the most economic at times, the legal obligation we have to our clients may necessitate such action.

4. Be Proposing

The potential lack of mental capacity the client may leave them with less available brain function to think creatively to solve issues which might arise in administration. This is where we can be the think tank of options and solutions that may have worked with other clients. The use of family settlement agreements where beneficiaries or heirs can make their own determinations can be extremely helpful in avoiding any unnecessary additional conflict.

5. Be Pointing

Lastly, we should be prepared to provide the client with additional information on resources and assistance that may be appropriate and beyond our expertise. I recommend adding a tab to the spreadsheet of your referral list (or rolodex for those more seasoned among us). While we all have the lists of accountants, financial planners, trust officers, insurance agents, and other estate planners, it is time we built a list of resources available to our clients mental health needs. Find those counselors, therapists, and physiatrists in your community. Make a note of who works with children or who specialize in grief and loss in their practice. If the client is concerned about the idea of a standing appointment for an extended period of time, note that there are several "intensive" grief and loss programs throughout the country. A week long intensive counselling program is often equated to years of standing counseling sessions. [39] Find local peer support groups or an individual's leading of such a group to provide to the client. Helping a client obtain the expertise they need is not new to the legal profession, we need only view mental health as an area of expertise where we can point clients in the right direction.[40]

IV. COMMUNITY SUPPORT AND MEMORIAL DONATIONS

Often tragic death is followed by an outpouring of community based support, whether that is from friends and family or from a larger community of individuals, who are searching for a way to provide comfort to those surviving following a tragic situation. Of course, flowers are a staple for funerals, but many people want to actually help the family and loved ones start to pick up the pieces of their lives and prefer to make monetary contributions to the family of someone tragically lost. This can take many forms, but three common options are discussed below as well as their strengths and weaknesses. Having conversations with grieving clients on the available options can be useful in helping the client prepare for the potential outpouring of support from those who wish to help but do not have feel like they have another means to do so.

a. Charitable Donations

For families with strong financial footing or exceptional planning (with savings and life insurance for example), the financial burden associated with the sudden death of a loved one (particularly a younger individual) may be small enough that the family prefer not to accept 'charity' of others. (Alternatively, for some the thought of accepting a 'handout' may be too much to accept.) Whatever the reason, many people choose to request that any one compelled to send donations provide those to a charity in lieu of direct receipt of funds (or of flowers). Here, we can counsel clients through the process of choosing a charity, perhaps it could be one related to the cause of their loved ones death such as suicide prevention or promoting recovery of those with substance use disorder. It could be an organization which the deceased cared deeply such as an animal shelter or park. Additionally, you

[38] See Comment 1, Rule 1.03

[39] Anecdotally, those programs encourage finding a peer support group or making a standing appointment upon return home and at times that is just the encouragement a client needs to allow themselves to get the local support they need and deserve.

[40] For discussion of several other areas where we can improve our role as counselor and a guidepost for client services see They Don't Call Me Counselor for Nothing – Adding Value to Your Product and Strengthening Your Client Relationships, written by Rhonda H. Brink and presented at the 43rd Annual Estate Planning & Probate Course, TexasBarCLE, State Bar of Texas, Chapter 17.2, June 18-20, 2019, San Antonio.

could assist the client in partnering with a community foundation to set up a scholarship fund.

While this approach is certainly useful to allow those compelled to give to provide to a worthy cause in honor of a deceased individual, for many the expenses associated with sudden loss do not allow families to forego the kindness of others in this way.

b. Crowdfunding

Crowdfunding is simply the practice of obtaining funds by soliciting contributions from a large number of people.[41] While the term certainly invokes the image of online platforms like GoFundMe, the concept is far from new. Passing the hat for those who have lost and are in need is the simplest form of charity and the best of humanity. This option for receipt of donations allows the deceased's loved ones access to often necessary funds (at least short term) which would allow the family to pay for immediate needs such as funeral and last illness expenses and expenses for necessities of widowed spouses and children of the decedent until other forms of payment such as life insurance, pension benefits, or social security could be processed and available. It does, however, have several short comings as a funding mechanism and very limited checks on the use of the funds. While briefly and more generally highlighted below a more in depth analysis is available in Blake Scott's comment *Save That Money: Ensuring Donations Received Through Crowdfunding are Properly Protected*, in Volume 10, Book 2 of Texas Tech University School of Law's Estate Planning and Community Property Law Journal.

Traditional Method

'Historic' crowdfunding involved someone opening a bank account where donations could be made. One major concern with this option is ensuring that the funds are used for purpose the donor intended. While immediate cash flow may be an issue, sources of non-donative funds to support a surviving spouse or children of a decedent eventually arrive. At this point, a significant amount of donative funds may still be in the memorial account and subject to potential uses (or abuses) beyond the donor's intent. The funds having been given are subject to no further control of the donor and can be used for any purpose. Additionally, there are ownership questions in the account. If the account was set up by a couple who lost a child what happens to the account if the pain and grief of the loss is unbearable for the parents to the point of their separation? What is the marital property characterization?

Electronic Platform Method

As with almost every other aspect of modern life, crownfunding has moved online with the creation of sites such as GoFundMe, Kickstarter, and IndieGoGo. For a fee, the site will process electronic donations and hold funds in an account for the benefit of the owner. Ownership of the account makes a huge difference in the rights and interest in the account. If the individual who initiated the campaign remained the owner of the account, then they have ultimate control. They may continue to use the funds received for the benefit of the decedent's family or if unscrupulous they may not. Here the intended beneficiary may have little to rights or recourse. Further, if the owner was to pass away prior to expending the funds for the benefit of the intended party then it would be there estate and not the intended beneficiary with power over the funds.[42]

Whether traditional or electronic, donative accounts have extreme limitations as to the protection of the intended beneficiary and use of the funds. The legal murkiness of these issues suggests a better alternative.

c. Memorial Trusts

Using a memorial trust is a way in which to allow the intended beneficiary of the funds with not only access, but also with rights to enforce the beneficial use of the funds while ensuring that the use matches the donative intent. A memorial trust has a great deal of flexibility in drafting and can be tailored to the situation in order to provide some assurance that the donations will be used for the purposes expressed therein.

Structurally, a close friend or family member creates a trust. This trust can be more fully funded through crowd sourcing as well. The beneficiaries can be a limited class such as the parents and siblings of a deceased child or the surviving spouse. Parents or surviving spouses can be named as Trustees with all the fiduciary obligations protecting the intended beneficiaries and intended purposes as any other trust. Distribution provisions can be written so that they could be made for funeral, last illness, and even legal expenses in addition to health, education, maintenance and support of the intended beneficiaries. Additionally, it is possible to have any unused funds be donated to a charitable beneficiary if the settlor wanted to ensure the family of the deceased was cared for in the moment of need while recognizing that work to help others similarly situated may be warranted.

The memorial trust approach combines the positive of community financial support while more fully protecting the intended beneficiary and the intent of the donor. A form recently used to create a memorial trust

[41] Scott, Blake, Save That Money: Ensuring Donations Received Through Crowdfunding are Properly Protected, 10 Estate Planning Journal 395(2018) citing Crowdfunding Definition, MERIAM-WEBSTER.COM, https://www.merriam-webster.com/ dictionary/crowdfunding perma.cc/5RDL-DZQD (last visited Sept. 26, 2017).

[42] *Id* at 414.

is attached as **Exhibit A** and is for informative purposes only. Herein, the settlors were the grandparents of a deceased grandchild. The trustee was the child's aunt. The beneficiaries are the parents and siblings of the deceased child.

V. CONCLUSION

As probate attorneys, we are called upon daily to help individuals navigate the legal process while they are in the midst of the grief of loss. However, for many clients experiencing sudden, unanticipated death, the grieving process may be significantly more emotional when compared to individuals who had an opportunity to being the process prior to their loved ones expected death. It is in these moments were we are called upon to serve our calling as counselors and attorneys in order to help clients navigate the legal process while experiencing the emotional processes of grief. We are all human and experience life with its ups and downs and yes doldrums, but understanding grief and sudden loss will help us help not only our clients, but also ourselves.

