

**Distribution Clauses:
Carrying out the Grantor's Intent to Protect,
Motivate, Empower and Train**

**by
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I. INTRODUCTION.

The objective of this outline and the exhibits to this outline is to provide the practitioner with a variety of distribution options, guidelines in using these provisions and information to assist the practitioner and his client determine the distribution structure that best accomplishes the client's objectives. Distributions for this purpose will include all methods of providing the beneficiary with access to the funds including withdrawal rights, decanting to other trusts for the benefit of the beneficiary and the beneficiary's involvement in the administration of the trust both as a voice with no control or as co-Trustee or sole Trustee of the trust.

As practitioners we also have clients who want to create a trust that will "incentivize" their children to be productive. The typical provision used is to match a beneficiary's income. In addition to rewarding a beneficiary who has selected a more lucrative career, the question arises whether matching income is an effective way to "incentivize" beneficiaries. If our intent is to structure a trust that motivates the beneficiaries to be productive children, then we must first determine what motivates individuals. This information then must provide the framework for structuring an "incentive" trust.

II. TRADITIONAL TRUSTS OR WHAT'S DIFFERENT NOW?

Trusts have been used for centuries and distribution provisions have only recently become an area of focus for attorneys. Why? Historically, trusts were managed by an individual for the benefit of persons who were incapable (or perceived to be incapable) of managing money. Typically trusts were for the benefit of a wife and family of a wealthy individual. The focus was less on the provisions of the trust than the identity of the Trustee. The Trustee was selected based on the Trustee's relationship with the family, integrity, knowledge and value system. The trust would provide that the trust income and principal would be distributed in the Trustee's discretion.

Health, education, support and maintenance became prominent in trusts primarily due to the application of the tax laws. In a purely discretionary trust, the individual was named as Trustee, the ability to distribute to himself for any reason was considered a general power of appointment and caused the assets to be included in the beneficiary's estate. To allow the beneficiary to be the Trustee now or possibly at some

time in the future and to allow the Trustee to participate in the removal and replacement of the Trustee, trusts used the distribution provision of "health, education, support and maintenance." However, for many grantors (and many attorneys) little thought was given to the distribution provisions other than the use of these terms for tax purposes. The focus was on the selection of the Trustee, not on the distribution provisions of the trust. The grantor selected a person who shared his value system with the intent that the trust would be administered as he would if he were alive. If there were a situation in which the grantor would not make a distribution to a child, then the grantor assumed that the selected Trustee would not make that distribution, even if the distribution would come within the terms "health, education, support and maintenance". Conversely if the Trustee were faced with a situation in which the grantor would have made substantial distributions, the grantor assumed that the selected Trustee would find a way to make these distributions even if they exceeded a traditional "health, education, support and maintenance" standard. In addition to relying on the Trustee to make the same decisions that the grantor would, these trusts typically were designated to provide for distributions during the lifetime of the beneficiary either at a specified age or in two or three distributions at different ages. Even if the Trustee did not make a distribution that the beneficiary desired, the beneficiary was aware that "in time" he would receive the trust assets outright in one or more distributions.

What changed? Initially three things: (i) increased divorce rate, (ii) proliferation of litigation and (iii) creation of the generation skipping transfer tax. As the divorce rate increased parents wanted to protect the inheritance they were leaving their child from a future estranged spouse. As litigation increased, parents wanted to protect the inheritance from the claims of a creditor. The primary creditor with which parents were concerned were tort creditors. If their child was a doctor, accountant or attorney they wanted to protect their inheritance from a malpractice lawsuit. The general view was that wealth invited litigation. The increased concern of divorce and lawsuits coincided with the passage of the generation skipping tax. Ironically, a tax intended to prevent property from being held in trust for generations, resulted in a dramatic increase in the use of trusts lasting for the lifetime of the beneficiary and beyond. The tax carried with it an exemption from the tax of \$1 million. The percentage of people with an estate of over \$1 million in 1986 was less than 1%, thus most people who created trusts lasting for the lifetime of the beneficiary could also structure the trust to be exempt from both the generation skipping tax and the estate tax.

The increased use of lifetime trusts lead to another change: litigation by beneficiaries. The beneficiary could no longer “wait it out” until he reached a certain age and could receive the funds held in trust. Beneficiaries who disagreed with the restrictive distribution decisions of the Trustee began to seek relief through the legal system. As we will review later in this outline, it did not make a difference if the Trustee was withholding distributions as intended by the grantor. If the grantor had not included those restrictions in the trust document and the trust document was not ambiguous, then the grantor’s intent was not admissible.

Another relatively recent shift has been toward the problems of creating a “trust baby”. I had not heard the term “trust baby” until some time in the 1990s. Some of the very successful Baby Boomers made significant wealth, far outstripping their parents in terms of success. These individuals frequently did so by working long hours and focusing on a business venture. As their children became teenagers they noted that their children did not have the same motivation to work that they had (or that they came to have) and became concerned about the effect their money would have on their children. Individuals such as Warren Buffet expressed this concern and stated that he wanted to leave his children enough money so that they could do anything but not so much that they could do nothing. This feeling resonated with other individuals and they went to their attorneys to prepare their estate plan with this mission – design a trust that will make my children productive. This desire gave birth to what has come to be known as the “incentive trust”. An incentive trust is any trust containing provisions designed to incentivize the beneficiary to engage in certain type of behavior.

The client who comes into our office may come with an intent to create an Incentive Trust or may just be coming to get a Will in place. In either event we need to advise the client of the effect of certain language, determine the client’s intent and draft a trust that best carries out our client’s intent.

III. ASSESSING WHAT IS NEEDED: DISTRIBUTION PROVISIONS FOR THE GRANTOR’S CHILDREN.

Our responses to our children as they grow up, mature and become responsible adults reflects a complex process. Each time we confront a challenging situation with our children, whether as minors or adults, we consider innumerable factors. We consider and weigh all of our own experiences with our children in the past, all of our own experiences growing up and as adults, our

children’s strengths and weaknesses, our value system, our successes and failures, our children’s successes and failures, all of our efforts to guide and assist our children in the past, the experiences of all of our friends and family as well as professional advice.

The difficulty with a trust for our children then is, how to draft a trust to operate the same as the client would if he or she was around to make the decision? Clients generally come to us with a specific set of experiences and a specific set of concerns. They had problems and successes in their lives and have observed problems and successes in the lives of their parents and siblings. They have observed their children and have specific hopes or concerns for and about their children.

As attorneys, in drafting a trust for their children, we must begin with these life experiences and these concerns.

Although I think it is possible to do a “kitchen sink” estate plan, I do not recommend it. Using this approach deprives the client of the opportunity and challenge of thinking through his estate plan to decide what his objectives truly are. I have found that my clients concerns and thoughts regarding their children fall into one of three categories:

- (1) current problems which need addressing;
- (2) “normal” children who have no serious problems but need some maturity time; and
- (3) “normal” children who are functioning well but the client does not want to “screw it up”.

These three situations require a different approach. Current problems which need addressing generally refer to a child with some sort of drug or addiction problem. This is an issue where money could potentially exacerbate the self-destructive behavior, and so the distribution provisions must be more restrictive when the self-destructive behavior is occurring.

Quote unquote “normal” children with no serious problems but need some maturity time are those children the clients feel do not have any serious addictions or other problems but may not handle money well, or may be unmotivated. This would include the child who appears like they are drifting, with no real focus in life. The grantor then wants a trust that is geared towards allowing the child to either develop motivation or certain skills.

The third category, is for the “normal” child who is motivated and developing well. The client simply doesn’t want to screw them up by giving them too much money at too young an age. These provisions focus on gradually transferring control to the beneficiary so they can be a steward of wealth without the wealth interfering with their intrinsic motivation to find their own calling. These trusts require less restrictive provisions because the children have already demonstrated motivation and good-decision making.

IV. BASIC OPTIONS: OVERVIEW

A. Ascertainable Standard.

A distribution provision with an ascertainable standard is a trust with distribution provisions the meaning of which a court can ascertain and enforce. A provision to distribute \$10,000 a year is an ascertainable provision. The courts have determined that a distribution for health, education, support and maintenance is ascertainable in that the courts can determine what distributions should be made to the beneficiary in a trust with this distribution standard. In my experience all clients want the trust funds used to provide an education for their children. However, most individuals do not actually want their children totally supported regardless of their ability to work. The interpretation of these terms and ways to refine the meaning of these terms to fit the intent of the client are discussed below.

B. Absolute Discretion.

The second most frequently used distribution provision is a provision that allows the Trustee to make distributions to the beneficiary in his sole and absolute discretion. Clients are generally relying on the individual’s (or institution’s) judgment to exercise this discretion in a manner that the client would if he were making the decisions. However, the individual will die, the personnel at the institution will change and the Trustee may respond to the pressures of the beneficiary or of the institution’s internal procedures and be unwilling to take the position that the grantor would want taken. With this provision as well, the client should consider ways to guide the exercise of discretion in the intended manner.

C. Other Provisions.

In drafting the trust there are a variety of special distribution provisions that a client may want to include

to carry out his intentions. These provisions fall into three broad categories.

1. Special Circumstance Provisions. These provisions are those designed to address a special problem or circumstance of the grantor’s family. For example, a child may have a special need or disability and special provisions are included to address this child’s needs.

2. Incentive Provisions. These provisions are intended to elicit a certain type of behavior from the beneficiary. The grantor may want to provide a distribution structure that will increase the likelihood of the beneficiary being gainfully employed or following his passion.

3. Restrictive Provisions. These provisions are designed to prevent certain behavior from occurring. The most common provision is a provision to discourage addictive behavior, most commonly drug and alcohol use.

The special circumstance provisions are unique to the individual and are not discussed in this paper. This paper will also not discuss the provisions designed to provide benefits from a trust for an individual while continuing to preserve the beneficiary’s eligibility for governmental benefits. Both incentive provisions and alternatives to these provisions and restrictive provisions will be discussed below in Section VI.

D. Withdrawal Provisions.

These provisions are not actually distribution provisions. The beneficiary is given the right to withdraw a certain percentage of the trust corpus on an annual basis. A certain percentage withdrawal can be given for various types of achievements or upon reaching certain ages. Provisions designed to encourage a certain behavior by shifting rights to the beneficiary will be discussed below in Section VI.

E. Decanting Provisions.

The grantor cannot anticipate all changes or events, nor can any of us predict what the world will be in the future. By providing that the Trustee can decant to a new trust, flexibility is retained for future adjustments. The decanting ability or process can be triggered by a certain event or action by the beneficiary (accomplishing certain tasks) or can be an option available to the Trustee at any time.

F. Adding Statements of Intent – Purpose Clauses and/or Through Guidelines.

The last method to be discussed in modifying distribution provisions is the use of a Purpose Statement in the trust or to use Guidelines attached to the trust to provide a framework for the exercise of discretion by the Trustee both in a trust with an ascertainable standard or in a trust providing for distributions in the sole and absolute discretion of the Trustee.

G. Beneficiary Engagement.

Beneficiary engagement is not a distribution provision but it is a process set forth in the trust instrument. By engaging the beneficiary, all provisions intended to affect the behavior of the beneficiary are enhanced.

V. DISCRETIONARY DISTRIBUTION STANDARDS.

A discretionary distribution standard allows the trustee to use their discretion in determining whether to make a distribution or not. Often, the trustee's discretion is limited to a standard. The standard can be either ascertainable or unascertainable. The selection of the standard is usually based on a number of factors:

- Purpose of the trust
- Whether a beneficiary may serve as trustee
- Preference between current and remainder beneficiaries
- Preference for objective versus subjective standard for review.

An ascertainable standard is often used when the beneficiary may serve as trustee, because the standard will avoid certain tax consequences. In particular, the standard will avoid the trust property from being included in the beneficiary's estate. I.R.C. § 2041(b)(1)(A). In addition, an ascertainable standard will avoid the loss of spendthrift protection from creditors. Tex. Prop. Code Ann § 112.035 (Vernon 1995 & Supp. 2010).

A. Ascertainable Standard.

The most commonly used ascertainable standard limits the trustee's discretion in making distributions to those distributions for "health, education, maintenance and support." Treas. Reg. § 20.2041-1(c)(2). This is referred to as the HEMS standard. The HEMS standard is considered to be a standard that a court could

determine and enforce. In fact, courts are reluctant to substitute their judgment for the judgment of a trustee and thus will generally only provide relief if the trustee acted fraudulently or in bad faith.

1. What does the HEMS Standard Really Mean?
Before we discuss ways we can modify or adjust how a trustee exercises his discretion under a HEMS standard, we first have to figure out what the HEMS standard is—to determine whether a client would actually want it modified, and in what way?

a. Support and Maintenance. Support and maintenance are often thought to be synonymous. Indeed, the Restatement of Trusts [Note: Texas has not adopted the Third Restatement of Trusts but some cases have cited it favorably. e.g., *Keisling v. Landrum* considers the terms synonymous. Importantly, when the distribution standard includes the terms support or maintenance, a trustee does not have unbridled discretion. Instead, the trustee's discretion must be "reasonably exercised to accomplish the purposes of the trust according to the grantor's intention and his exercise thereof is subject to judicial review and control." *State v. Rubion* 208 S.W.2d at 8. This suggests that the overwhelming factor in interpreting support and maintenance is the grantor's intent. Unless there is an ambiguity in the trust provisions, the grantor's intent must be determined from the four corners of the trust agreement. This makes purpose statements or guidelines particularly helpful in insuring the trust is administered as the grantor would have liked.

In *State v. Rubion*, the Texas Supreme Court outlined a number of factors that should be considered by a trustee exercising its discretion in a "support" or "maintenance" trust. *Rubion*, 308 S.W.2d at 10. These factors include:

- The size of the trust estate
- The beneficiary's age, life expectancy and condition in life
- The beneficiary's present and future needs
- The other resources available to the beneficiary's individual wealth
- The beneficiary's present and future health, both mental and physical.

What does support really mean? Support encompasses more than the bare necessities. *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710 (2d Cir. 1929). Instead, support includes the beneficiary's ordinary living expenses. Ordinary living expenses may include "regular mortgage payments, property taxes,

suitable health insurance or care, existing programs of life and property insurance and continuation of accustomed patterns of vacation and charitable and family giving.” Restatement (Third) of Trusts § 50 cmt d (2003).

In other words, this suggests ordinary living expenses are those expenses necessary to maintain the standard of living of the beneficiary. This raises the question that, if the trustee is to consider the standard of living of the beneficiary—at what point is the beneficiary’s standard of living determined? At the time the trust is drafted? At the time it becomes irrevocable? At the grantor’s death? The general rule is the beneficiary’s standard of living is set at the time of the grantor’s death or when the trust becomes irrevocable. The thought is, that in determining the standard of living at this time, is the most consistent with the grantor’s intent.

The beneficiary’s standard of living may be increased. For example, the Restatement provides that the standard may be increased if the beneficiary’s standard of living has increased and the increase is consistent with the trust’s productivity and the increase is not inconsistent with the productivity of the trust; or considering the productivity of the trust, the failure to increase the beneficiary’s standard of living results in favoring the remainder beneficiaries over the current beneficiaries.

Support has even included the educational expenses of the beneficiary’s dependants. For example, in *First National Bank of Beaumont*, the Texas Supreme Court held that support included the educational expenses of the beneficiary’s children. The grantor had paid for his daughter’s college education, which indicated that the grantor considered the expense of college for a dependent was a “necessary” expenditure. *First Nat’l Bank of Beaumont v. Howard*, 229 S.W.2d 781 (Tex. 1950).

b. Education. Absent a more limited (or expansive) definition in the trust document, education is considered to include living expenses, tuition, fees, books and other costs of higher education and technical training. Restatement (Third) of Trusts § cmt d(3) (2003).

c. Health. The term health typically includes distributions for health as would be implied from a support standard alone. Restatement (Third) of Trusts § 50 cmt d(3) (2003).

2. Drafting Limitations or Guidance for the HEMS Ascertainable Standard. As seen above, this standard could potentially allow a beneficiary to live a lavish lifestyle—which the grantor may not really have intended. Do you really want to support your children in their 20s? Do you want the same distributions at 25 as at 45 or 65? For example, is buying a yacht for the beneficiary necessary to “support” them? Or, is a yacht educational in that it allows the beneficiary to travel? Do you want your grandchildren to be able to sue for a distribution for educational expenses? Do you want your trustee to give in to every whim of your children’s request for “support” out of fear they could successfully sue them?

There are three means of drafting limitations or providing guidance for the trustee’s exercise of their discretion to make a distribution: (1) clarify whether other resources should be considered; (2) define the HEMS terms more narrowly or expansively in the trust document; and (3) include a purpose statement written by the client. The first two are addressed below. Purpose statements are important in interpreting all distribution standards and so they warrant their own section. See the discussion of purpose statements in Part C.

a. Other Resources. When making discretionary distributions, a trustee will consider whether he or she is obligated to consider the beneficiary’s other resources. If the grantor has provided guidance on this, then the grantor’s intent will control. Absent any clarification on the grantor’s intent, the general rule is that a trustee should consider other resources, but the trustee has some discretion in determining the impact of the resources on distributions. The consideration of other resources, then, is a balancing of the intent of the grantor on the treatment of the beneficiary and the other purposes of the trust. Restatement (Third) of Trusts § 50 cmt e.

What other resources should the trustee consider? Other resources normally include the beneficiary’s other income but not principal available to the beneficiary. See *Keisling v. Landrum*, 218 S.W.3d 737 (Tex.App.—Fort Worth 2007 pet. Denied). In *Keisling*, the appellant was the second wife of the grantor and had become accustomed to a very high standard of living. This included five vehicles, three houses and numerous luxurious vacations. The trust provided that the primary purpose of the trust was to “provide for the support, maintenance, and health of my wife in the standard of living to which she is accustomed to at my death. If my wife’s own income and other financial resources from sources other than from this trust are not

sufficient to maintain her in such standard of living.” *Id.* at 740. The trustee made no distributions to the appellant reasoning that until she had exhausted all of her other assets (including two of the three houses and four of the five cars), she was not entitled to trust income payments. The court held that “other financial resources” as used in the decedent’s will means “income and other period receipts, such as pension or other annuity payments and court-ordered support payments.” *Id.* at 743. (Citing Restatement (Third) of Trusts § 50 cmt. e(2)).

My experience has been that most people do not want the trust to operate to encourage the individual to quit working. However, if other resources are to be considered, the trust document may unintentionally benefit a beneficiary who quits working over one who continues working. Clarifying whether the trustee is to consider other resources can insure the trust is not punishing those who choose full-time employment.

b. Defining HEMS. Another way to affect how the HEMS standard is applied, is to define the terms to conform with the grantor’s intent. This could be a more expansive or limited definition. There is one important risk in defining the terms—the trust compromises some flexibility.

If something is omitted, then the document may be interpreted to preclude a distribution for that item. The more specific a trust document is, the less likely it is that the document will have the flexibility to allow for varying interpretations as situations change. This concern for flexibility may make writing a purpose statement a better option to influence the trustee’s discretion.

(1) Support. The grantor may choose to include provisions that define support and maintenance to restrict their expansive meaning. Many individuals who have expressed concern that their children seem unmotivated, or feel entitled, may not want the trust to fund a lavish lifestyle they grew up accustomed to. Instead, the grantor may want to restrict support to a much smaller amount. There are two primary ways to restrict the definition of “support.”

First, support could be defined to be a certain amount. For example, support can be defined to be the amount of the median income in the United States—approximately \$45,000. Or, support could be defined to be a set amount adjusted for inflation.

Another alternative means of limiting support, is to define a certain point at when the individual’s standard of living is set. The grantor could choose to support a

person according to their lifestyle at a certain age or the standard could be determined in reference to a particular event (i.e. the grantor’s death). The grantor may feel differently as between beneficiaries. The grantor may want to support his or her surviving spouse to the standard of living she was accustomed to at his death, but his children he may desire to be supported only up to \$25,000 per year.

In addition, the grantor may feel the level of support should vary according to the beneficiary’s age or other benchmarks. Would providing your 18 year old \$100,000 per year (in addition to educational expenses) be good for their motivation? Do you feel differently about providing that amount to the beneficiary at 40? To many people these do feel like very different things. While providing that kind of support at 18 might developmentally stunt the 18 year old, development has finished by 40, and will not have any ill effect on a 40 year old. This concern may lead the grantor to want support to vary depending on the age of the beneficiary. For example, in his twenties support may be set at a very low level such as half the median income in the US or 1% of the trust corpus, with the amount increasing at age 30 and again at age 35 or 40. Alternatively it could be set at one level until the beneficiary achieved certain benchmarks such as a college education, full time employment, etc.

(2) Education. Some restrictions or expansions on education that the settler may want to include is what level and type of degree would the grantor like to support? Is trade school okay? Does education include traveling abroad? What types of travel would be considered educational? A trip around the world? A community service program in Africa? A cruise on spring-break to the Caribbean? The grantor may feel different about these different types of experiences.

Another possible consideration is whether distributions for education should be contingent on any requirements. While many clients wish to pay for education in its entirety, some nominal amount contributed by the children could increase the value of their degree. For example, Gallo and Gallo have mentioned they have a client who requires all college-age children to work during the summer and contribute 10% of their earnings to college. While this is a small amount, the children felt that this gave their degree more significance to them. Should the trust require college-age children to contribute a percentage of their summer employment to their education? Should the trust require a certain GPA to continue funding?

(3) **Health.** Health may be one item where many grantors do not wish to restrict the meaning. Providing health insurance and paying the medical expenses of college age or children in their 20s can provide the grantor peace of mind. The grantor may want to clarify whether health includes cosmetic surgery, braces (if only cosmetic), or various items that may promote health like gym memberships, vitamins, or the additional costs of shopping for organic groceries. Another possible clarification is whether "Health" includes a rehabilitation facility if the child suffers from a drug or alcohol problem. Is there a limit to how many rehabilitation facilities the trust will pay for?

B. Absolute Discretion.

Thirty years ago if we wanted the trust administered in a certain way, we simply selected a trustee with our own values. This provided a grantor with the confidence that the trust would be administered consistent with his values. Often, the grantor would give the trustee absolute discretion—trusting the trustee to administer the distributions and trust consistently with his values. Now, individual trustees are becoming a rarity due to their susceptibility to litigation, administrative costs, and time.

There still may be a place for giving a trustee absolute discretion. In those situations where the grantor does have a trustee in mind with similar values, or in a trust where the grantor offers some guidance as to his or her value system and expectations in how the trust ought to be administered. In a HEMS trust, the trust can include a provision allowing additional distributions if a corporate (or independent) trustee is serving. This may broaden the HEMS standard or may take the place of HEMS allowing the trustee to be more restricted.

1. **Absolute Discretion: What does it mean?** Absolute discretion is not, in fact, absolute. A trustee's discretion will always be subject to judicial review and control. *State v. Rubion*, 308 S.W.2d at 9. A trustee must act honestly and in a manner contemplated by the grantor. Restatement (Third) of Trusts § 50. In addition, the trustee is not allowed to refuse to make any distributions to the beneficiary. The Restatement explains an absolute discretion provision allows the "trustee ordinary discretion with respect to the benefits to which the discretionary beneficiary is minimally entitled (e.g. reasonable support), with the extended discretion applicable to the trustee's allowance of more." Restatement (Third) of Trusts § 50 cmt c (2003) (effect of extended discretion). Including terms that provide for

absolute or unfettered discretion will deter remainderman from complaining if distributions are generous.

2. **How can we influence this "Discretion"?** Absolute discretion provides little guidance to the trustee or to the beneficiary as to when distributions will be made. The ambiguity means the beneficiary will have no perceived control or input over the process, and it also means the trust may not be treated consistently with grantor's intent. How can we offer some guidance of the grantor's intent?

There are really two primary ways the trust can influence the trustee's discretion: 1) purpose statements; and 2) guidelines. These can be used in combination to truly convey the grantor's vision of the trust. Each is addressed in turn below.

C. Purpose Statement.

In interpreting a trust document, the primary focus is the grantor's intent. See *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957). If the trust is unambiguous, then the meaning of a trust agreement is a question of law. *Alpert v. Riley*, 274 S.W.3d at 286 (citing *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex.App.—Houston [1st Dist.] 1995, no writ)).¹ If the trust document is ambiguous, then the trustee should consider various outside factors to determine the grantor's intent. See *First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 783 (Tex. 1950) (citing *McCreary v. Robinson*, 59 S.W. 536 (Tex. 1900)).

One way to insure no ambiguity regarding the grantor's intent and to limit a distribution standard (whether absolute discretion or limited to a HEMS standard) is to provide a purpose statement. Purpose Statements provide guidance in the interpretation and administration of a trust and provide a meaningful statement to the Grantor's family. What makes drafting a trust difficult is that you can include any type of provision but the document is irrevocable, cannot be amended and, in most situations, will be operating after the Grantor is dead. A purpose statement gives the Grantor an opportunity to define their intentions in how the trust should be distributed, and provides the trustee with a context for the Grantor's values. These purpose clauses can be included in the terms of the trust.

¹ For more on the construction of a trust instrument, see Sarah Patel Pacheco & Marjorie J. Stephens "Discretionary Distributions: Clear as Mud," Texas Bankers' Association Trust Administration Seminar (2011).

A trust will typically provide that income and principal may be distributed for the beneficiary's health, education, support and maintenance according to his/her standard of living. This language gives the trustee the flexibility to make distributions if the beneficiary "needs it" but does not require that distributions be made if he doesn't. But what does "if he needs it" mean? Does it mean the same thing to your client as it might to the trustee? Does it mean the same thing to your client and the trustee as it does to the beneficiary? Does your client feel one way about distributions to his spouse and another about distributions to his children and yet another about distributions to his grandchildren? Differing feelings in each of these situations is likely and yet the terms we use in the trust are frequently the same or at least substantially the same.

Times change, the world changes, attitudes change. The way your client feels today may change and circumstances will change. We want the trust to be flexible, a dynamic document, able to change when it needs to change.

As mentioned above, the use of very specific language in the distribution provisions can restrict the trustee. The best way to provide guidelines without restricting the trustee by using very specific language in the distribution provisions is to include a Purpose Statement to guide the trustee in administering the trust.

1. What are considerations in developing a purpose statement? In formulating a Purpose Statement discuss with your client how they would administer this amount of money for their spouse, or their children, or their grandchildren. Consider asking your clients the following questions:

- Do you want your spouse, children and/or grandchildren to receive an annual amount, to receive regular distributions? Of the income of the trust? Of the principal of the trust?
- Do you want your spouse favored over your children? Do you want your children favored over your grandchildren?
- Do you want a beneficiary to be "supported and maintained"? Until a certain age? Only after a certain age? Always? Never?
- Do you want funds to be available to start a business? Purchase a house? Pay for education? College? Graduate school? Continuing education? Pay for the education of a beneficiary's children's education?

- What do you want for your child? To be happy? Productive? Self sufficient? Secure? Rich? Ensured a certain standard of living?
- What are your fears? That they'll squander the money? Be on drugs? Not be able to have access to the funds when they need it?
- How do you feel about your children suing your spouse claiming that he/she is spending their inheritance?
- How do you feel about your grandchildren suing your children claiming that he/she is spending their inheritance?
- Do you want money preserved for passing on to your children? To your grandchildren?