> EMILY: Do any human beings ever realize life while they live it?—every, every minute?
> STAGE MANAGER: No. Saints and poets maybe...they do some.
> ― Thornton Wilder, Our Town: A Play in Three Acts, Act III

[NAME] MEMORIAL TRUST

AGREEMENT

Dated:___________________

DRAFT
DO NOT SIGN

PREPARED BY
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[NAME] MEMORIAL TRUST AGREEMENT

We are [GRANTOR 1] and [GRANTOR 2] of Midland County, Texas. We irrevocably transfer the sum of One Dollar to [SOLE TRUSTEE], as Trustee. This property and all investments, reinvestments and additions shall be administered as provided in this instrument. This instrument may be designated the "[NAME] MEMORIAL TRUST AGREEMENT."

[DECEDENT] ("[FIRST NAME]") is deceased. We are creating this trust as a vehicle to facilitate donations made in his memory by friends and family. The primary purpose of this trust is to benefit [FIRST NAME]'s parents and siblings as they incur expenses relating to [FIRST NAME]'s death. In addition, we anticipate this trust to be available for [FIRST NAME]'s parents, [MOTHER] and [FATHER] and [FIRST NAME]'s siblings [SIBLING 1] and [SIBLING 2] for their general health, maintenance, support and education. Furthermore, we expect that [FIRST NAME]'S family may request a portion of any funds gifted into this trust be donated for charitable purposes such as scholarships in THERON'S memory, or donations to causes they desire.

ARTICLE I – TRUSTEE APPOINTMENT

1.1 **Trustees**. We appoint [SOLE TRUSTEE] as sole Trustee of every Trust created hereunder. As set forth below, she may appoint her successors. Nonetheless, if there is a vacancy in the office of the Trustee, the Trustee Appointer (designated in Subsection 4.1A) shall appoint a Trustee of that trust in accordance with the provisions of Section 4.2.

1.2 **Settlors Prohibited**. Neither of us may ever be appointed or serve as the Trustee of any trust created under this instrument.

ARTICLE II – THERON BROWN MEMORIAL TRUST

2.1 **Creation Of Trust**. All property transferred to the Trustee shall initially be administered as the "[NAME] MEMORIAL TRUST" ("the trust" in this Article) as provided in this Article.

2.2 **Distributions During The Trust Term**. During the term of the trust, the Trustee may distribute to such of [MOTHER], [FATHER], [SIBLING 1] and [SIBLING 2] and their descendants (the "Primary Beneficiaries.") so much or all of the trust income and principal (even though exhausting the trust) as the Trustee determines to be appropriate to provide for their continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education). In addition, the Trustee may, but is not required to, pay any expenses relating to the last injuries and death of [FIRST NAME], upon written request of [MOTHER] or [FATHER].

2.3 **Inter Vivos Power of Appointment**. At any time, [MOTHER] and/or [FATHER] may direct the Trustee to make a distribution out of this trust to any charity or charitable fund, including but not limited to one or more scholarship funds, donations to one or more charities or similar funds and organizations.

2.4 Termination And Final Distribution. On the date ninety days after the death of both of [MOTHER] and [FATHER], the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows. The last to die of [MOTHER] and [FATHER] is given a limited Testamentary power of appointment in favor of one or more charities.

A. Distribution To Children And Descendants. If at least one child or other descendant of [MOTHER] and [FATHER] is then living, the remaining unappointed trust property, if any, shall be distributed in equal shares to their then surviving children, subject to the provisions of Article IIIII (providing for Contingent Trusts for beneficiaries who are under age thirty or Incapacitated). However, if any child who fails to survive leaves one or more then surviving descendants, the share that child would have received (if he or she had survived) shall be distributed per stirpes to his or her then surviving descendants, also subject to the provisions of **Error! Reference source not found.**II.

B. Contingent Disposition. Any property of this trust not effectively disposed of by the preceding provisions shall be distributed one-half to [MOTHER]'S then living Heirs (defined in Section 6.4) and one-half to [FATHER]'S then living Heirs, subject to the provisions of Article III (providing for Contingent Trusts for beneficiaries who are under age thirty or Incapacitated).

ARTICLE III – CONTINGENT TRUSTS

3.1 Creation Of Trusts. All property that passes subject to the provisions of this Article or that otherwise would be distributable by the Trustee to any beneficiary (for whom a trust is not otherwise provided) who has not reached the age of thirty years or who, in the discretion of the Trustee, is Incapacitated (defined in Section 6.3), may instead be distributed to the Trustee as a separate Contingent Trust named for the beneficiary, to be administered as provided in this Article. When used in this Article, the words "the trust," "the beneficiary's trust," or "his or her trust" mean the Contingent Trust named for a particular beneficiary and the words "the beneficiary" mean that beneficiary.

3.2 Distributions During The Beneficiary's Life. During the life of the beneficiary, the beneficiary's trust shall be administered as follows.

A. General Discretionary Distributions. The Trustee shall distribute to the beneficiary so much or all of the income and principal of the beneficiary's trust (even though exhausting the trust) as the Trustee determines to be appropriate to provide for the beneficiary's continued health, maintenance, support, and education (including college, vocational, graduate, or professional school education).

B. Mandatory Terminating Distribution To Beneficiary At Age Thirty. Whenever the beneficiary (i) reaches the age of thirty years and, (ii) in the Trustee's discretion, is not Incapacitated (defined in Section 6.3), the Trustee shall distribute to the beneficiary the remaining property of his or her trust.

3.3 Termination And Final Distribution Upon The Beneficiary's Death. If the beneficiary dies before the complete distribution of his or her trust, the trust shall terminate and the remaining trust property, if any, shall be disposed of as follows.

A. Distribution To Descendants. The remaining property of the beneficiary's trust shall be distributed per stirpes to the following individuals who survive the beneficiary: (i) the beneficiary's descendants, if any, otherwise, (ii) the descendants of the nearest ancestor of the beneficiary who is a descendant of ours and who has surviving descendants, if any, otherwise, (iii) our descendants, if any. All of the preceding distributions are subject to the provisions of this Article.

B. Contingent Disposition. Any property of the beneficiary's trust not effectively disposed of by the preceding provisions shall be distributed as provided in Section 2.4, as if it were the remaining trust property of the [TRUST] and as if the [TRUST] had terminated on the termination date of the beneficiary's trust.

ARTICLE IV – TRUSTEE PROVISIONS

The provisions of this Article govern the fiduciary relationship of the Trustee. When used in this instrument, where the context permits, the term Trustee means the trustee or co-trustees from time to time serving and the "estate" of the Trustee means the particular trust estate being administered by the Trustee.

4.1 Trustee Succession.

A. Trustee Appointer. We name [SOLE TRUSTEE], otherwise the last serving Trustee, otherwise all of our then living adult descendants, if any (acting by majority vote) as the Trustee Appointer.

B. Resignation. A Trustee may resign as Trustee of any one or more trusts created under this instrument at any time, with or without cause, by delivering a resignation notice in recordable form (i) to each of us who is then living, or, if neither of us is then living, to each adult beneficiary of the trust who is then permitted to receive distributions from the trust; (ii) to each serving Co-Trustee, if any; and (iii) to the next successor Trustee named in this instrument, if any, otherwise, to the Trustee Appointer (but only if the Trustee Appointer's action is required to fill the resulting vacancy). The Trustee's resignation notice shall specify the anticipated effective time and date of the resignation, which shall be 5:00 p.m. on the last business day at least thirty days after the date of the resignation notice (or any earlier time and date to which every continuing or successor Trustee of the trust may consent); however, the Trustee's resignation shall be effective only upon the acceptance and qualification of the successor.

C. Acceptance Of Office. A successor Trustee shall commence serving as Trustee upon the effective time and date of the acceptance of office, without the necessity of making application to any court and without the necessity of any conveyance or assignment of the trust estate, although conveyances and assignments shall be made if requested by the successor Trustee.

4.2 Trustee Appointment Procedures.

A. **Generally**. Every appointment of a Trustee must be evidenced by a written instrument in recordable form, signed by the person (or the requisite number of persons) required to approve the appointment, and delivered to the appointee. The instrument must identify the appointee, state the effective time and date of appointment, and every appointment must contain an acceptance by the appointee. Except as otherwise provided, every Trustee appointed under this Will must be either a Qualified Corporation or one or more Qualified Individuals (defined below).

B. **Appointments By Trustee Appointer**. Except as otherwise provided, in the case of appointments made by a Trustee Appointer (or in any other circumstance where multiple persons or multiple groups of persons have successive rights to appoint a Trustee), the following shall apply: (i) each Trustee Appointer must appoint a Trustee within one month after receiving written notice that the right to appoint has arisen, otherwise, the right shall lapse and the next named Trustee Appointer shall have the right to appoint a Trustee; (ii) if a Trustee is appointed within the one-month period but declines such appointment, the Trustee Appointer who appointed such successor Trustee shall have the right to appoint another Trustee within one month after receiving written notice that the previously appointed Trustee has declined such appointment; and (iii) if such Trustee Appointer fails to appoint another Trustee within such one-month period, such Trustee Appointer's right shall lapse and the next named Trustee Appointer shall have the right to appoint a Trustee.

C. **Qualified Individual**. The term Qualified Individual means any legally competent individual (other than either of us) who has attained the age of thirty years and who is willing to serve under this instrument.

D. **Qualified Corporation**. The term Qualified Corporation means any corporation having trust powers that is qualified and willing to serve under this instrument and that has, as of the relevant time, either (i) a minimum capital and surplus of at least five million dollars ($5,000,000 U.S.), or (ii) at least one hundred million dollars ($100,000,000 U.S.) in trust assets under administration.

4.3 **Trustee Compensation**.

A. **Expense Reimbursement And Reasonable Compensation**. Each Trustee shall be reimbursed from its estate for the reasonable costs and expenses incurred in connection with the administration of its estate and also shall be entitled to receive fair and reasonable compensation from its estate (payable at convenient intervals selected by the Trustee) considering: (i) the duties, responsibilities, risks, and potential liabilities undertaken; (ii) the nature of its estate; (iii) the time and effort involved; and (iv) the customary and prevailing charges for services of a similar character at the time and at the place the services are performed.

B. **Professional Serving As Trustee**. A professional individual serving as Trustee may receive compensation for Trustee services based on his or her customary hourly rates (or other customary charges for professional services). If the professional has hired himself or herself (or any professional organization with which he or she is affiliated) in a professional capacity with respect to his or her estate, Trustee compensation shall be in addition to compensation for professional services; however, each service shall be compensated for only once (as either a Trustee service or professional service but not both).

C. **Corporate Co-Trustee**. Where appropriate and customary, a bank or other corporate Co-Trustee may receive compensation in amounts not exceeding the customary and prevailing charges for services of a similar character at the time and at the place the services are performed as if it were serving as sole Trustee.

D. **Waiver Of Right To Compensation**. Any Trustee may at any time waive a right to receive compensation for services rendered or to be rendered as Trustee.

4.4 **Trustee Liability**.

A. **Generally**. A Trustee who has made a reasonable, good faith effort to exercise the standard of care and other fundamental duties applicable to the Trustee in Section 5.3 and the other provisions of this instrument shall not be liable: (i) for any loss that may result from depreciation in value of any property constituting a part of its estate; (ii) for any loss that may occur as a result of investments which the Trustee may make or retain; (iii) for any loss that may occur as a result of any other actions taken or not taken by the Trustee; (iv) for the acts, omissions or defaults of any other individual or entity serving as Trustee or as ancillary trustee; nor (v) to any person dealing with the Trustee in the administration of its estate, unless the Trustee expressly contracts and binds itself personally. For purposes of the preceding, a Trustee's conduct shall be judged in light of the facts and circumstances existing at the time and not by hindsight.

B. **Uncompensated Individual Trustee**. In addition, an individual serving as Trustee without compensation, including an individual who has at all relevant times waived his or her right to compensation, shall never be liable to any person for any consequences of any action (or inaction) unless he or she takes the action (or inaction) in bad faith, with gross negligence, or with intentional or reckless disregard for his or her duties as Trustee.

C. **Reimbursement**. An individual or entity serving as Trustee shall be entitled to reimbursement from its estate for any liability or expense, whether in contract, tort or otherwise, reasonably incurred by the Trustee in the administration of its estate.

4.5 **Transactions In Which The Trustee Has An Interest**. Notwithstanding any contrary provisions of the Texas Trust Code or other applicable law: (i) any individual or entity serving as Trustee under this instrument may engage his or her estate in transactions with himself or herself personally (or otherwise), so long as the Trustee establishes that the consideration exchanged in the transaction is fair and reasonable to his or her estate; and (ii) any Trustee may engage its estate in transactions with itself personally (or otherwise) pursuant to the terms of any valid and enforceable executory contract signed by either or both of us. For example, the Trustee may: (i) buy or sell property of its estate from or to such person, or from or to a relative, employee, business associate or affiliate of such person serving as Trustee; (ii) sell or exchange and transact other business activities involving properties of its estate with any other estate under the control of any such person serving as Trustee; and (iii) sell to or purchase from its estate the stock, bonds, obligations or other securities of the person serving as Trustee or its affiliate. Whenever the office of Trustee is filled by more than one person, any transaction in which a Trustee has a personal interest must be approved by all Trustees.

4.6 Independent Administration Without Bond. So far as can be legally provided, all of the powers and discretions granted to the Trustee shall be exercised without the supervision of any court. No bond or other security shall be required of any primary or successor Trustee in any jurisdiction, whether acting independently or under court supervision.

4.7 Ancillary Trustee. If at any time and for any reason the Trustee is unwilling or unable to act as Trustee as to any property subject to administration in any jurisdiction (other than the jurisdiction in which the Trustee is serving), then, to the extent permitted by applicable law, the Trustee may appoint any one or more Qualified Individuals or a Qualified Corporation (both terms defined in Section 4.2) to act as ancillary trustee or as successor ancillary trustee of that property, on such terms and for such compensation, if any, and requiring such security (or no security), as the Trustee may deem appropriate. Except as specifically limited or provided in the appointing instrument: (i) the ancillary trustee shall account to the Trustee for all property which it may receive in connection with the administration of such property and shall have all of the rights, titles, powers, duties, discretions and immunities of the Trustee; (ii) the ancillary trustee may resign at any time by giving thirty days advance written notice to the Trustee; and (iii) the ancillary trustee may be removed at any time by the Trustee upon such notice (or no notice) as the Trustee may deem appropriate. Every appointment, removal and acceptance of an ancillary trustee shall be made by written instrument in recordable form which specifies the effective time and date of such action.

4.8 Restrictions On Beneficially Interested Trustee; Independent Trustee. No Trustee shall ever possess or exercise any powers with respect to, or authorize or participate in any decision as to: (i) any discretionary distribution or any loan to or for the benefit of himself or herself, except to the extent that the distributions or loans are limited by an ascertainable standard relating to his or her health, maintenance, support, or education; (ii) any discretionary distribution to any other beneficiary in discharge of any of his or her legal obligations; (iii) the termination of the trust because of its small size, if the termination would result in a distribution to himself or herself or if the distribution would discharge any of his or her legal obligations; nor (iv) the treatment of any estimated income tax payment as a payment by him or her, except to the extent that the payment is limited by an ascertainable standard relating to his or her health, maintenance, support, or education. Each such decision shall be made solely by the "Independent Trustee", meaning the first of the following who is not prohibited from making the decision under this Section: the currently acting Co-Trustee(s), if any, otherwise, the next successor Trustee(s) designated under this instrument, if any, otherwise, a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Independent Co-Trustee is appointed under these circumstances, the sole power and responsibility of the Independent Co-Trustee shall be to make decisions reserved to the Independent Trustee under this Section.