Talk to your client about sitting down and writing up what the goals of the trust and their vision of its administration. Provide the trustee with guidance in making distributions including:

- Whether you want the trust to benefit multiple beneficiaries.
- Whether one beneficiary or group of beneficiaries are primary and another secondary.
- Whether all the funds in the trust can be spent for one beneficiary.
- For what purposes you want distributions made to your children.

2. Writing the Purpose Statement. After discussing the questions above with your client, they are ready to write their purpose statement. This can be a difficult endeavor. In many ways, the client is defining their legacy, something which is difficult to put into words. How should they begin? What is your role as their attorney in this process?

Begin with focusing on their answers to the questions above. Feel free to adjust the questions based on issues you see in your practice. Second, I have found that it can be helpful to read a Purpose Statement that someone else has written. A Purpose Statement with which your client disagrees can be as helpful in preparing their own as one that they agree with.

For that reason I have included some sample Purpose Statements. See Appendix.

3. What about clients who already have Wills and Trusts in place? Many clients with existing Wills or trusts will not have a Purpose Statement unless they

revised their Will or trust very recently. If the trusts are either created in your client's will or in a revocable trust, then they can easily be revised to include a Purpose Statement.

If your client's existing trust is irrevocable, then write a Purpose Statement to be kept with the trust. Your client should specifically state that the Purpose Statement is a reflection of their intent in creating the trust and should be used in interpreting any unclear provisions contained in the trust and in making distributions from the trust.

If the trust is considered to be clear and no outside evidence is admissible but the interpretation of the trust is contrary to the purpose statement then include a request that your trustee be directed to seek modification of the trust to include the Purpose Statement.

If the client has written a letter to the trustee with this information, the letter can be revised as a Purpose Statement. The client should keep the Purpose Statement or letter with their Will and trust documents so that these documents will not be lost and can provide evidence of their intent in creating and in structuring the trust. The next time the client revises their Will, have them bring the statement with them, so that it can be incorporated into their Will or Revocable Living Trust or any other trust they create during their lifetime.

D. Guidelines. Guidelines can be used when the grantor wants to include a number of specific provisions outlining when a distribution will or will not be made. While the purpose statement is a broad statement of the grantor's goals, the guidelines provide a list of the type of actions or behavior that the grantor thinks will lead to the accomplishment of the purposes of the trust. For example the purpose of the trust might include that the grantor desires that the trust facilitate the child finding his passion. The Guidelines may provide that the grantor considers the following as action that furthers that purpose: a college education, career counseling, joining Americorp for two years after college before selecting a career, travel to Europe or travel to third-world countries.

By including these items as guidelines, the specificity of the guidelines does not have the effect of prescribing these actions and not ones that are not included. The Guidelines are included as illustrations of action and not as an exhaustive list of acceptable actions. To provide additional flexibility it is helpful if the beneficiary also has the power to request that additional actions be

included in the Guidelines as ones that further the purposes of the trust.

VI. REMEDIAL PROVISIONS.

The most common kind of remedial provision needed is to address a drug or alcohol problem. There are also other addictions that impair life enjoyment and health such as eating disorders but do not lend themselves as easily to being addressed in a trust document since the beneficiary with an eating disorder may be able to function very well professionally and financially. A gambling addiction can be handled in a manner similar to a drug or alcohol addiction. Essentially, these are problems which could consume a child, causing a child to lose himself or herself in the addiction.

Generally the objective is to delay distributions during such time as a certain behavior continues or until a certain level of maturity is reached. The behavior to be discouraged is one which the client considers destructive and generally ones which the presence of money is more likely, or as likely, to exacerbate the problem as to remedy it. In addition to drug, alcohol and gambling addictions, other problems include a spendthrift lifestyle and psychological dysfunction. I phrase this a "remedial" dysfunction since the dysfunction is not one which is necessarily permanent. It is not lacking the mental or physical capability to function, it is a physical or mental impairment that can be overcome. It may have aggravating conditions in that the individual may have physical, emotional or learning problems which make recovery more difficult, but the potential for recovery is present.

If a client is concerned about a drug abuse or another consuming addiction, then there are four separate issues that must be addressed in the trust:

- Distributions both while the beneficiary is drug free or abusing drugs;
- Withdrawal rights if the beneficiary is drug free;
- Drug testing; and
- Increasing/Transitioning control to the beneficiary if the beneficiary has been drug free for a certain number of years.

Each of these is addressed below.

A. Distribution Provisions.

A trust cannot incentivize an addict to remain clean, but it certainly can prevent enabling the addict with money to fund the addiction. If addiction is a concern of a client, then restricting distributions or termination while the individual has a drug or alcohol problem is advisable.

1. Purpose Statement. Distribution provisions should be guided with a purpose statement of the grantor's general intentions for how the beneficiary should be treated when drug free and while abusing drugs. This will clarify the grantor's intent for the trustee. The purpose statement can provide the trustee not only with guidance as to how to exercise his discretion, but with a commitment to the grantor's ideals—and investment in the grantor's child. This is a helpful experience, because this understanding of where the grantor is coming from, and a commitment to his goals, is something we want our corporate trustee to feel. In addition, the purpose statement will be something the beneficiary will read, and if the beneficiary was not sober during his parents' lifetime, reading the purpose statement after becoming sober can provide the beneficiary with that reassurance of his parent's love and support throughout his addiction. A purpose statement for this type of remedial trust is included in the Appendix.

2. Distributions while beneficiary is abusing drugs. In dealing with a child who is abusing drugs or alcohol, there are two alternative approaches the grantor could take to distributions being made while the child is abusing drugs. The trust could provide either:

- No distributions are to be made while the beneficiary is abusing drugs; or
- Distributions are only to be made for bare necessities of food, shelter and health needs—with some possible additional modifications and restrictions.

First, the grantor could restrict all distributions or termination until the beneficiary has been drug or alcohol free for a certain period of time, e.g. two years. The trustee can determine, in its discretion, whether the beneficiary has been drug and alcohol free. This total restriction on distributions, however, may not be what the grantor wants.

One of the most difficult things for a parent with an addict child, is the thought that while on drugs, something even worse could happen to them. They could prostitute themselves for a place to stay, have no health care when a medical emergency arises, starve from spending their food money on drugs. This concern brings

us to a second alternative, the grantor may want to provide for some distributions for basic necessities like food and shelter even when the beneficiary is abusing drugs or alcohol to prevent these worst-case scenarios. The grantor does not, however, want the distribution for food or shelter to be spent on drugs. The trust can provide that while the beneficiary is using drugs or alcohol, the trust can make distributions for food, shelter and health needs, provided these payments are made *directly* to the institution providing the food, shelter or health services.

For example, the trust can provide that the trust will pay rent and utilities on an apartment that is consistent with the beneficiary's income level. An example of a provision which provides for food could be drafted as follows:

During such time the Beneficiary has tested positive for drug use, the Trustee may not distribute more than \$500 per month in the form of a gift card for groceries at a local grocery store cumulatively to the beneficiary.

These provisions may be important to the grantor, as they can give the grantor the peace of mind to be providing the bare necessities for their child while avoiding enabling the addiction. While the grantor may want to provide the bare necessities even when the child is abusing drugs, the grantor likely does not want these distributions to be to support a lavish lifestyle. The grantor may want to cap the total distributions. For example, distributions for shelter, food, and health services could be capped at \$25,000 in the aggregate per year while the beneficiary is abusing drugs.

However, often any support given to an addict can be counter productive. We've probably all heard the heart-wrenching anecdotes from parents or friends of addicts that, "A food card will be sold for drugs" or "If you give your addict son a car, he will just become a taxi for drug money." This may mean that any support will be counterproductive and enable the addict to continue their addiction. Therefore, it may be advisable to include a provision that if the drug rehabilitation counselor says that support even for only bare necessities made directly to providers is counterproductive, then the beneficiary will receive nothing. This support for bare necessities is only given if the drug counselor believes it will not be counter productive and are made in a manner which will promote the beneficiary's future sobriety and productivity.

3. Distributions when beneficiary is drug free.

a. Distributions Contingent on being Drug Free. If the beneficiary is sober, then the grantor may want to provide for additional distributions depending on how long the beneficiary has been drug free. These distributions could be dependent solely on whether the beneficiary is drug free or include other requirements as well. For example:

During such time the Beneficiary has tested free of drugs, the Trustee may distribute up to \$1,000 per month cumulatively to the beneficiary.

During such time the Beneficiary has tested free of drugs and is employed for at least 30 hours a week, the Trustee may distribute up to \$2,000 per month cumulatively to the Beneficiary.

The amount distributed can be increased if the beneficiary has taken greater responsibility for his support, and a long period of time has elapsed since his last confirmed drug use.

b. Loans for Drug Free Beneficiary. In addition, the grantor may want to provide that the trust can loan the beneficiary money in certain circumstances if the beneficiary is drug free. While this isn't a distribution per se, a loan can provide financial support while the beneficiary is transitioning into a drug-free, responsible adult. One of the difficulties that addicts face, is that when they decide they want to recover, there are likely many obstacles to their recovery. Perhaps they don't have a car which would help them attend AA meetings or obtain employment.

One way to provide some support during this time without doling out money with no accountability is to allow the trust to loan the beneficiary money with a set interest rate and payments. This loan can be limited to certain items, or it can just generally be for expenses that will facilitate the beneficiary re-entering society drug free. One such provision could read:

The Trustee may loan the beneficiary up to \$2,500 for the following purposes if the beneficiary is drug-free and has shown a commitment to his recovery: resolution of traffic tickets, reinstatement of driver's license, automobile insurance, and automobile registration. Such promissory note will

bear interest at 5% payable \$100 per month until paid in full.

B. Withdrawal Provisions.

The Trust can provide the beneficiary with a withdrawal right of a certain percentage of the trust assets if the beneficiary has been drug free for a certain number of years. For example, if the beneficiary has been drug free for a continuous period of three years, then the beneficiary can have the right to withdraw from principal 1% of the trust assets. The percentage amount can then be increased after a certain number of years, e.g. 2% if the beneficiary is drug free for a continuous period of 5 years, and 3% if the beneficiary has been drug free for a continuous period of 10 years.

C. Drug Testing.

In order to prevent the Trust from operating as an enabler or facilitator of drug or alcohol abuse, the distribution provisions all hinge on whether the beneficiary is abusing drugs or alcohol. Therefore, it's important the trust have provisions to address how to determine whether the beneficiary is abusing drugs or alcohol. While these provisions can be drafted to address a drug, alcohol, or gambling addiction, the following provisions focus on drug abuse. The Trust should outline three different alternatives:

- How a beneficiary with no drug abuse history is treated;
- How a beneficiary is tested following an instance of confirmed drug use; and
- How a beneficiary who at one time abused drugs, but is no longer abusing drugs.

These three stages are each addressed in turn. See Appendix for sample language.

1. Initial Testing: Beneficiary with no drug abuse history. If a grantor is dealing with a child with drug or alcohol problems, there is a greater risk that any grandchildren would also suffer from the addiction. The Trust may address this possibility by providing that any beneficiary can be requested to take a drug test. The drug test can be requested by the Trustee or the Trust committee if there is a concern.

2. Beneficiary with current drug use. This trust wouldn't be used unless the beneficiary already suffered from drug or alcohol abuse and addiction. Therefore, it's

important the trust outline how the beneficiary be tested for drug use, and what constitutes drug use. As to what constitutes "drug use," drug use can be defined to include a conviction of a crime involving drug use, failing a drug test, or refusing to submit to a drug test requested by the Trustee.

Once the beneficiary has an instance of confirmed drug use, more frequent tests are employed. The Trustee can then require the beneficiary be tested at least once a quarter and the trustee may require tests up to three times a month. The timing is random, and the time and place can be specified by the trustee or drug tester. The trustee must notify the beneficiary of the drug test and the beneficiary must appear at the site and take the test within the 24 hour period following notification.

3. Beneficiary with prior drug use but now drug free. Once a beneficiary is sober, there must be a procedure in the trust to transition to fewer drug tests. This could be a transition to monthly testing after six months of the beneficiary being drug-free, and then annually after the beneficiary is drug free for a certain number of years.

D. Increasing Control and Transition to Control.

1. Increasing control and transition provisions. The goal in this trust, is ultimately, to have a drug or alcohol free beneficiary who is a responsible, productive adult. Consistent with this goal, is transitioning control to the beneficiary. Indeed, continually treating a recovering addict as if they are still an addict may be counter productive. While this control should be contingent on a certain time period of sobriety, there should be some gradual transition of control. For example, if the trust is administered by a trust committee of three individuals, then the beneficiary can be appointed to the trust committee after five years of being drug free. While the beneficiary doesn't have a controlling vote, he is then part of the conversation, part of the process: this involvement is empowering, not enabling.

2. Forfeiture Provisions. An unfortunate fact of addicts is the high likelihood that they will relapse. While we hope he or she does not, relapse may occur. The trust should address this possibility. If the addiction resurfaces, the trust should contain a forfeiture provision of any control the beneficiary has obtained. In the example above, if the beneficiary had a confirmed instance of drug use, then the beneficiary would be removed from the trust committee.

VII. MOTIVATING BENEFICIARIES: WHAT WORKS, WHAT DOESN'T - THE QUEST TO RAISE PRODUCTIVE HAPPY CHILDREN.

Current thinking in the areas of psychology, business and other areas of law has not been brought to bear on the structure of trusts. Our challenge as estate planners is to explore and use this information and current thinking in considering how to restructure trusts to better accomplish the new objectives of our clients.