4.9 Restrictions On Insured Trustee; Insurance Trustee. No Trustee who is an "Insured Person" (meaning a person who is an insured under a life insurance policy with respect to which the trust owns any interest or holds any rights or powers) shall ever possess or exercise any rights or powers with respect to the policy, nor authorize or participate in any decision as to the policy, except as specifically authorized by this Section. Every such Trustee who serves as sole Trustee must: (i) designate the Trustee of the trust as the beneficiary of the policy to the extent of the trust's interest in the policy; (ii) continue to pay the premiums on the policy without using policy loans; (iii) allow any policy dividends to reduce premiums; and (iv) upon termination of the trust, distribute the policy pro rata to the remainder beneficiaries of the trust. All decisions whether to take any different or additional actions with respect to the policy shall be made solely by the "Insurance Trustee", meaning the first of the following who is not an Insured Person with respect to the policy: the currently acting Co-Trustee(s), if any, otherwise, the next successor Trustee(s) designated under this instrument, if any, otherwise, a Trustee appointed by the Trustee Appointer upon written request of any Trustee to whom this Section applies. If an Insurance Trustee is appointed under these circumstances, the sole power and responsibility of the Insurance Trustee shall be the exclusive authority to make discretionary decisions as to the policy, including decisions whether to surrender or cancel the policy, borrow against the policy and distribute the policy during the term of the trust.

4.10 **Co-Trustee Provisions**. Except as otherwise provided, Co-Trustees shall act (i) by unanimous consent if two are serving, and (ii) by majority vote if three or more are serving. Any individual Co-Trustee may revocably delegate to any other Co-Trustee any or all of his or her rights, powers and discretions as a Co-Trustee (other than any rights, powers and discretions specifically vested in him or her to the exclusion of the other Co-Trustee). Any delegation shall be by written instrument specifying the extent and duration of the delegation. Whenever a corporate Co-Trustee is serving, it shall have custody of all investments and records of its estate to the exclusion of all individual Co-Trustees (but it may revocably waive this right in whole or in part from time to time), and it shall have the primary responsibility for preparing and distributing accountings. However, the preceding shall not limit the right of any co-owner to utilize any real property or any tangible personal property in a manner consistent with the rights of a co-owner of such property.

4.11 **Reorganization Or Insolvency Of Corporate Trustee**. If a corporation nominated to serve or serving as the Trustee ever changes its name, or merges or consolidates with or into any other bank or trust company, the corporation shall be deemed to be a continuing entity and shall continue to be eligible for appointment, or shall continue to act as the Trustee. If a corporation serving or designated to serve as the Trustee becomes insolvent and its assets are sold, transferred to, or otherwise acquired by another entity by any form of governmental or regulatory process, the successor entity shall not succeed to appointment as Trustee, and if it does so succeed by operation of law, we direct the Trustee to resign from its office as Trustee unless the Trustee Appointer agrees that it may continue to serve.

ARTICLE V – ADMINISTRATIVE PROVISIONS

5.1 **Trust Irrevocable**. This instrument and the trusts evidenced by it shall be irrevocable.

5.2 **Duties At Inception Of Estate**. Within a reasonable time after accepting a fiduciary appointment or receiving assets as a part of its estate, the Trustee shall (i) review the records, assets, beneficiaries, purposes, terms, distribution requirements, and all other relevant circumstances of its estate, and (ii) make and implement a distribution plan and an investment plan that are consistent with the purposes of its estate generally and that bring the estate portfolio into compliance with Sections **Error! Reference source not found.** and 5.5.

5.3 **Fundamental Fiduciary Duties**. The Trustee shall administer its estate in good faith and in accordance with the terms of this instrument and the law. Except as otherwise provided, the following fundamental provisions apply to all aspects of the Trustee's investment, management and administration of its estate.

A. **General Standard Of Care**. The Trustee shall exercise the standard of care, skill, and caution generally exercised by compensated trustees with respect to comparable estates in the same geographic area. A Trustee who has special skills or expertise, or is selected as a Trustee in reliance upon the Trustee's representation that the Trustee has special skills or expertise, has a duty to use those special skills or expertise.

B. **Loyalty And Impartiality; Primary And Secondary Beneficiaries**. The Trustee shall act solely in the interest of the beneficiaries of its estate, not in the interest of the Trustee personally. If a Trustee's estate has two or more beneficiaries, the Trustee shall act impartially, taking into account any differing interests of the beneficiaries. However, the Trustee (i) may favor present income beneficiaries over future beneficiaries and (ii) shall favor "primary" beneficiaries over other beneficiaries and "secondary" beneficiaries over beneficiaries who are neither primary nor secondary.

C. **Conflict Resolution**. The Trustee shall make a reasonable effort to resolve any conflicts (including conflicts as to favorable or adverse tax consequences) between or among the Trustee and those persons who are beneficially interested in its estate by mutual agreement. If after reasonable efforts the Trustee, in the Trustee's discretion, determines that a mutual agreement is not likely to be reached, the Trustee shall resolve the conflicts in the Trustee's discretion.

D. **Duty To Verify Facts**. The Trustee shall make a reasonable effort to verify relevant facts. However, the Trustee may rely on (and need not independently verify): (i) the advice of any professional (including an agent, attorney, advisor, accountant, fiduciary, or other professional or representative) who was hired (or to whom duties were delegated) in accordance with this instrument and with reasonable care; and (ii) any written instrument or other evidence that the Trustee reasonably believes to be accurate. (But a corporate Trustee shall always be liable for the acts, omissions and defaults of its affiliates, officers and regular employees.)

E. **Reliance On Predecessor Fiduciary**. No Trustee shall have any duty: (i) to investigate the prior acts or failures to act of a Predecessor Fiduciary (meaning a predecessor Trustee under this instrument or a personal representative or trustee of any estate or trust from which distributions may be made to the Trustee); (ii) to request a formal accounting by a Predecessor Fiduciary; or (iii) to investigate any accountings provided by a Predecessor Fiduciary. The Trustee may rely on the records and other representations of a Predecessor Fiduciary, and need not request an accounting from or contest any accounting provided by a Predecessor Fiduciary. However, the preceding shall not apply to any Trustee to the extent that the Trustee (i) has received a request from a beneficiary having a vested material interest in its estate to secure an accounting or to conduct an investigation, or (ii) has actual knowledge of facts that would lead a reasonable person to believe that, as a consequence of any act or omission of a Predecessor Fiduciary, a material loss has occurred or will occur.

F. **Special Rule For Uncompensated Individual Fiduciaries**. Notwithstanding any contrary provision, whenever an uncompensated individual is serving as Trustee (meaning an individual serving with no right to compensation or who, at all relevant times, has waived his or her right to compensation), he or she: (i) may continue any style of investing that is consistent with the style of investing we undertook during our lifetimes; and (ii) shall exercise that standard of care which is commensurate with his or her particular skills and expertise, or, to the extent lower, the general standard of care required of Trustees without special skills or expertise.

5.4 **Election To Opt Out Of Prudent Investor Rule**. We expressly provide that the trust estate is not subject to, and the Trustee is not required to comply with, the prudent investor rule and the provisions of Chapter 117 of the Texas Trust Code. Rather, except as herein otherwise specifically provided, the Trustee shall have as wide a latitude in the selection, retention, or making of investments as an individual would have in retaining or investing his own funds, and shall not be limited to, nor be bound or governed by, any rules of law, statutes, or regulations respecting investments by trustees. Investments of the trust estate need not be diversified, may be of a wasting nature and may be made or retained with a view to possible increase in value.

5.5 **Specific Management And Investment Authority**. The Trustee's management and investment authority includes, but is not limited to, the following powers, which may be exercised in whole or in part and from time to time in the Trustee's discretion.

A. **Securities And Business Interests**. The Trustee may acquire securities, whether traded on a public securities exchange or offered through a private placement, and may trade on margin, borrow upon, and purchase or sell securities in such accounts as the Trustee may deem appropriate or useful. The Trustee may form, reorganize or dissolve corporations, vote stocks and voting securities, give proxies to vote stocks and voting securities, enter into or oppose (alone or with others) voting trusts, buy-sell, stock restriction or stock redemption agreements, mergers, consolidations, foreclosures, liquidations, reorganizations, or other changes in the financial structure of any corporation, and generally exercise all rights of a stockholder. The Trustee may continue, initially form, expand, and carry on business activities, whether in proprietary, general or limited partnership, joint venture, corporate, or other form, with any persons and entities as the Trustee deems proper. Business activities conducted by the Trustee should be sufficiently related to the administration and investment of its estate so that its estate never becomes taxable as an association for federal tax purposes.

B. **Real Estate**. The Trustee may purchase, sell, exchange, partition, subdivide, develop, manage, and improve real property. The Trustee may grant or acquire easements, may impose deed restrictions, may adjust boundaries, may raze existing improvements, and may dedicate land or rights in land for public use.

C. **Mineral And Alternative Energy Properties**. The Trustee may acquire, maintain, manage, or sell mineral interests, and make oil, gas and mineral leases covering any lands or mineral interests forming a part of its estate, including leases for periods extending beyond the duration of its estate. The Trustee may pool or unitize any or all of the lands, mineral leaseholds or mineral interests of its estate with others for the purpose of developing and producing oil, gas or other minerals, and make leases or assignments containing the right to pool or unitize. The Trustee may enter into contracts and agreements relating to the installation or operation of absorption, repressuring and other processing plants, drill or contract for the drilling of wells for oil, gas or other minerals, enter into, renew and extend operating agreements and exploration contracts, engage in secondary and tertiary recovery operations, make "bottom hole" or "dry hole" contributions, and deal otherwise with respect to mineral properties as an individual owner might deal with his or her own properties. The Trustee may enter into contracts, conveyances and other agreements or transfers deemed necessary or desirable to carry out these powers, including division orders, oil, gas or other hydrocarbon sales contracts, processing agreements, and other contracts relating to the processing, handling, treating, transporting and marketing of oil, gas or other mineral production. The term "mineral" means minerals of whatever kind and wherever located, whether surface or subsurface deposits, including (without limitation) coal, lignite and other hydrocarbons, iron ore, and uranium. The Trustee may acquire, maintain, manage, or sell rights and interests relating to alternative energy resources, and make leases for the purpose of exploring for, generating, harnessing or transmitting alternative energy on any lands forming a part of its estate, including leases for periods extending beyond the duration of its estate. The Trustee may cooperate with others for the purpose of developing, harnessing or transmitting alternative energy. The Trustee may enter into contracts and agreements relating to the installation or operation of alternative energy equipment such as data gathering equipment, wind turbines or solar arrays, or contract for the harnessing or transmission of alternative energy. The Trustee may enter into, renew and extend operating agreements and exploration contracts, and deal otherwise with respect to such alternative energy endeavors as an individual owner might deal with his or her own properties. The Trustee may enter into contracts, conveyances, leases and other agreements and execute all instruments deemed necessary or desirable to carry out these powers for the exploration, construction, maintenance, generation, harnessing, processing, handling, transmission and marketing of alternative energy as well as the replacement or removal of data gathering equipment, wind turbines, solar arrays, monitoring facilities, gathering facilities, transmission facilities or other similar facilities and equipment. The term "alternative energy resources" means all energy resources other than minerals, including (without limitation) wind, solar and geothermal energy resources.

D. **Life Insurance**. The Trustee may acquire, maintain in force, and exercise all rights of a policyholder under policies of life insurance insuring the life of a beneficiary of its estate, or an individual in whom such beneficiary has an insurable interest.

E. **Purchase Of Estate Assets**. The Trustee may purchase any property (including speculative investments) from either of our probate estates at fair market value, and may retain the purchased property (and any property received as a consequence of a merger or consolidation of the purchased property) without liability for any depreciation or loss that may result, to the same extent as if the property were part of the assets originally contributed to its estate.

F. **Joint Investments; Accounts With The Fiduciary**. The Trustee may invest its estate in undivided interests in any otherwise appropriate investment and, for administrative and investment purposes only, may hold separate estates under this or any other instrument in one or more common accounts in undivided interests. A corporate Trustee may deposit the cash portion of its estate with itself as either a permanent or temporary investment, and may invest its estate in common trust funds established and maintained by the Trustee or its affiliate. In determining where to invest cash resources, the Trustee may consider all factors, including facility of access and security of funds invested, as well as the stated rate of return.

G. **Manage, Sell, And Lease**. Without the consent or ratification of any court, remainderman or third party, and upon the terms, for the consideration and with the covenants and warranties of title (general, special or otherwise) as the Trustee deems appropriate, the Trustee may: manage; sell; lease (for any term, even if beyond the anticipated term of its estate); grant, acquire or exercise options for the purchase, sale, lease, or other disposition (exercisable at any time, even if beyond the anticipated term of its estate); partition; improve; repair; insure; and otherwise deal with all property of its estate.

H. **Nominee Title**. The Trustee may hold title to any property in the name of one or more nominees without disclosing the fiduciary relationship, and may allow its nominees to take possession of assets of its estate with or without direct custodial supervision by the Trustee.

I. **Loans And Guarantees**. The Trustee may lend money to any individual or entity (including either of our probate estates), and may endorse, guarantee, become the surety of, provide security for, or otherwise become obligated for or with respect to the debts or other obligations of any individual or entity (including either of our probate estates). All these transactions shall be on commercially reasonable terms, including adequate interest and security; except that transactions for the benefit of any current beneficiaries of the particular estate involved may be on the terms (including no interest and no security) the Trustee may deem appropriate and consistent with the purposes of its estate.

J. **Borrow**. The Trustee may assume, renew and extend any indebtedness previously created, and borrow for any purpose (including the purchase of investments or the payment of taxes) from any source (including a Trustee individually) at the then usual and customary rate of interest, and mortgage or pledge any property of its estate to any lender.

K. **Pay Expenses**. The Trustee may pay all taxes and all reasonable expenses, including reasonable compensation to the agents and counsel (including investment counsel) of the Trustee.

L. **Claims**. The Trustee may institute suits on behalf of and defend suits brought against its estate, and release, compromise or abandon claims or rights to property for whatever consideration (including no consideration) the Trustee determines to be appropriate.

M. **Environmental Hazards**. The Trustee may: (i) take all appropriate action (including environmental assessments, audits, and site monitoring) to determine compliance with any environmental law or regulation or to prevent, identify or respond to actual or threatened violations of any environmental law or regulation for which the Trustee may have responsibility; (ii) take all appropriate remedial action to contain, cleanup, or remove any environmental hazard including a spill, release, discharge, or contamination, either on its own accord or in response to an actual or threatened violation of any environmental law or regulation; (iii) institute legal proceedings concerning environmental hazards or contest or settle legal proceedings brought by any local, state, or federal agency concerned with environmental compliance, or by a private litigant; (iv) comply with any local, state, or federal agency order or court order directing an assessment, abatement, or cleanup of any environmental hazards; and (v) employ agents, consultants, and legal counsel to assist or perform the above undertakings or actions.

5.6 **Agents And Attorneys**. The Trustee may employ and compensate, and may discharge, agents, attorneys, advisors, accountants, and other professionals (including the Trustee individually and any professional organization with which the Trustee is affiliated) as the Trustee deems proper, and, to the extent permitted by applicable law, may rely on their advice and delegate to them any authorities (including discretionary authorities) as the Trustee deems appropriate.