A. The Paradox of Control and Efforts to Motivate.

If our objective is to create a trust which will motivate our children, a logical response is to look to the field of psychology to determine what are effective ways to motivate an individual. The structure of incentive trusts makes two assumptions. First, in creating incentive trusts, it is assumed that we can motivate our children through the way distributions are made. The trusts are based on the premise that money can be an effective way to motivate our children. Second, we assume that the clients or a third party (not the beneficiaries) having control of the circumstances in which distributions will be made is the most effective method of motivating the beneficiaries.

1. Intrinsic/Extrinsic Motivation. If individuals are intrinsically motivated they are motivated from within. Extrinsic motivation is when an individual is motivated by the efforts of another person seeking to elicit certain types of behavior. This area is key in estate planning since our clients want their children to be intrinsically motivated but their only control is of extrinsic factors. This question arises: can parents motivate their children through actions, the environment, and most particularly, through money? The research in this area provides us with the following information on the ability of external rewards to motivate individuals:

- a. General Rule: External rewards **decrease** intrinsic motivation.
- b. External rewards are effective in two areas:
 - (1) To motivate an individual to continue to engage in a boring activity; and
 - (2) To motivate an individual to try a new behavior;

provided that the rewards are not designed to elicit that behavior. This last proviso is very significant for structuring trusts. The research shows that rewards will not be effective to motivate an individual to even engage in the above two activities if the reward is designed to

control the individual, i.e. is designed to encourage the behavior.

2. The Element of Control in Motivation. As discussed above, attempts to gain control over our children by using rewards to encourage certain types of behavior are ineffective. If external rewards do not work, then how do we structure an "incentive trust" intended to elicit certain behavior. If all we have to work with is money is there any other way other than rewarding certain behaviors by distributing money and discouraging other behaviors by withholding money? Our ultimate objective is for our children to take control over their own lives. Paradoxically, we have used control over our children in order to "teach" them to take control over their own lives.

Extensive research has been conducted in the area of control, and in fact, control is very important, but it is our control over *ourselves* and all things that impact our lives that is deemed essential. Not only is *actual* control important to an individual's ability to function at high levels and to cope with stress, but also *perceived* control and even knowledge of factors over which the individual has no control is important as well.

a. Actual Control. We can have actual control over the outcome, for in certain situations we can *cause* the occurrence of a certain outcome. We can also have control over the process so that we can *influence* the outcome. Our clients almost never want their children to have actual control, at least not until they are mature and responsible individuals. However, there are other forms of control, including perceived control, which are not the same as actual control but which provide many of the benefits of actual control.

b. Knowledge as Control. Possessing information as to the events that occur or as to the process which will occur or the action to be taken is also a form of control. We can have information about the process and/or the outcome so that we can be ready to respond and/or know the consequences of certain actions based on that knowledge. Rarely in life do we have actual control. However, the more we perceive ourselves as having some control over the outcome, the greater will be our ability to cope and to actually accomplish certain results. The more we perceive ourselves to be in control of our lives and our circumstances, the more motivated and productive we will be. Even with no control, if we know what will or won't happen and know what we can expect, the better able we are to cope and take control over our own lives.

The objective in the Incentive Trust is to use money (i.e. to exercise control over the beneficiary) to enable, encourage and/or cause our children to take control over their lives. The very statement makes it clear that at some point a shift must occur from the child being controlled by someone to the child taking control of his own life. The fact that knowledge is a form of control indicates that a child's involvement, even if only to be fully informed without having any level of actual control, is empowering to the child.

If a distribution is made from a trust when the beneficiary takes certain actions or exhibits certain desired behaviors and distributions are withheld when the beneficiary exhibits undesirable behaviors does not work, then what does? What makes an individual intrinsically motivated, to be proactive in his life and to take control and responsibility for his actions?

B. Self-efficacy - Predictor of Success.

Engendering motivation and shifting control to our children has been the subject of theories and research in an area known as "self-efficacy theory." Self-efficacy is couched in terms of an individual's perception of his ability to control outcomes in his life.¹ Regardless of the way the individual would describe his motivation, whether faith or rugged individualism, the person believes that he can "get things done," "make them happen," obtain a desired result. The research confirms the positive effects of an individual's perception that he has control over the outcomes in his life. In his book "Self-efficacy: The Exercise of Control, Albert Bandura," noted the findings from his (and others) research that a high sense of self-efficacy is a better predictor of career selection and success than actual ability, prior preparation, achievement and level of interest. A high sense of self-efficacy also contributes significantly to the development of intellectual abilities and to academic achievement, advancement in one's career, reemployment after a job loss, tenacity in the face of problems, creativity, and management of certain types of job stresses, to name a few.² Sounds exactly like what our clients want for their children, doesn't it?

If highly self efficacious individuals is what we want, then how do we increase "self efficacy"? Bandura found that an individual's self efficacy beliefs are constructed from four principal sources of information: "enactive mastery experiences that serve as indicators of capability, vicarious experiences that alter efficacy

¹Albert Bandura. *Self-efficacy: The Exercise of Control*. New York: W. H. Freeman and Company, 1997, 10 - 31.

²*Ibid.* 422 - 436.

beliefs through transmission of competencies and comparison with the attainments of others; verbal persuasion and allied types of social influences that one possesses certain capabilities; and physiological and affective states from which people partly judge their capableness, strength, and vulnerability to dysfunction.” In more layman’s terms these four sources are: (i) mastery, (ii) modeling, (iii) verbal persuasion and (iv) physical and emotional perceptions. My clients have relayed to me aspects of their lives that were important to their development as an individual.

The four sources of self efficacy are interrelated. The mastery experiences occur and others respond to the individual as he engages in the process. For example, if an individual masters something but is ridiculed for it, the experience will not have the same effect as a person whose mastery experiences are recognized as being important. Therefore, in considering these four sources of information about ones self efficacy, it is also important to consider how an individual integrates this information into his sense of self efficacy. Let’s look at each of these sources individually as they are played out in the lives of individuals and their families and then consider what each may have to tell us about the structure of a trust.

1. Mastery. Mastery experiences are the most direct and powerful of the four sources and is the easiest to understand.

Bandura found that mastery experiences were the most powerful source of self efficacy beliefs. However, it seemed to be the process of attaining mastery since if success came easily then the individual was easily discouraged by failure. If failures occur prior to developing a sense of self efficacy then the failures may prevent the individual from realizing that success requires sustained effort. After realizing the benefit of sustained effort, the individual will continue to persevere in the face of obstacles. In addition, to the mastery experiences themselves, the way the individuals processed the mastery experiences was important. Bandura cites a study by Schunk & Rice³ in which they taught strategy techniques to children with severe academic problems. The instruction in itself did not increase the children’s self efficacy, nor did repeated feedback of success. However, having someone remind them of how they were effectively using the strategy techniques *substantially* enhanced the children’s beliefs in their self efficacy and their subsequent intellectual performance. This study illustrates the importance of a

parent’s (or trustee’s) feedback on the child’s successes and that the source of those successes are within the child.

An individual’s perception of their self efficacy tends to be very stable. If a person has developed a high sense of self efficacy then that individual will interpret failures as due to things that can change such as insufficient effort or poor strategies and thus use these to improve their subsequent performance. Unfortunately individuals with a low sense of self efficacy also have their beliefs persist, thus a mastery experience alone will not change the individual’s sense of self efficacy. Changing a low sense of self efficacy requires “explicit, compelling feedback that forcefully disputes the preexisting disbelief in one’s capabilities.”⁴ Thus the interaction of the parent (or the Trustee) with the child (or beneficiary) after a mastery experience is as important (if not more so) as the mastery experience itself. One success is unlikely to increase a low sense of self efficacy since it is one piece of information in a sea of failures; however, if the individual successfully handles multiple tasks in different situations, then over time his sense of self efficacy will increase. The individual who remembers and attends to his successes will have an ever increasing sense of self efficacy, whereas the individual who remembers and attends to his failures will underestimate his capabilities. Clearly, the child’s parents or trustee can reinforce the focus on successes or failures by their interaction with the child or beneficiary. Are there some individuals who experience mastery without the mastery process so that they do not gain the focus and discipline of that process.

Malcolm Gladwell, in his best selling book *Outliers*, discusses the relationship between mastery and success. The outstanding “talented individuals” were those that devoted the time to developing their skill or talent. One particularly illustrative study was one by psychologist K. Anders Ericsson and two colleagues at Berlin’s elite Academy of Music. The violinists were divided into three categories: stars (with potential to be first class soloists), good and third, those unlikely to ever play professionally. Everyone started playing at around age five. The amount that each group practiced was then determined. By the time they were twenty the stars had practiced 10,000 hours, the “good” violinist had practiced 8,000 hours and the third group just over 4,000 hours. The groups were further examined to see if any “naturals” actually only practiced 4,000 hours and they found no naturals (who didn’t reach the 10,000 hour) and no grinds (who practiced but remained in the third

³*Ibid.* 80.

⁴*Ibid.* 82.

group). All of these individuals had talent but given a certain level of talent, what distinguished the groups was the amount that they practiced.⁵

The “take away” for trusts is that if an objective of the trust is to facilitate the development of productive individuals, the trust should be structured to facilitate the engagement in the mastery process, not just if the individual is paid well for the process but to enable the individual to engage in this process even if it means that the beneficiary is support when he is making little or no money.

2. Modeling, vicarious experiences, family stories. We can encourage mastery and be open to all types of mastery but we cannot “require” mastery. Based on the discussion of mastery, it is clear that the individual’s relationships with other can either be obstacles to his development or encourage and facilitate his development. An individual’s mastery efforts are not his sole source of self efficacy. Parents and other people are significant to the individual’s development. In developing our sense of self, we consider not only our own experiences but also how we compare with others, how people with similar talents or situational circumstances have done and what story our family tells us and we tell ourselves of how life is.

For each of us there is a first time for everything. Our assessment of whether we will succeed or fail is based on a number of factors including whether persons we perceive ourselves to be similar to succeeded or failed at the activity. We develop strategies from these individuals.

Bandura found that modeling was also a source of an individual’s sense of self efficacy. The individual sometimes learned strategies from the role model but the most important lesson learned from modeling was perseverance. The strength of the model was greater if the model was similar to the individual or had other characteristics that the individual could identify with. If the model was competent, he/she was more effective than if he/she was not competent. However, the most powerful model was one that was not as competent initially but persevered in a task to gain competence. The model had more of an impact on the individual’s sense of self efficacy if the model was confident as he/she worked on a task particularly if the task required repeated efforts.

In considering our efforts to motivate our children, this process is instructive. We say more by what we do

than what we say. If our children struggle, then if we also struggle to accomplish something we are likely to be a better model than if our accomplishment comes with apparent ease. If our children see us fail and then succeed, that is a better model for their own perseverance.

Symbolic modeling (from television or other visual media), self-modeling (through video-tapes of successes) and cognitive self-modeling (though visualization of accomplishing a task and stories we tell ourselves) were also effective in increasing an individual’s sense of self efficacy. In our own efforts we seek models of someone who has faced challenges similar to ours, be they like us in life or innate talents, and has accomplished something we wish to accomplish. These models may be individuals we know or persons we have learned about through the media.

As a part of “self-modeling”, the individual can be helped by developing his/her own story. In “What’s Your Story?”, a 2005 article in the Harvard Business Review, the authors discuss the importance of having a personal “story” during periods of career change. In addition to providing coherence during a job search, “[c]reating and telling a story that resonates also helps us believe in ourselves. It will give us motivation and help us endure frustration, suffering, and hard work.”⁶ The individual provides his own model to follow based on his past and his hope for the future.

Modeling also formed a type of “life map.” A family’s “view of life,” their values, their life pattern provided a framework, a pattern for their children. This life pattern was like modeling on a collective level. The modeling was through our families and even our cultures. The modeling takes on a “myth” quality in that the myths show us how life is. The myths are not falsehoods, although they can be. They are illustrative pictures of life. Our families will paint a picture of life by their lives, the lives of their friends, their families and we augment that with the experience of our peers. The picture may be one of college, marriage and children. That is the life pattern set for us. If we go on automatic pilot, we will tend to fall into these patterns. These patterns can be very useful. They may result in a college education that serves us well later. Obtaining the college education may be without seeking to master something, it may be “just a degree”; but as we all know, a degree can be a very important accomplishment. Our families set forth what is acceptable and not acceptable. Until

⁵Malcolm Gladwell. *Outliers*. New York: Little, Brown and Company, 2008, 38-39..

⁶Herminia Ibarra and Kent Lineback. “What’s Your Story?”. *Harvard Business Review*, January 2005, 66.

such time as the individual considers other options, this path will more or less be followed. When obstacles are encountered we will look to our family, to our friends, to our culture, for models to address these obstacles.

Frequently these life “myths,” these patterns, provide a framework to allow for the necessary focus. However if this pattern provides the only “acceptable” life pattern then the pattern restricts our possibilities. As noted in mastery, the individual must be free to choose what to master. The individual must have some leeway and control in making choices in life.

On the other hand, if there is no pattern, no framework then a different problem is created. One of the lessons learned from mastery is focus and discipline. What if we try many different things, if we “graze” rather than focus. If “the sky is the limit,” and we can do anything then frequently the result is that we do nothing: we lack the framework for focus. Focus is essential for accomplishing anything. Too many options can leave us with no direction, can leave us drifting. The family or cultural pattern provides us with a course of action until ... until something catches us, until we desire mastery, until our mastery in some area carries over to mastery in “practical” areas. The family myth can also be so restrictive that it does not allow for a slightly altered course of action. The family view may be that college is only worthwhile if an engineering or some other “practical” degree is obtained. However, the designated practical education may only open options that hold no interest for the individual.