5.7 **Principal And Income**. The Trustee shall allocate receipts and disbursements between principal and income in a reasonable manner and may establish a reasonable reserve for depreciation or depletion and fund this reserve by appropriate charges against the income of its estate. For purposes of determining an appropriate reserve for depreciable or depletable assets, the Trustee may (but need not) adopt the depreciation or depletion allowance available for federal income tax purposes. For purposes of determining income from a partnership or proprietorship, the Trustee may (but need not) utilize the partnership's or proprietorship's income as reported for federal income tax purposes.

5.8 **Records, Books Of Account, And Reports**. The following procedures shall be followed in lieu of the accounting and reporting procedures of the Texas Trust Code, which we expressly reject.

A. **Records, Inspections, And Audits**. The Trustee shall promptly set up and thereafter maintain, or cause to be set up and maintained, proper books of account which shall accurately reflect the true financial condition of its estate. The books of account shall at all reasonable times be open for inspection or audit by us and all current permissible beneficiaries of its estate who are not Incapacitated. The inspection or audit may be made personally or by any duly authorized agents, attorneys, representatives and auditors, and shall be made at the expense of the beneficiary making the inspection or audit.

B. **Reports**. Within a reasonable time after receiving written request from a beneficiary entitled to inspect books of account, the Trustee shall make a written financial report to the beneficiary. The natural or court appointed guardian of an Incapacitated beneficiary otherwise entitled to request a report may request (and receive) a report on the beneficiary's behalf. No Trustee shall ever be required to deliver reports of its estate more frequently than quarterly.

C. **Report Content**. The first report shall identify all property initially received by the Trustee. Every report shall include a statement of (i) all property on hand at the beginning and end of the accounting period, (ii) all property and liabilities that have come to the knowledge or possession of the Trustee that have not previously been listed as property or liabilities of its estate, (iii) all material receipts and disbursements during the period (including a statement as to whether the receipt or disbursement is of income or principal), and (iv) any other facts the Trustee deems necessary to provide adequate information as to the condition of its estate.

D. **Additional Reports**. If any person interested in the estate of any Trustee requests an accounting for the Trustee's actions that is more extensive or more frequent than the accounting normally to be rendered, the Trustee may either reject the request, or accept the request and, in the Trustee's discretion, require the requesting person to pay the additional costs incurred in preparing it before complying with the request.

5.9 **Discretionary Distribution Considerations**. Except as otherwise provided, in making discretionary distributions under this instrument, the Trustee making the distribution decision may consider all circumstances and factors the Trustee deems pertinent, including: (i) the beneficiaries' accustomed standard of living and station in life; (ii) all other income and resources reasonably available to the beneficiaries and the advisability of supplementing their income or resources; (iii) the beneficiaries' respective character and habits, their diligence, progress and aptitudes in acquiring an education, and their ability to handle money usefully and prudently, and to assume the responsibilities of adult life and self-support in light of their particular abilities and disabilities; and (iv) the tax consequences of the Trustee's decision to make (or not to make) the distributions and out of which trust any distributions should be made. Except as otherwise provided, as to any trust with more than one beneficiary, the Trustee may make discretionary distributions in equal or unequal proportions and to the exclusion of any beneficiary. The Trustee shall not allow a beneficiary who reasonably should be expected to assist in securing his or her own economic support to become so financially dependent upon distributions from any trust that he or she loses an incentive to become productive in a manner that is reasonably commensurate with any other individual having the ability and being in the circumstances of the beneficiary. Whenever this instrument provides that the Trustee "may" make a distribution, the Trustee may, but need not, make the distribution.

5.10 **Form Of Payment To Beneficiaries**. If a beneficiary is entitled to a discretionary, mandatory or terminating distribution of any property under this instrument, the Trustee may distribute the property: (i) directly to the beneficiary; (ii) if the beneficiary is Incapacitated (defined in Section 6.3), to the guardian or other similar representative (including the Trustee) of the beneficiary or his or her estate; (iii) to a Custodian (including the Trustee) for a minor beneficiary under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act of any State; (iv) by expending the same directly for the benefit of the beneficiary or by reimbursing a person who has advanced funds for the benefit of the beneficiary; (v) by offsetting the same against any amount owed by the beneficiary to the trust; or (vi) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution. The Trustee shall not be responsible for a distribution after it has been made to any person in accordance with this Section.

5.11 **Character Of Beneficial Interests**. All interests provided under this instrument (whether principal or income, and whether distributed or held in trust): (i) shall belong solely to the particular estate (not any beneficiary) prior to actual distribution, and (ii) upon distribution, shall be received as a gift from us and shall not be the community property of the beneficiary and his or her spouse.

5.12 **Distributions Not Treated As Advancements**. Except as otherwise provided, no discretionary distribution to a beneficiary of any trust created under this instrument shall be treated as an advancement against the beneficiary's share of such trust unless the distribution is specifically so treated on the Trustee's records at the time of the distribution or unless the Trustee gives notice of such fact to the beneficiary at the time of the distribution. If the Trustee has the discretion to make distributions from a trust to more than one beneficiary, the Trustee ordinarily should not treat distributions to any particular beneficiary as an advancement of that beneficiary's share of the trust unless an event has occurred causing the termination of such trust.

5.13 **Spendthrift Trust**. Each trust created under this instrument shall be a "spendthrift trust," as defined by the Texas Trust Code. Prior to actual receipt by any beneficiary, no income or principal distributable from a trust created under this instrument shall be subject to anticipation or assignment by any beneficiary or to attachment by or to the interference or control of any creditor of, person seeking support from, person furnishing necessary services to, or assignee of any beneficiary, nor shall such property be taken or reached by any legal or equitable process in satisfaction of any debt or liability of any beneficiary (including governmental claims), and any such attempted action by any beneficiary or claimant shall be absolutely and wholly ineffectual to the fullest extent permitted by law.

5.14 **Early Trust Termination**. Subject to Section 4.8, if, in the Trustee's discretion, the property of any trust becomes so depleted as to be uneconomical to be administered as a trust, the Trustee may terminate the trust and distribute the property of the trust as follows: (i) if the trust is named for or identified by reference to a single then living beneficiary, to the named beneficiary; otherwise, (ii) if then living descendants of ours are beneficiaries of the trust, to the descendants; otherwise, (iii) to the then living beneficiaries of the trust in proportion to their then respective presumptive interests in the trust and the Trustee shall assume that a beneficiary who would be entitled to receive an interest in a trust by surviving to a specified age will live to attain that age.

5.15 **Maximum Duration Of Trusts**. Despite any other provision of this instrument, to the extent that any trust created under this instrument has not previously vested in a beneficiary, the trust shall terminate upon the expiration of the period of the applicable Rule Against Perpetuities (determined using as measuring lives both of us, all of the descendants of our parents, and all persons who are mentioned by name or as a class as beneficiaries of any trust created by or pursuant to this instrument who are living on the date of this instrument), and the Trustee shall distribute any property then held in the trust (i) to the beneficiary for whom the trust is named, if any; otherwise, (ii) per stirpes to the then living descendants of the named beneficiary, if any; otherwise (iii) the trust estate shall be distributed as provided in Section 2.4, as if it were the remaining trust property of the [NAME] MEMORIAL IRREVOCABLE GIFT TRUST and as if the [NAME] MEMORIAL IRREVOCABLE GIFT TRUST terminated on the termination date of the trust. This provision shall apply, without limitation, to any trust created by the exercise of a Power of Appointment granted in this instrument.