Family myths are not inherently good or bad. They can work both ways. It is recognition of these myths that is important. They exist because they have provided a useful framework for those who have lived life before us. They can provide the guidance needed to carry us to the next step. They can provide a structure for us to live “in the meantime,” but they can also be roadblocks to an alternate way of being. Recognizing these patterns for ourselves and for our children can help us use these patterns when they are helpful and reconstructing or discarding them when they are not.

What does this tell us about the structure of a trust? First, the trust can provide the same type of framework that the family provided: a framework for a life plan. An expectation that a college education is beneficial, that internship experiences are helpful, that one learns from study abroad, that working in an Americorp, Teacher Corp or Peace Corp is beneficial or whatever else the family may believe. However, this is only a framework. This structure is only what has worked for the parents or

grandparents with flexibility for the individual to forge a different practice.

On an individual level, the selection of the trustee (Or other advisor or mentor) is important. In considering the individuals who will serve as trustee or as trust committee members, consider the relationship of this person with your child or the potential for a relationship with your child. Consider whether they will provide a model for your child. James E. Hughes, Jr. wrote an article entitled “The Trustee as Mentor” which discusses and highlights the importance of this aspect of the trustee relationship. A corporate trustee can be appointed with the potential mentor appointed to act as an advisor to the trustee and develop a relationship with the beneficiary.⁷

3. Verbal Persuasion - Trust and Communication. In Bandura’s research he found that verbal persuasion was a third source of an individual’s sense of self efficacy. At first blush, verbal persuasion seems to be an attempt at external control or manipulation. However, the success of verbal persuasion in increasing an individual’s self efficacy is dependent on the relationship that the persuader has with the person to be persuaded. Bandura noted “It is easier to sustain a sense of efficacy, especially when struggling with difficulties, if significant others express faith in one’s capabilities.”⁸ If the persuader understands the other person, appreciates and recognizes his talents and motivations, and is accepting of that individual, then the verbal persuasion is effective. Persuading someone to try something that is clearly beyond that person’s capabilities is setting up the individual for failure and a decline in that person’s sense of self efficacy.

Bandura pointed out that “[i]t is more difficult to instill enduringly high beliefs of personal efficacy by persuasory means alone than it is to undermine such beliefs.” Encouraging action that is beyond ones capabilities quickly is proven incorrect and can operate negatively on ones sense of self efficacy. That special relationship with someone who understands the individual is essential here. The praise and encouragement must be genuine. In addition, focusing on past successes and the improvements made increases an individual’s self efficacy while focusing on the additional improvements needed does not. Bandura

⁷James E. Hughes, Jr. “The Trustee as Mentor.” 1998. <http://www.jamesehughes.com/articles/TrusteeMentor.pdf>

⁸Bandura, 101.

notes that “[s]ocial persuasion works best as part of a multifaceted strategy of self-development.”⁹

Bandura’s findings provide us with a framework for our relationship with our children as well as guidance on the structure of a trust for our children after our deaths. As a model to our relationship with our children we can develop a genuine, positive, non-judgmental relationship and can support and encourage our children as they encounter challenges in their lives. And when we are no longer here? We can include individuals with whom the child has a close relationship such as a mentor and/or we can select individuals who are attentive, caring and non-judgmental to serve as trustees, advisors or trust committee members. These individuals are persons with whom the beneficiary can identify. Selecting persons who have overcome challenges are ones that the individual can better identify with and learn from rather than one for whom everything comes easy, therefore success alone is not the only criteria. Consider both the benefits of mentoring as well as being mentored. If a different path is chosen, then developing relationships to help guide others can also encourage us to continue forging a new path. When we are considering the power of verbal persuasion to motivate our children, we first must remember the importance of the context. In the *Seven Habits of Highly Effective People*, Stephen Covey’s fourth habit is “Seek First to Understand and then to be Understood”. This habit provides us a guide for developing relationships in which verbal persuasion is a positive factor.

4. Self Awareness - Our bodies and moods. A fourth source of our sense of self efficacy is the information we receive from our own bodies. Our bodies not only provide us information about our physical capabilities, but our response to situations may increase our stress levels, interpret experiences in a negative manner. For example, do we interpret our arousal as fear or excitement? Each of these affects our judgment of our personal self efficacy. We can alter our self efficacy by: 1) enhancing our physical well-being, 2) reducing our stress levels, 3) adding experiences and situations and 4) correcting misinterpretations of our bodily responses.¹⁰

On National Public Radio on Labor Day, 2011, an interview aired with Dr. Madhukar Trivedi at Southwestern Medical School on research conducted on the effect of exercise on depression when used in connection with an anti-depressant. One of the benefits

he mentioned was that by exercising and taking medication, the depressed individual increased his sense of self-efficacy. He compared this increase in self efficacy to the effect that diabetics have who control their diabetes through diet and exercise.¹¹

This source of self efficacy is the least relevant in guiding us in the structure of a trust. However, this source of self efficacy, of shifting control, has embedded in it one of the most difficult and heartbreaking situations a parent can face: a child who is addicted to drugs or alcohol. The child has learned to “cope”, to moderate his/her moods by giving up control to an outsider — to drugs or alcohol. The shift of control starts here, with the child, with the child’s decision not to use drugs or alcohol. As parents this situation is the ultimate challenge. This situation is one in which more than any other we want to help, to intervene and yet, our intervention must be designed to not undermine the principles reviewed above. To undermine the process of choice and internalizing control or to use verbal persuasion in a judgmental and controlling fashion is to directly or indirectly facilitate the continued use of drugs or alcohol. This situation is one which needs to be addressed on a case by case basis. Provisions in a trust are fixed. To address this inflexibility in a trust document, one of the most effective ways to address the issue may be to avoid any specific provisions, but to provide that if the child is addicted to drugs or alcohol that all distributions be made in consultation with a drug rehabilitation counselor.

C. Motivation - What Works, What Doesn’t.

Daniel Pink wrote a fascinating book *Drive: The Surprising Truth About What Motivates Us*. I commend the book to all as worthwhile and helpful reading whether you decide to incorporate the ideas into your drafting or only want to expand the conversations you have with your clients. If you want a quick view of what Pink has to say, he has a TED talk as well, the following is the url for the talk:

http://www.ted.com/talks/dan_pink_on_motivation.html

1. Money as a Motivator - For everything we want, it does not work. Pink reviewed the research and literature and provides the following areas in which money does not work:

¹¹Sam Baker. “Health Segment: Depression and Exercise.” KERA News Report. Aired Sept. 5, 2011. <http://www.publicbroadcasting.net/kera/news.newsmain/article/1/0/1847937/North.Texas/Health.Segment.Depression.And.Exercise>.

⁹*Ibid.* 105

¹⁰*Ibid.* 106.

a. Money decreases Motivation. When an individual is given a reward for certain behavior, the individual is *less* likely to engage in that behavior in the future. One of the studies illustrative of the research was a study by Lepper & Greene on the impact of rewards on the behavior of preschoolers who were selected for the time spent in drawing.¹² These preschoolers were divided into three categories: those given a drawing project who were not rewarded, those given a drawing project who were told they would be rewarded for drawing and those who were given a reward but who did not expect the reward. The preschoolers who were told they would be rewarded drew *less* after being given the reward than they were before. In numerous studies the result was the same if the group was given a “if - then” reward, a reward that if they would engage in a certain activity, then they would be rewarded, the group was much less likely to engage in the behavior in the future.

Parents, employers and groups routinely provide a “if-then” reward with the intent to increase the motivation to engage in that activity yet the studies universally show that the rewards have the opposite effect.

b. Money decreases the Level of Performance. To illustrate the effect on performance Pink cited studies done for the Federal Reserve System. One of those studies by Dan Ariely provided tasks for three groups in India. One group was paid the equivalent of one day's wage for the task, one group was paid the equivalent of two week's pay for the task and one group was paid the equivalent of five months pay for the task. The two small groups performed about the same but the highly paid group performed much worse than the other two groups. The same results were found in other studies for the Federal Reserve System. Studies by the London School of Economics found the same results.¹³

c. Money decreases Creativity. On tasks that required creativity, a thinking “outside the box” the research in the study discussed above found that the highly paid participants took *longer* to solve the task. The pay seemed to narrow the focus, the opposite of what is needed on a creative task.¹⁴

d. Money increases Undesirable Behavior. Pink cited four areas in which undesirable behavior was increased 1) decreased good behavior (e.g. giving blood), 2) increased unethical behavior (e.g. cheating), 3)

increased addictive behavior (e.g. requiring more rewards each time to elicit the behavior) and 4) encourages short term thinking (e.g. profits in the next six months rather than over the next several years).

2. Money is not always negative. We all need money to live, so money is not always negative. Enough money needs to be paid (in an employment situation) so money is taken “off the table”. People do need to pay their basic expenses, food, shelter. Enough money must be paid to someone so that their survival is not at stake. As Pink stated “.. one reason fair and adequate pay is so essential is that it takes people's focus off money, which allows them to concentrate on the work itself.”¹⁵

In addition, Pink noted that money can motivate individuals to engage in routine tasks.¹⁶ Individuals are motivated to engage in routine tasks for money. However even in this situation, it is important to provide something outside of just pay. In these situations rewards should be accompanied by 1) a rationale for why the task is necessary, 2) acknowledge that the task is boring and 3) allow people to complete the task in their own way.¹⁷ Even in these situations rewards are dangerous. If there is any way to shift “if then” rewards to “now that” rewards (i.e. rewards that are given after the task is completed), the shift should be made. Attempts should be made to substitute nontangible rewards and always provide as much useful information as possible.

3. Motivation - What does Work? If money does not work, then what does? The origin of the idea of paying people to motivate them came in the industrial revolution when people were needed to provide very boring routine tasks. As we have seen in this limited situation tangible rewards can be successful. The premise of the ineffectiveness of tangible rewards is that people are intrinsically motivated. Pink opens his book by asking how people would have predicted the success of an online encyclopedia created by a major company with teams of researchers (Microsoft's Encarta) compared to one for which all of the information is provided by individuals receiving no pay (Wikipedia). The answer is clear that the encyclopedia created entirely by volunteers would never have made it, yet Encarta no longer exists and Wikipedia is very successful.

a. Self-determination Theory - SDT. Deci and Ryan, two of the primary researchers in the area of motivation, developed what they called self

¹²Daniel Pink. *Drive: The Surprising Truth About What Motivates Us*. New York: Riverhead Books, 2009, 35-38.

¹³*Ibid.* 38-40.

¹⁴*Ibid.* 40-45.

¹⁵*Ibid.* 77.

¹⁶*Ibid.* 58-67.

¹⁷*Ibid.* 62.

determination theory. Their research showed that all of us are motivated. The three primary psychological needs that fuel this motivation are: competence, autonomy and relatedness. Pink expanded upon a variation of these three psychological needs as the drivers of motivation: autonomy, mastery and purpose.

b. First Driver of Motivation - The drive for Autonomy. The first requirement for the environment to nurture our motivation is autonomy. The whole premise of an incentive trust is that we need a prod to do something and that we need a specific set of actions that we are to take. We need to be managed. But this idea is not borne out in the research and is being challenged and changed in the business community. Pink noted that Deci and Ryan cited autonomy as the most important of the three components: competence, autonomy and relatedness. In fact, in their research Deci and Ryan stopped using the terms intrinsically motivated and extrinsically motivated and began categorizing these two types of behavior as autonomous and controlled. The word control is one we are familiar with in estate planning. Our clients want to control, even from the grave but according to Deci and Ryan's work, "controlled" is the antithesis to intrinsically motivated. The push for autonomy in business resulted in Cali Ressler and Jody Thompson, two former human resources executives, creating a results only work environment (ROWE). The employees do not have a schedule. They can do the work when they want, where they want and how they want. The concept seemed radical and clearly would not work if we truly need to be managed and are only (or primarily) motivated by money. Pink cited a Cornell study as follows: "researchers at Cornell University studied 320 small businesses, half of which granted workers autonomy, the other half relying on top-down direction. The businesses that offered autonomy grew at four times the rate of the control-oriented firms and had one-third the turnovers." The four essential components of autonomy are: what people do, when they do it, how they do it and whom they do it with - task, time, technique and team.¹⁸

(1) Task. This component is most easily seen in business in the technology area. Pink mentions several businesses that have a certain percentage of time for the employee to work on anything he wants. The company that is probably the best known of the technology companies for the autonomy it gives its workers is Google. For business it may seem difficult to provide autonomy over the task but in the administration

of a trust, the freedom for a beneficiary to select tasks (or profession, jobs, etc.) is much easier to see.

(2) Time. The employees work when they want and the only requirement is that they get the work done. Interestingly Pink spends over half of his discussion on time on why lawyers are unhappy and unproductive focusing on our training, the nature of our profession and in particular, on the billable hour. The billable hour is considered the antithesis of the "results only work environment." The billable hour is surely destined to die over the next ten years but that is a discussion for another paper.

(3) Technique. Pink uses the typical call center as the epitome of routing work. Generally the call center provides for the information to be input and then provides the employee with a script. Turnover is from 35% to 100% a year. Zappos.com uses an entirely different approach. When a call comes in the call center has these instructions: serve the customer, no scripts, no monitoring, no timing of the calls. The turn over at Zappos is minimal. And the calls are not received in a central call center. The calls are routed to the individual's homes. Zappos.com has one of the best customer service records for call centers.

(4) Team. Selecting who you are working with has taken hold in some businesses. Whole Foods has an employee work for a trial period and then the other individuals working in that team decide whether to hire the individual. Recently I was in the cardiac wing of Presbyterian hospital in Dallas and a nurse in that wing stated that they also were involved in the hiring of the managers and the other nurses in their wing. The effect showed in a group of people who worked very well together and that team work provided the patient with more seamless shift changes and a more personal feel.

Every person does not crave every type of autonomy. Some aspects are more important than others. Autonomy for a young adult, for a beneficiary of a trust is even more important than for an employee. In a trust our objective is much more frequently the development of the individual as an autonomous person. The goal of autonomy and proactivity is not fostered by a controlling environment. Pink quoted Ryan as stating:

"The course of human history has always moved in the direction of greater freedom. And there's a reason for that - because it is in our nature to push for it. If we were just plastic like [some] people think, this wouldn't be happening. But somebody stands in front of a tank in China. Women, who've been

¹⁸*Ibid.* 89.

denied autonomy, keep advocating for rights. This is the course of history. This is why ultimately human nature, if it ever realizes itself, will do so by becoming more autonomous.”¹⁹

c. Second Driver of Motivation - The Drive for Mastery. In the discussion of self efficacy we saw that mastery is a source of self efficacy and Pink also found that seeking to master something is what we are naturally motivated to do. We have a little of the chicken and the egg dilemma. From mastery comes a sense of self efficacy. A high sense of self efficacy results in an intrinsically motivated person. If we have not yet mastered something, how are we motivated to master something? Pink uses the terms Type X for the person who is extrinsically motivated. Type X would be motivated by money. Type I is a person who is intrinsically motivated. Pink believes we learn Type X behavior to our detriment. He believes we are naturally motivated and that we can unlearn the type X behavior and become a Type I and in doing so our productivity and life satisfaction soar. We are naturally motivated to seek mastery. Pink considers this as our “default setting”. Only through engagement can we master something. Pink notes that control leads to compliance and autonomy leads to engagement. The three elements of motivation also each reinforce the other.

(1) Our Optimal State. Mihayli Czikszentmihalyi has conducted research on the psychology of an enjoyable life. Through his research Czikszentmihalyi determined the elements that comprise the optimal experiences and joy in our lives. He reported and discussed his findings in *Flow, the Psychology of Optimal Experience*. The “good” news is that every individual can create for himself an enjoyable life. The “bad” news is that only by the individual’s efforts can an enjoyable life be created. Another person cannot provide us with an enjoyable life and the process is not a simple one, not a recipe to be followed, but rather an exploration that each of us takes on his own.²⁰ Once again we return to the conclusion that control by another cannot yield the type of person or experiences that we desire for ourselves or our children. Czikszentmihalyi found that individuals were most happy, most satisfied with their lives when they were totally engrossed in an activity and stated that these experiences had eight components:

“First, the experience usually occurs when we confront tasks we have a chance of completing. Second, we must be able to concentrate on what we are doing. Third and fourth, the concentration is usually possible because the task undertaken has clear goals and provides immediate feedback. Fifth, one acts with a deep but effortless involvement that removes from awareness the worries and frustrations of everyday life. Sixth, enjoyable experiences allow people to exercise a sense of control over their actions. Seventh, concern for the self disappears, yet paradoxically the sense of self emerges stronger after the flow experience is over. Finally, the sense of the duration of time is altered; hours pass by in minutes, and minutes can stretch out to seem like hours.”²¹

These activities are autotellic, referring “to a self-contained activity, one that is done not with the expectation of some future benefit, but simply because the doing itself is the reward.”²² The effect of these experiences is to lift “the course of life to a different level. Alienation gives way to involvement, enjoyment replaces boredom, helplessness turns into a feeling of control, and psychic energy works to reinforce the sense of self, instead of being lost in the service of external goals. When experience is intrinsically rewarding life is justified in the present, instead of being held hostage to a hypothetical future gain.”²³

Czikszentmihalyi labeled these autotellic experiences as “flow”. But flow is not mastery although it may be experienced on the road to mastery or in an activity in which the individual has previously reached a level of mastery. Mastery itself is a long term project. It takes focus and perseverance over a period of years.

(2) Three Laws of Mastery. Pink describes three laws of mastery:²⁴

- Mastery is a Mindset. Belief systems affect our performance. Pink discussed research done by Carol Dweck. Dweck’s research primarily focused on the area of intelligence. Dweck stated that individuals could hold one of two views regarding their own intelligence: the “entity theory” or the “incremental theory”. If the individual viewed intelligence as something you were born with and which did not change over your lifetime, you belonged to the entity theory. If you believed that intelligence varied from person to

¹⁹*Ibid.* 106.

²⁰Mihayli Czikszentmihalyi. *Flow, the Psychological of Optimal Experience*. New York: Harper & Row Publishers, Inc. 1990, iv

²¹*Ibid.* 49.

²²*Ibid.* 67.

²³*Ibid.* 69.

²⁴Pink, 118-125.

person but was something you could increase with effort then you subscribed to the “incremental theory”. A person’s view of his/her intelligence affects the way the individual responds to any task. If the individual subscribes to the entity theory then each task is a test of whether they have the ability to do the task or not. Failure leads to less effort in the future. If the individual subscribes to the incremental theory then each task is a learning experience and leads to further growth.

- Mastery is a Pain. Pink’s “law” is somewhat misleading. Mastery requires effort. In a study of West Point students, a group of researchers looked for the characteristics of the individuals who stayed in the academy and those who dropped out after basic training. Pink reports the results and his conclusion:

Was it physical strength and athleticism?
Intellect? Leadership ability? Well-
roundedness?

None of the above. The best predictor of success, the researchers found, was the prospective cadets’ ratings on a noncognitive, non-physical trait known as “grit” – defined as “perseverance and passion for long-term goals.” The experience of these army officers-in-training confirms the second law of mastery: *Mastery is a pain.*

As Malcolm Gladwell reported in his book *Outliers*, “talent” is always accompanied by hard work. Pink quotes psychologist Anders Ericsson as saying “Many characteristics once believed to reflect innate talent are actually the results of intense practice for a minimum of 10 years”.²⁵ Pink reported that another researcher who conducted a three year study of Olympic swimmers stated “Whereas the importance of working harder is easily apprehended, *the importance of working longer without switching objectives* may be less perceptible ... in every field, grit may be as essential as talent to high accomplishment.”²⁶

If we care about something we do commit to it. We do focus on it. We do practice it. As Dweck pointed out “Effort is one of the things that gives meaning to life. ... It would be an impoverished existence if you were not willing to value things and commit yourself to working toward them.”

- Mastery is an Asymptote. You can get closer and closer to mastery but you can never fully achieve mastery. It is the curved line that goes up and then levels out and gets closer to a horizontal but does not ever reach it. Mastery continues forever. It is not achieved and then one moves on. It is always there.

(3) The Alternative? Csikszentmihalyi did research to find out how eliminating flow experiences from their lives affected people. He stopped the experiment after two days stating “... the general deterioration in mood was so advanced that prolonging the experiment would have been inadvisable.” The effect was similar to the six symptoms of “generalized anxiety disorder” in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV):

- Restlessness or feeling keyed up or on edge
- Being easily fatigued
- Difficulty concentrating or mind going blank
- Irritability
- Muscle tension
- Sleep disturbance

We thrive on flow. We thrive on focus. We thrive on effort. It is important to our sense of self. It improves our sense of self efficacy. It provides much of the enjoyment in life. We seek it out. It is natural to us. Without it we can seem a little crazy.

d. Third Driver of Motivation - The drive for Purpose. The individuals with the highest level of motivation are those that are driven by service to some greater objective. Pink discusses the “pronoun test” used by Robert Reich, former U.S. labor secretary, to determine the health of an organization. Do the employees of that company refer to the company as “they” or as “we”. The sense of being a part of a company and working for something worthwhile is a powerful motivator. By giving people the “why” of doing the business they do, they are motivated to carry out that business. Interestingly, if individuals are given a checklist of what they “should” do, what is right to do, their standards are lower, they meet the checklist but don’t think of the underlying purpose of the list. People are more motivated by “doing the right thing” than by a checklist of standards.²⁷

²⁵Pink, 122.

²⁶*Ibid.* 123 (emphasis added)

²⁷*Ibid.* 139.

Pink cited a study at the University of Rochester by Deci, Ryan and Niemiec to illustrate the power of purpose. Deci, Ryan and Niemiec interviewed 1,300 graduating seniors about their post graduate plans and goals. Some of the students cited "profit goals", extrinsic aspirations to become wealthy or achieve fame. Others had intrinsic aspirations to improve their lives, to learn or to grow. These goals were "purpose goals". These students were interviewed again in a couple of years. Those students with the purpose goals who were attaining those goals were more satisfied and felt better about their lives than when they were in college. Interestingly the students with the profit goals who were attaining their goals reported no higher satisfaction than when they were students. Reaching the goals did not make them any happier. In addition, they showed increased anxiety, depression and other negative affect. One response to this dissatisfaction that Ryan pointed out was the desire to increase the size and scope of the goals - to make more money and yet, this response would only increase their dissatisfaction. (pp 141-142)

D. Life Span Development Research.

Before moving on to how we structure distribution provisions in a trust so that the trust fosters the development of productive individuals, a brief overview of some other research in the area gives us a broader perspective. Trusts are created for children who may be minors at the time of creation (and/or for grandchildren who almost certainly are minors) and continue so long as they are serving the stated purpose. The course of the development of each individual beneficiary is not yet known. Each individual is unique. If the objective is to create a trust to "incentivize" certain behaviors, a consideration of the dynamics and life challenge that individuals encounter at certain points in their life can be helpful in considering the distributions from the trust.

1. An Overview of Developmental Changes and Challenges of Young Adulthood. In his book, *Life Span Development*, John W. Santrock outlines the various stages of an individual's development and their impact on his behavior.²⁸ In reviewing Santrock's research, the following are some of the observations/information on life span development which are relevant in considering the structure and distribution provisions of a trust.

a. Adulthood is a time of developing an autonomous self. The most obvious measure of autonomy is economic independence. The transition

from adolescence to adulthood is marked by four factors: taking responsibility for one's self, making independent decisions, accepting responsibility for the consequences of one's actions, and establishing a relationship with parents as an equal adult.

Significance for Trusts: If the autonomous self is the desired development, consider the impact of a trust which supports a child, provides little information, fosters dependence and "bails" the child out of difficult situations. The trust should reinforce the beneficiary making his own decisions and being responsible for his livelihood. Let the individual accept responsibility for the consequences of his own actions - exercise "tough love." This response or admonition has less to do with the amount of the distribution than it does with the administration or process surrounding the distributions.

b. Individuals have the greatest need for economic assistance from age 20 to 40. While the individual needs to become autonomous, this period is also the period when the beneficiary has the greatest need for assistance.

c. Individuals can receive money at age 40 without impairing their development in any way. This observation does not state that the individual can handle money by the age of 40, but simply that receiving money does not impair his development. The adult child may still not be able to handle money, but receiving the money at age 40 will not impair his development of the ability to handle money, because his abilities in the area of money management are, for the most part, set. At age 20, the individual's development in this area is likely to be arrested by the receipt of a large sum of money.

The critical years in the administration of the trust are from 20 to 40. Thereafter the trust administration may change, the trust may terminate, have different governing provisions, or the child may be named as the trustee of his/her own trust.

d. Interaction and resources can facilitate an individual's development during this period. This assistance is particularly important if there are adverse psychological, social, or biological circumstances. The child with special psychological or physical needs or with social issues, can benefit from the use of resources for therapy, training or other assistance.

More assistance and positive interaction may be needed for children with special needs. Consider here the increased use by some attorneys of provisions in trusts which authorize hiring a "personal care manager" for the elderly. A similar approach is likely to be the

²⁸John W. Santrock. *Life-Span Development*. Sixth Edition. Dubuque, Iowa: Brown & Benchmark, 1977, 416-418.

type of action which would provide this type of assistance.

e. An individual's transition from adolescence to adulthood includes separating from parents and establishing an equal relationship with them. This separation is complicated by an ongoing financial dependence. This separation and shift to an equal relationship should be encouraged by the parents as trustees, or by the trustee as a parent surrogate, in the distribution of money. A distribution of a limited distribution with "no strings attached" can facilitate the separation whereas distributions with strings attached can retard the separation.

f. Drug use, unemployment, less education and poor occupational performance negatively impact an individual's self esteem. This developmental fact may seem obvious but in terms of considering the administration of a trust, trusts should authorize intervention, if necessary, and assistance in job hunting, pursuing an education, and obtaining employment. The trust should provide as much assistance and resources as are needed to facilitate furthering education and obtaining a job, including college and/or career counseling, tutoring, and any other resources that would assist in this process.

2. Emerging Adulthood: A New Developmental Stage?

We have all heard stories from our friends or have experienced ourselves, young adults in their 20s who just can't quite seem to get their lives "launched." They may drift from job to job, travel, dabble at school or move back in with parents but the common characteristic is that they are not settling into a career and are not self sufficient. This trend is real and is being considered as a new "stage" of growth, the name of this stage is emerging adulthood.

a. Boomerang Kids: The Phenomenon. Today's young adults from the age of 18 to 26 seem to "grow-up" later. Often kids move back home with their parents after college—the term "boomerang kids" was coined in response to this phenomenon.²⁹ These 20-somethings don't just move back home with their parents, they become financially independent later—nearly two-thirds

²⁹ They move-out of their parent's home later—56.8 percent of men and 43.2 percent of women 22 to 31 years old lived at home with their parents or planned to move back home after graduation in 2002 (Census Bureau's Current Population Survey).

of young adults in their early 20s receive economic support from their parents, while 40 percent still receive assistance in their late 20s, according to the American Sociological Association. They avoid making a commitment to full-time employment, and take temporary, unpaid internships, compete for two-year Teach for America jobs, travel, and generally avoid the shackles of a committed relationship or a permanent home. The median age for marriage in 2009 was 26 for women and 28 for men, as compared to 21 and 23 in the 1970s. Five years in the span of a generation!