5.16 **Combination Of Trusts**. If at any time the Trustee determines it would be in the best interest of the beneficiary or beneficiaries of any trust created under this instrument to combine all of the assets held in the trust with any other trust (created under this instrument or otherwise) for the benefit of the same beneficiary or beneficiaries and under substantially similar trusts, terms and conditions, the Trustee under this instrument, after giving not less than thirty days advance written notice to its then living identifiable beneficiaries, may terminate the trust and transfer to or combine all of the assets of the trust with the other trust, regardless of whether the Trustee under this instrument also is serving as the trustee of the other trust. The Trustee under this instrument shall not be subject to liability for delegation of its duties for a transfer to a substantially similar trust having a different trustee nor for defeating or impairing the interests of remote, unknown or contingent beneficiaries, and shall have no further liability with respect to trust assets properly delivered to the trustee of the other trust. Similarly, the Trustee of any trust created by this instrument is authorized to receive from the trustee of any other substantially similar trust the assets held under the other trust. In exercising either discretion, the Trustee shall consider the inclusion ratio for generation-skipping transfer tax purposes of the trusts being considered for combination but may combine trusts with different inclusion ratios if the Trustee shall deem the combination to be advisable. If the combined trusts specify any dollar amounts to be distributed at specified times, the dollar amounts so specified shall be aggregated and the sum shall be distributed at the specified times. If trusts having different contingent and/or remainder beneficiaries are combined, any distribution to the contingent and/or remainder beneficiaries from the acquiring trust shall be made based on the relative values (pre-combination) of the respective trust estates. The applicable Rule Against Perpetuities for any acquiring trust shall be based on those measuring lives of both the combining and acquiring trusts that were in existence on the date that the earlier of the trusts became irrevocable.

5.17 **Creation Of Multiple Trusts**. The Trustee may divide any trust created under this instrument into two or more separate identical trusts (in any proportion) if the Trustee, in the Trustee's judgment, concludes that accounting or other administrative burdens would be simplified (for tax reasons or otherwise) or if the Trustee otherwise deems it advisable. The Trustee shall divide any trust created under this instrument into two or more separate identical trusts (in the appropriate proportion) in order: (i) to segregate assets having different presumed or actual transferors for GST purposes into separate trusts, (ii) to segregate assets exempt from the generation-skipping transfer tax from other assets, and (iii) to ensure that every trust has a GST inclusion ratio of either one or zero. The Trustee may exercise discretionary powers held with respect to the new trusts independently. Where the original trust specifies a dollar amount to be distributed at a specified time, the aggregate dollar amount shall not change but the Trustee may distribute the amount from any new trust or partly from one or more in any ratio. If the Trustee allocates assets between the new trusts based on values as of a date prior to the allocation date, the assets allocated to each trust shall have an aggregate fair market value that is fairly representative of the appreciation and depreciation in value of all available assets from the valuation date to the date or dates of allocation (or the Trustee may use an alternative allocation approach so long as the method of asset allocation does not jeopardize an otherwise allowable estate tax deduction or generation-skipping transfer tax exemption).

5.18 **Division And Distribution Of Trust Estate**. The Trustee may divide, allocate or distribute property of its estate in divided or undivided interests, pro rata or non pro rata, and either wholly or partly in kind. Except as otherwise provided, all required distributions shall be made on the basis of the fair market value of the assets to be distributed at the time of distribution. If non pro rata distributions are to be made, the Trustee should attempt to allocate the tax basis of the assets distributed in an equitable manner among the beneficiaries of its estate, but the Trustee may at all times rely upon the written agreement of the beneficiaries as to the apportionment of assets. To the extent non pro rata distributions are made and the tax basis of the assets so distributed is not uniformly apportioned among beneficiaries, the Trustee may, but need not, make equitable adjustments among the beneficiaries as a result of any nonuniformity in basis.

5.19 **Successive Distributions Not Required**. To the extent that the Trustee is authorized to distribute property to any trust (created under this instrument or otherwise) and under the terms of that trust (or by virtue of the exercise of a discretionary power or for any other reason), the property would be immediately distributable to or among any one or more persons or other trusts, the Trustee may distribute the property directly to those persons or trusts in lieu of the directed distribution.

5.20 **Receipt Of Property After Termination Of Trust**. If property is received by the Trustee to be held in any trust (created under this instrument or otherwise) which has already terminated, such property shall be distributed by the Trustee as though such trust were then in existence and had terminated immediately after the receipt of such property, to the trusts, persons, or entities which would then have received such property on termination of such trust as though any power of appointment held by any person over such trust had not been exercised.

5.21 **Additional Contributions**. Subject to Section 5.17, the Trustee may receive (or refuse to receive for tax or other reasons) contributions of additional property to its estate from any source and in any manner.

5.22 **Collection Of Nonprobate Assets**. The Trustee may receive (or refuse to receive for tax or other reasons) the proceeds of life insurance policies, employee benefit plans and other contractual rights that are payable to the Trustee, as well as any other property tendered to the Trustee as a consequence of either of our deaths from sources other than the personal representative of either of our estates (collectively, "Nonprobate Assets"). The Trustee may take whatever action, if any, the Trustee considers best to collect Nonprobate Assets, without regard to whether the Nonprobate Assets are of a character generally authorized for trust investments or are subject to conditions (including reasonable written rights of withdrawal and directions to allocate such property to or among one or more trusts created under this instrument) that are acceptable to the Trustee. The Trustee: (i) need not incur expense or initiate legal proceedings unless indemnified; (ii) may give a full discharge to an obligor of such obligor's liability under any such policy or plan; (iii) may elect optional modes of settlement available to it, after giving consideration to the tax effect upon all of the beneficiaries of our estates and any trust created by either of us by this instrument or otherwise; and (iv) may make any election that the Trustee believes is reasonable or proper under the circumstances. The Trustee may, but need not, make economic adjustments among the beneficiaries of its estate as a consequence of the tax ramifications resulting from any such election made or not made by the Trustee. Subject to the other provisions in this instrument, any Nonprobate Assets shall be allocated: to or among the trusts created under this instrument in accordance with the directions contained in the beneficiary designation or other instrument of transfer, if any; otherwise, in the same manner as other trust contributions.

5.23 **Partial Distributions**. In making distributions, the Trustee may make a partial distribution or distributions to any beneficiary, including any trust created by this instrument.

5.24 **GST Taxes On Trust Distributions**. If the Trustee considers any distribution or termination of an interest or power in a trust created under this instrument to be a taxable distribution (a "Distribution"), a taxable termination (a "Termination"), or a direct skip (a "Direct Skip") for generation-skipping transfer tax purposes, the Trustee may exercise the following authorities with respect to any such Distribution, Termination, or Direct Skip. In the case of a Distribution, the Trustee may increase the amount otherwise distributable by an amount estimated to be sufficient to permit the beneficiary receiving such Distribution to pay the estimated generation-skipping transfer tax attributable to such Distribution. Generally, the Trustee would not be expected to augment any partial terminating distribution in order to pay generation-skipping transfer taxes attributable to such partial terminating distribution from a trust. In the case of a Termination or Direct Skip, the Trustee shall pay the generation-skipping transfer tax attributable to such Termination or Direct Skip, and may postpone final termination of any trust or the complete funding of any Direct Skip, and may withhold all or any portion of the distributable trust property, until the Trustee is satisfied it no longer has any liability to pay any generation-skipping transfer tax with reference to the Termination or Direct Skip. If a generation-skipping transfer tax is imposed in part with respect to property held in trust under this instrument and in part with respect to other property, the Trustee shall pay only the portion of such tax that is fairly attributable to the property held in trust under this instrument, taking into consideration deductions, exemptions, credits and other factors that the Trustee deems appropriate. The Trustee may, but need not, make equitable adjustments among beneficiaries of a trust as a consequence of additional distributions or generation-skipping transfer tax payments made with respect to Distributions, Terminations or Direct Skips.

5.25 **Discharge Of Legal Obligation Prohibited**. Notwithstanding any contrary provision, the Trustee shall not make any distribution that would discharge any legal obligation either of us may have.

5.26 **Governing Law**.