These trends represent a paradigm shift of when childhood ends. Under Erik Erikson's developmental model, the transition to young adulthood occurred around the age of 18. Now, it appears the transition to adulthood doesn't occur until 26. This has led to a whole new stage in development, which Jeffrey Arnett refers to as emerging adulthood.³⁰

b. Developmental Features of Emerging Adulthood. Jeffrey Arnett outlines five developmental features of emerging adulthood, which are:

(1) Identity Exploration. The emerging adult tries out various possibilities in love and work, maybe the emerging adult works as a physical therapist, but decides this isn't the right path for them, and tries out an alternative.

(2) Instability. This period is marked by instability, the emerging adult moves to college only to decide they don't like the location, or the college, they may change majors frequently, redefine their priorities and interests. There are semesters abroad, time off from college, time exploring new people, new places, new ideas. The baby boomer generation held an average of eleven jobs in their lifetime. According to the US Census, today, the average American between the ages of 18 and 30 have already held seven to eight jobs.

(3) Self-focus. Emerging adults develop skills for daily living, gain a better understanding of who they are and what they want from life, and begin to build a foundation for their adult lives.

(4) Feel in-between. The instability and identity exploration leave the emerging adult constantly in transition—not an adolescent nor an adult. The instability and overwhelming choices have led to blogs, movies, and books dedicated to the "quarter-life crisis."

³⁰ Jeffrey Arnett. *Emerging Adulthood: The Winding Road from Late Teens through the Twenties*. New York: Oxford University Press, 2004.

(5) The age of possibilities. Now, our children are inundated with the idea that they can do anything! This gives them a hope of having unparalleled opportunities. This is the most affluent generation in American history, so they have high expectations for life.

While these emerging adults might evoke images of the movie "Failure to Launch" the postponed adulthood doesn't have to be a negative trend. This developmental stage allows people to make more enduring life choices with more maturity and exploration. As Arnet points out "What's the hurry?" Maybe you look back and wonder what if you had waited to choose a career, a spouse, buy a home? It's not that today's emerging adults aren't going to do those things, it is just that they will do them later. As Gallo and Gallo point out, "today's young people view marriage, home, and children not as achievements to be pursued currently but as perils to be avoided for a time. They want them, but not now."

c. Impact on parent's financial support. With children taking longer to "grow-up," this means more support from parents. In a survey by Karen Fingerman—a developmental psychologist at Purdue University, two out of three parents had provided practical support to their children within the previous month. In 1988, only one out of every three had.

But how should this support be given? How should parents provide assistance to their kids to make emerging adulthood a rich and varied period for self-discovery rather than a time for self-indulgence?

This delayed period until a child is "grown up" can cause anxiety for parents as they watch their child seem to drift, experiment and fail to really commit to anything. Parents may feel embarrassment or anger that their child isn't more like them. If money is spent to influence the child to meet the parents' expectations, then this can hinder the identity exploration of the child to make enduring choices about what matters to them in their life. Erickson refers to this phenomenon as external forces foreclosing the development of a true identity. This makes incentive trusts a troubling option—incentive trusts often reward children for making decisions similar to those the parents made or believe ought to be made. One psychiatrist at Harvard, Edward Hallowell, observed that using money as an external motivator is as likely to produce a depressed adult as it is to produce a materially successful one. Children need to be able to make wrong decisions and learn from them.

This new stage of development, emerging adulthood, impacts the structure and administration of our trusts. What may seem to be evidence of a lack of

motivation or irresponsibility may simply be a phase and the way that a parent or a trustee responds to the child or beneficiary may influence how the child or beneficiary comes through this phase.

E. Reflections on the Impact of Money in the Development of the Individual.

Money is not the "problem." Individuals are not "de-incentivized" by money, but rather by the dynamics around the money. Money means control *over* the individual, not *by* the individual, the opposite result from that which research has found to be effective. Parents/trusts control the flow of money and, as importantly, control the flow of information about money. It is the unspoken strings attached to the money that create much of the problem, the expectations that come with giving money. Providing a child with money and/or support is not, in itself, necessarily detrimental. For example, if parents want their child to be self-sufficient and independent of any parental support, then those parents should not give their child money or support the child. The parents should express their expectation and live consistently with that. Do not support the child. Give them the money at a later time. If parents do not want their child to view the parents' money as theirs - to have a sense of entitlement, then do not take actions which contradict that. If the parents never intend to assist their child or never intend them to inherit anything, tell them that. If they do intend to give them the money, but not until they are 40, tell them that. If the parents have a limited amount of funds available for assisting their children, then it is best to begin discussing with their children at a young age their desire to assist and their limits in this regard, and involve the children in the decision of when assistance is most helpful. Discuss fears as well as desires. Discuss the desire to let go with no strings and how difficult that is, if it is. However, if the parents intend/desire to supplement their children's income and have none of these expectations, then they can support the children so long as there are no strings attached to that money. In psychology, a basic fact is that the most powerful reinforcement is erratic reinforcement. If a parent bails his child out occasionally, or erratically provides support to his child, that child is going to have the strongest psychological tie to the possibility of receiving that money.

VIII. MOTIVATIONAL AND TRANSITIONAL PROVISIONS.

Many clients have children that may be "coasting" in school, or seem unmotivated, or they may represent some spendthrift tendencies. These may cause

the client to fear his child will never realize his own potential if simply given the wealth at a young age. The client fears the child will feel "entitled" to the wealth, and not have the appropriate maturity to be a trustee, or receive large distributions without it affecting the child's value system or productivity.

This situation raises a difficult question for parents. Trusts are often created to help support children. At the same time, parents strive to raise children who are independent emotionally and financially. Therein lies the conundrum many of my clients face. How do you, as parents, facilitate and nurture your child's independence and growth, while at the same time, wish for them to share your wealth?

Perhaps rather than considering an "incentive" trust or a trust to motivate, this trust should be considered a transitional trust. A transitional trust is designed to provide support to the child in a way that facilitates their emotional and financial independence. These children do not have debilitating addictions, but rather, may lack maturity or motivation. The transitional trust is one which allows for some training provisions, or more restrictive provisions to facilitate the individual's development of certain skills or identity. These trusts are transitional in that once the child has developed more maturity or financial independence, the trust shifts control to the child.

A transitional trust can be valuable when:

- The beneficiary is very young, and it is unclear at age 2 or 4 whether the child will have the requisite financial skills and maturity to handle the trust property later on in life.
- When the child is "normal" but still drifting, and acquiring trust property and responsibility too early could thwart their development (see discussion below regarding Emerging Adults)
- When the grantor would like the beneficiary to acquire a certain skill, for example, financial responsibility before acquiring control over the trust property.

The outline then discusses three possibilities for a transitional trust:

- (1) the incentive trust;
- (2) a skills trust;
- (3) a trust for the emerging adult (an individual between the ages of 18 and 26) designed to facilitate

personal growth and development.

Each is addressed in turn. Before we begin our review and discussion, let's consider what we know from the motivation and other psychological literature. First, money does not motivate an individual to be productive and creative. The effect of money is to narrow an individual's focus on a routine task. Money's effect in other situations is negative at best. Motivation is nurtured by autonomy, mastery and purpose. The trust should foster these three areas of the individual beneficiary. The best predictor of success and happiness is for an individual to have a high sense of self efficacy. There are four sources of an individual's sense of self efficacy. First the individual develops his sense of self efficacy in part from mastery experiences. However, individuals do not have the opportunity to master all areas and there is always the point before mastery has begun. The individual will derive his sense of self efficacy from his interactions with others, the second source of self efficacy, observing others with whom he can identify because of some real or perceived similarity to him. Third, in addition, by his interactions with others who understand who he is with all of his talents and challenges. These individuals by their support and encouragement can increase his sense that he can tackle the task and reach the goal. Last the individual looks to his own physical, emotional and psychological make-up for his sense of self efficacy. If the individual sees that he can improve his physical health and well-being, alter his moods and address psychological issues, he will gain a higher sense of self efficacy from those beliefs and actions.

A. Incentive Trusts.

1. What is an Incentive Trust? Designed to facilitate the child's transition into a productive adult, the incentive trust is one form of a "transitional" trust. The incentive trust is designed to facilitate this transition by encouraging certain types of behavior. With the sudden wealth of many individuals who were raised by middle-class parents (both entrepreneurs and employees of start up high-tech companies), there is an increasing concern about raising unmotivated children. Warren Buffet has been quoted on this issue as saying that he wanted to give his children enough so that they could do anything, but not so much that they could do nothing. The derogatory connotation to the term "trust baby" resonates with individuals such as Mr. Buffet. They want their funds to pass to their children in a manner which will encourage some perceived positive behaviors and discourage some perceived negative behaviors.

A November 17, 1999 article in *The Wall Street*

Journal entitled "Trust Me, Baby" highlighted concerns on the impact of wealth on children and discussed the use of "Incentive Trusts" by these families in response to the concerns. The wealthy families responded with restrictions in their Wills. Their Wills created trusts for their children with strings attached to the receipt of distributions. These plans were termed "Family Incentive Plans." The concept of a family incentive plan is becoming increasingly popular. The family incentive plans depart from the traditional distributions to beneficiaries for their "health, education, support and maintenance according to their standard of living." In a wealthy family with substantial funds held in the trust, the traditional distribution standard of "health, education, support and maintenance" can result in distributions made to the beneficiaries to maintain the standard of living they had in their childhood. The individuals need not work since the trust standard provides for their support. So long as these distributions can be made from the income in the trust, the distributions will be made in an amount to maintain that standard of living. The "family incentive trust" departs from that philosophy and either limits those distributions or provides for a different standard for distributions altogether. The limitations or incentives encourage certain types of behavior. Some of the specific provisions discussed in *The Wall Street Journal* article were:

- Matching earned income up to a specified amount (e.g. \$100,000);
- Specified amount of funds (e.g. \$200,000) to set up a professional practice or start a business;
- Providing a monthly payment (e.g. \$10,000) to a "stay-at-home mom";
- Denying distributions if the child does not enter into a premarital agreement when he/she marries;
- Denying distributions if he/she fails a drug test;
- Receiving additional distributions while the child is receiving psychotherapy treatment or on certain antipsychotic drugs;
- Receiving additional distributions for each year in which the child has no driving violations.³¹

2. Does the Incentive Trust Work? It is easy to see the appeal of an incentive trust, and in some sense, it seems intuitive...but does it really work? The answer to this question really depends on the objective. If the

objective is to elicit certain types of behaviors such as the completion of routine tasks, this type of "if then" rewards will actually cause the individual to engage in those tasks. However, the incentive trust rarely even mentions routine tasks. Alternatively, if the objective of the client is simply to reward certain behaviors with no regard to whether the provisions affect intrinsic motivation or an individual's productivity, then the trust does "work" by rewarding those behaviors. If the client wants to offer a reward for a year of safe driving—then an incentive trust certainly offers a reward.

But among my clients, this isn't really the objective. The objective is to produce productive, motivated members of society. Often these trusts are drafted based on what the client perceives as the behaviors that will produce a child who is a productive, responsible member of society. A "productive" child may mean something different to each family, but having "productive" children is a common thread among families.

Does the incentive trust do this? Does the trust produce productive, motivated members of society? All evidence suggests no, it does not. Pulling from psychology literature on motivation and money, and self-efficacy, the research suggests the incentive trust does not work. There are three primary flaws in the incentive trust structure: (1) money not only does not increase intrinsic motivation, it actually decreases motivation (except to complete routine tasks); (2) incentive trusts deny the beneficiary any control over the process, and control is key to self-efficacy; and (3) incentive trusts may thwart the individual's ability to develop into his own person by reinforcing rigid family myths. In other words, the incentive trusts operates to diminish mastery, autonomy and purpose. Each of these three problems with incentive trusts is discussed in turn.

a. Money can Decrease Motivation. Recent research makes clear that people are not motivated by money. In fact, intrinsic motivation is reduced by money. In the discussion of the book *Drive* (see discussion page 20) this impact was discussed. Another example is in one study, paying college students for variations on completing the Soma Cube (the ancestor to the rubik's cube) substantially reduced the time the paid group spent on the cube.³²

³¹Edward Deci, "Effects of Externally Mediated Rewards on Intrinsic Motivation", 18 *J. Personality & Soc. Psych.* 105-15 (1971); Gallo, Gallo, & Grubman (providing a full review of the research on how money may decrease intrinsic motivation).

³¹M. Langley. "Trust Me, Baby." *The Wall Street Journal*. November 17, 1999.

If the objective is to increase an individual's efforts toward mastery, then incentive trusts fail. The individual is less likely to engage in the behavior and is less likely to be creative in his engagement. The trust thus fails to encourage one of the three essential aspects of motivation outlined by Pink: mastery.

b. Control and Motivation. Our ultimate objective in these trusts is for our children to take control over their own lives. Paradoxically, we have used control over our children in order to "teach" them to take control over their own lives. Extensive research has been conducted in the area of control, and in fact, control is very important to motivation, but it is our control over *ourselves* and all things that impact our lives that is deemed essential to motivation. Not only is *actual* control important to an individual's ability to function at high levels and to cope with stress, but also *perceived* control or knowledge of factors over which the individual has no control is important as well.

Possessing information as to the events that occur or as to the process of change or decision making is also a form of control. We can have information about the process and/or the outcome so that we can be ready to respond and/or know the consequences of certain actions based on that knowledge. Rarely in life do we have actual control. However, the more we perceive ourselves to be in control of our lives and our circumstances, the more motivated and productive we will be.