A. **Generally**. To the extent consistent with the other provisions of this instrument, (i) the Trustee shall have the powers, duties, and liabilities of trustees set forth in the Texas Trust Code, as amended and in effect from time to time, and (ii) the construction, validity and administration of every trust created under this instrument shall be governed by Texas law.

B. **Change Of Governing Law**. The Trustee of any trust may designate any other jurisdiction's law as the governing law with respect to the administration of that trust, on the following conditions: (i) The change of governing law must be in the best interests of the trust's beneficiaries and must not jeopardize any otherwise allowable estate tax deduction or generation-skipping transfer tax exemption. (ii) The Trustee (or at least one Co-Trustee) of the trust must be domiciled (in the case of an individual Trustee) or have its principal place of business (in the case of a bank or other corporate trustee) in the designated jurisdiction. (iii) The designated jurisdiction may be any nation, state, district, territory, political subdivision, or similar jurisdiction. (iv) The designation must be by signed, acknowledged declaration which states the effective date of the designation and is filed among the trust records. (v) Unless waived, thirty days' advance written notice of the proposed designation must be given (A) to each of us who is then living, or, if neither of us is then living, to the beneficiary for whom the trust is named, if any, otherwise to each adult beneficiary of the trust who is then permitted to receive distributions from the trust, if any, and (B) to the Trustee Appointer. (vi) There is no limit on the number of successive designations of governing law for any trust. (vii) Notwithstanding any designation, Texas law shall continue to apply to the extent that the powers of the Trustee are broader under Texas law than under the designated jurisdiction's law.

ARTICLE VI – GENERAL PROVISIONS

6.1 **Disclaimers**. Except as otherwise provided, if a beneficiary under this instrument is surviving but is deemed to be deceased by virtue of a qualified disclaimer (as defined under Code Section 2518), then the beneficiary shall only be deemed to be deceased with respect to the specific interest in property specified in the qualified disclaimer and the qualified disclaimer shall not affect any other rights or interests granted under this instrument, including but not limited to rights or interests in trusts to which the disclaimed interest passes as a result of the qualified disclaimer. If the qualified disclaimer is of a life estate or the disclaimant's entire interest in property (or an undivided portion of such property) in trust, the termination provisions of such estate or trust with respect to the disclaimed interest shall be applied as if the disclaimant failed to survive.

6.2 **Powers Of Appointment Created In This Instrument**. Except as otherwise provided, the following provisions shall apply to every Power of Appointment ("Power of Appointment") created in this instrument which may be exercisable at any particular time by any person (the "Donee").

A. **Exercise Of Powers Of Appointment**. Every exercise of a Power of Appointment must specifically refer to the Section in this instrument creating the Power of Appointment. An inter vivos Power of Appointment may be exercised solely by a writing delivered to the Trustee and signed by the person exercising the power. A testamentary Power of Appointment must be exercised by Will.

B. **Permissible Appointees Of Powers**. The Donee may exercise a Power only in favor of the described group, in such proportions among them (even to the complete exclusion of any one or more of them) and subject to such trusts and such other conditions as the Donee may choose. Notwithstanding any contrary provision, the Donee of a Limited Power shall never have the power to exercise the Power in favor of himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate, nor may he or she appoint trust property in discharge of his or her legal obligations.

6.3 **Determination Of Incapacity**. Except as otherwise provided, an adult individual generally shall be considered to have full legal capacity absent a presently existing adjudication of incapacity or insanity by a court or other judicial tribunal having jurisdiction to make such a determination.

A. **Fiduciaries**. For purposes of qualification to serve as a Trustee or in any other fiduciary capacity under this instrument, an adult individual shall be considered legally incapacitated to act when two physicians who have examined such person within the prior two years have certified that in their judgment such person does not have the physical or mental capacity to effectively manage his or her financial affairs.

B. **Beneficiaries**. An adult individual beneficiary under this instrument shall be considered Incapacitated upon a good faith determination made by the fiduciary charged with making such evaluation that such individual lacks the physical or mental capacity, personal or emotional stability or maturity of judgment needed to effectively manage his or her personal or financial affairs (whether because of injury, mental or medical condition, substance abuse or dependency, or any other reason). Individuals under the age of majority shall be considered legally incapacitated.

6.4 **Definitions**. In connection with the construction and interpretation of this instrument the following definitions apply, unless otherwise expressly provided.

A. **Children And Descendants**. Except as otherwise provided, a "child" of another individual means a child determined in accordance with Section 160.201 of the Texas Family Code. An adopted person shall be a child of the adopting parent(s) but only if legally adopted before attaining age eighteen. A posthumous child who survives birth shall be treated as living at the death of his or her parent. An individual's "descendants" means the individual's children, the children of those children, and so on, determined in accordance with the preceding.

B. **Code**. References to the Code or any Section of the Code mean the Internal Revenue Code of 1986, or the Section, as amended and in effect from time to time, or the appropriate successor provision.

C. **GST Taxable Portion**. The "GST Taxable" portion of any terminating trust is, collectively, each portion or fraction of the trust, if any, with a positive inclusion ratio that would pass to a skip person with respect to the presumed or actual transferor of the trust in a transfer subject to the generation-skipping transfer tax (all as determined under Chapter 13 of the Code) if no Powers of Appointment over any part of the trust existed.

D. **Heirs**. A person's Heirs or then living Heirs means those individuals who would be that person's heirs at law as to separate personal property if that person were to die single, intestate and domiciled in Texas at the referenced time.

E. **Per Stirpes**. Whenever a distribution (or allocation) of property is to be made "per stirpes" to (or to trusts for) the descendants of any person, the property shall be divided into as many equal shares as there are then living children of the person and deceased children of the person who left descendants who are then living. One share shall be distributed to (or to the trust for) each living child and the share for each deceased child shall be divided among his or her then living descendants in the same manner.

F. **Pronouns**. Pronouns, nouns and terms as used in this instrument shall include the masculine, feminine, neuter, singular, and plural forms wherever appropriate to the context.

G. **Survive**. A requirement that an individual "survive" a specified person or event or be "surviving" or "living" means survival by at least ninety days.

6.5 **Notice**. Any notice required to be given or delivered under this instrument shall be deemed given or delivered when an acknowledged written notice is actually delivered to the person or organization entitled to notice or mailed certified mail, return receipt requested, to the address then appearing on the Trustee's records for the person or organization.

6.6 **Actions By And Notice To Incapacitated Persons**. Any action permitted to be taken by a minor or other incapacitated person shall be taken by the person's parents or guardian. Any notice or report required to be delivered to a minor or other incapacitated person shall be delivered to such person's parents or guardian. If both parents of a minor are living, any such action shall be taken by, and any such notice shall be given to, the parent to whom we are more closely related.

6.7 **Effect Of Inoperative, Invalid Or Illegal Provision**. If any provision of this instrument or any amendment to it is held to be inoperative, invalid, or illegal, all of the remaining provisions shall continue to be fully operative and effective as far as is possible and reasonable.

6.8 **Headings**. The headings employed in this instrument are for reference purposes only and shall not in any way affect the meaning or interpretation of the provisions of this instrument.

6.9 **Statement of Intent**. While we may make nominal gifts to this trust, it is anticipated that the majority of trust assets will be donations made by others. We intend that this trust not be taxed in our estates or in the estate of any Trustee. We further grant the Trustee the broadest possible powers consistent with this intent.

We have signed this instrument this ____ day of May, 2022.

______________________________	______________________________
[GRANTOR 1], Grantor	[GRANTOR 2], Grantor

The undersigned accepts the above trusts as of the day and year last written above.

____
[SOLE TRUSTEE], Trustee

STATE OF TEXAS §
§
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this ____ day of May, 2022, by [GRANTOR 1] and [GRANTOR 2], as Grantors.

____
Notary Public, State of Texas

STATE OF TEXAS §
§
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this ____ day of May, 2022, by [SOLE TRUSTEE], as Trustee.

____
Notary Public, State of Texas