The objective in the Incentive Trust is to use the exercise of control to enable, encourage and/or cause our children to take control over their lives. The incentive trust commonly gives no control to the beneficiary. The behavior to be elicited is decided by the grantor with no input from the beneficiary. The behavior may be measured by vague or even specific benchmarks but in neither case did the beneficiary have any input in the behavior to be encouraged or the measures set forth to determine if the beneficiary has met that objective. These benchmarks may have no meaning to the beneficiary, no connection to his life. The beneficiary is usually not involved in drafting the trust, nor does the beneficiary perceive he has any control over the trust property. Instead, the trust administration is happening to him: he is a passive observer to the process. The drafting process, trust administration and the behaviors to be incentivized will likely leave the beneficiary feeling powerless. For the beneficiary to develop motivation, the beneficiary must feel empowered, in control.

In short, the trust fails to provide the beneficiary with any autonomy. The trust thus fails to encourage another of the three essential aspects of motivation

outlined by Pink: autonomy.

c. Incentive Trusts May Enforce Unhelpful Family "Myths". In Bandura's research (discussed on pages 15-16) on what helps a person develop "self-efficacy," having another person "model" how to achieve a task similar to what the individual is trying to accomplish can increase a person's self-efficacy. If the "model" however, is too rigid or restrictive in the possible life options, then the model becomes one that inhibits the development of self efficacy.

A fundamental flaw of the incentive trust is that the behaviors the client may attempt to encourage are often based on a modeling "myth." A client likely outlines certain benchmarks that achieved a certain result for them. That is, they choose to incentivize a college degree, or a certain income level because these are the means by which the client achieved a fulfilling, productive life—but it is a myth to assume it is the *only* way to achieve a fulfilling, productive life. By incorporating these into a trust as a requirement for a distribution, the client denies the child the freedom to depart from the model to explore an alternative path.

Consider the story of Cindy and Sam. Cindy is a successful litigation attorney. She went to college, did well and then went to law school and has developed a successful litigation practice. Her practice enabled her to be self sufficient when she and her husband were divorced. Her son, Sam, hated school. Homework, attending class, and grades all became a battle. Sam had a learning disability which only further frustrated his efforts. Despite Sam's resistance to school, and sincere frustration with the process, Cindy insisted Sam finish high school and go to college. Cindy's insistence wasn't because Cindy found college innately valuable, but because for Cindy, it was how she found a rewarding (both emotionally and financially) job. After significant tension between Cindy and Sam over Sam's life path, Sam dropped out of high school. He decided to work on boats—something that has always been his passion. He now works on a Scripps Institute Research boat that does marine biology research. Sam has found his passion in life, he loves the boat, the open ocean, the marine wildlife. In essence, Sam now has what Cindy always wanted for him—a fulfilling and stimulating life—but Sam found this life by rejecting the model Cindy had rigidly insisted upon.

The behaviors incentivized in these trusts are designed by the client to achieve a certain outcome: a productive, fulfilling life for their children. The benchmarks, however, don't correlate with whether the child will find this. Instead, these benchmarks reflect the

process by which the parent achieved these goals. Cindy would have thought college and law school were prerequisites to a productive life—but giving Sam the flexibility to find his own path allowed Sam to achieve the very goal Cindy wanted. Had Cindy not given Sam the flexibility (much to Cindy's consternation at the time), Cindy's model would have become a restrictive "myth" that his process was the *only* acceptable means.

These family myths are not inherently good or bad. They can work both ways. It is recognition of these ideas as myths that is important. They exist because they have provided a useful framework for those who have lived life before us. They can provide the guidance needed to carry us to the next step. They can provide a structure for us to live "in the meantime," but they can also be roadblocks to an alternate way of being. Recognizing these patterns for ourselves and for our children can help us use these patterns when they are helpful and reconstructing or discarding them when they are not. Placing these patterns into a trust format to "incentivize" certain behaviors fails to give the child the flexibility to make his own path, his own process. While there is a role for modeling in discussions with our children, enforcing our model in a trust as the *only* way is not an advisable.

The incentive trust fails to provide the environment for the beneficiary to find purpose in his actions. The incentive trust fails to encourage any of the three essential aspects of motivation outlined by Pink: mastery, autonomy and purpose.

B. An Incentive Trust with Purpose: Results Oriented Trust Environment: A Skills Trust.

One of the problems with an incentive trust is that it fails to define its goals and objectives. The typical incentive trust skips the purpose of the trust and goes straight to a list of behaviors that the client has decided will accomplish the objective of the trust. Gallo, Gallo and Grubman tackled this challenge in a paper presented at the Heckerling institute in 2011: *The Use and Abuse of Incentive Trusts: Improvements and Alternatives*.

1. Focusing on the Goal rather than the Behavior.

If incentive trusts don't work, then what does? How should you draft a trust for a client with a child who is unmotivated and lacks certain skills? Gallo, Gallo & Grubman developed an alternative to the incentive trust drawing on the *Results Oriented Work Environment* (ROWE) developed by Cali Resler and Jody Thompson, executives with the human resources department of BestBuy. The ROWE allowed individuals to do whatever they wanted, whenever they wanted as long as the work

got done. Gallo *et al* used this idea to propose an alternative to an incentive trust, a Results Only Trust Environment. This trust determines the results to be obtained, develops benchmarks to determine if the results have been obtained and leaves the process of attaining such results to the beneficiary.

2. A Trust designed to Develop Skills: the Skills Trust. Gallo *et al* considered their clients and what the most common concerns were in creating a trust for their children. Gallo *et al* cited the conclusions of Judy Barber, a mediator and therapist, in her article *The Psychology of Conditional Giving: What's the Motivation* that an incentive trust represented to her clients: "This is what I value and I want to ensure my legacy is not wasted through irresponsible spending of my hard-earned resources." Gallo *et al* considered this objective and in considering the importance of the beneficiary's autonomy in accomplishing any objective, developed what they call a "Skills Trust" since the trust document sets forth the skills to be acquired. The skills trust is a trust focused on developing discrete, objective skills. A skills trusts is very different from the incentive trust because:

- (1) The trust has objective benchmarks that directly correlate with the skill to be developed, and avoids incentivizing intrinsic motivation with money;
- (2) The trust engages the beneficiary in the process so that the beneficiary has control over the process and outcome; and
- (3) The trust doesn't enforce a prescribed method as the only way to achieve a certain result—the result is all that is required—giving the beneficiary the flexibility to determine how to develop the skills.

A skills trust can be used when the grantor wants the beneficiary to develop a certain skill set, for example, financial responsibility, or a responsible way to manage charitable giving, or to develop entrepreneurial skills before acquiring more control over trust property. The grantor determines the skills that he values, benchmarks are developed to determine when the skills are acquired and upon attaining the requisite skills the beneficiary receives distributions or control over the trust.

The example below addresses a financial skills trust developed by Gallo *et al* but the techniques could be applied in another setting when the grantor wants the beneficiary to develop a different set of skills before acquiring more control. This is a transitional trust in that the beneficiary is transitioning into a role with more control and perhaps greater distributions, but this transition will be facilitated by the beneficiary gaining a

discrete, specific set of skills.

3. What is the Financial Skills Trust? Many clients are concerned that their children do not appreciate money, and lack basic financial skills. Some clients may express concerns that their children will squander their inheritance quickly. Clients may have used the provisions of incentive trusts to indicate a level of financial maturity. For example, clients may want a provision that provides for dollar for dollar income matching, i.e. the trust distributes an amount equal to their child's W-2 income because they believe full-time employment will indicate that the child is able to manage money. Similarly, a client may believe that a college education may reflect a level of maturity suggesting the child will have the requisite financial skills to manage their inheritance. As many people can recognize in the people they know, a college education or a job will not ensure that person makes wise financial decisions. These behaviors are poor indicators of whether the child has really developed this skill.

Gallo *et al* recognizing that incentive trusts do not actually produce the behavior they are meant to develop, have suggested an alternative trust structure designed to foster financial responsibility.³³ As opposed to using poor indicators of fiscal responsibility, Gallo *et al* offer an alternative approach: the financial skills trust. The trust employs objective benchmarks that directly correlate with an individual's ability to manage money. The novel structure of the trust is that it is premised on the results-oriented work environment which focuses on the desired results and not any predetermined structure or methodology of how these results are achieved. In focusing on results, beneficiaries have the autonomy to develop the necessary skills to meet the results. They aren't forced to conform to a particular structure which may thwart their creativity and autonomy in hoping this structure produces certain results.

This is at the heart of the shift in the financial skills trust (FST). The FST focuses on the goal—responsible money management—and not the process by which the grantor believes the beneficiary should achieve that goal (going to college, securing full-time employment, etc.). The benchmarks then, are benchmarks that correlate directly with whether the beneficiary has met the desired goal: responsible money management. The financial skills trust does not attempt to control the process by which the beneficiary develops these skills or the beneficiary's life choices.

4. The Structure of the Financial Skills Trust. The overall structure of the FST is a largely discretionary trust which begins with a purpose statement by the grantor which addresses the general goals the grantor has for their children regarding financial responsibility. The trust then has guidelines which provide the results the trustee is to consider in making distributions of income and principal, and whether and when the beneficiary becomes a co-trustee.

Gallo *et al* identify six financial skills that are fundamental to money management, these six financial skills—they suggest—can provide the guidelines to the trustee's exercise of his discretion.

1. The ability to live within one's means, that is, is the child making more than they're spending?

2. The ability to manage spending relative to income in a manner that would be consistent with being able to save a portion of income, as needed;

3. The ability to understand and manage credit and debt processes;

4. Ability to maintain reasonable accounting of one's financial resources;

5. The ability to understand and manage one's personal assets, this could be by using basic investment procedures or delegating these actions responsibly to appropriate advisors;

6. The ability to generate income for spending needs if additional resources are required or desired beyond the trust distributions.

The trust empowers the beneficiary through providing the beneficiary with control. This control comes from two aspects of the trust. First, because the desired results are clear, the beneficiary has a level of perceived control over the trust. Unlike absolute discretion, the beneficiary in the FST should know and understand what is required of him to receive distributions. This knowledge is empowering and gives the beneficiary some ownership over the process. Second, to successfully administer a FST there must be transparency in the trust administration process. The trustee and the beneficiary must meet regularly to assess whether the beneficiary is meeting the guidelines, and the trustee can provide any assistance the beneficiary may need in mastering these financial skills.

The beneficiary is no longer subject to the controlling forces of a traditional incentive trust, but the child is given the information to control his own life.

³³Jon J. Gallo, Eileen Gallo & James Grubman, "The Use and Abuse of Incentive Trusts: Improvements and Alternatives." (2010) www.themadisongroup.com.

Indeed, if we want to create self-efficacious children—that is, empowered children, then the child's perception of his ability to control outcomes in his life is key!³⁴

In addition, the trust doesn't prescribe requirements for a strict process by which the beneficiary will learn financial responsibility, but instead allows the beneficiary the creativity to determine how to master these skills themselves. The trustee can provide helpful modeling and advice, but there are no "myths" forced into the trust structure.

5. Limitations of the Financial Skills Trust. While this trust is designed to foster economic independence, and the development of financially responsible adults—this may not be the only goal of the parents. Parents want their children to realize their full potential, to be empowered and live for their passion. For example, a child may live within his means and demonstrate the financial skills outlined in the guidelines, but spend every day watching TV and surfing the internet. This probably isn't the fulfilling life the parent envisioned for their child.

The Skills Trust does provide the beneficiary with autonomy in the way he seeks to accomplish the task of obtaining these skills but the Skills Trust does not provide the individual with the freedom to choose what he is to master, or even any encouragement to master anything other than the skills set forth in the trust. The beneficiary also cannot determine what his purpose is in life. The trust prescribes the purpose whether it is financial skills, philanthropy or entrepreneurial skills. The Skills Trust is a greatly improved incentive trust but it retains part of the shortcomings of the incentive trust.

C. Emerging Adults: A Trust to Facilitate Personal Growth and Development.

While a skills trust may be helpful in some situations, often the grantor wants more for the beneficiary than just the development of a set of skills—they want the beneficiary to come into their own, experience self-realization, become a "productive" adult. What would a trust look like with a goal to facilitate the personal development of a beneficiary?

1. Qualities important to a Trust to Facilitate Independence, Self Efficacy and Mastery. One demographic discussed earlier that might be particularly well-suited for a transitional trust designed to facilitate

personal growth and development is the "emerging adult" those between the ages of 18 to 26.

How can parents provide financial assistance in a way that is positive? In a way that allows their children to find an authentic identity, forge lasting relationships, and develop a fulfilling life?

In an article entitled *How 18 Became 26: The Changing Concept of Adulthood*, Gallo and Gallo have developed a model to help clients answer the question of when to provide financial support from a letter written by Al Wroblewski an independent financial planner in Cambridge, to his five adult children. He said in evaluating requests for money he was looking at several things:

- *Is whatever you're going to do important to you; are you really committed?*
- *Does it represent something meaningful to both yourself and others?*
- *Does it move you toward financial self-sufficiency?*
- *Will money make a difference?*
- *Is giving you money healthy for our relationship?*

Essentially, what Al wanted to know was whether giving his children money would fuel his children's independence or whether it would give them the easy way out. Consider these questions in the context of what we have learned from the research in self-efficacy and motivation. These questions foster mastery (providing resources only if the child is committed and thus willing to spend the focus and perseverance necessary for mastery), purpose (the use for the money is to represent something meaningful to the individual and others) and autonomy (no strings attached to the money after responding to these questions and the desire is for the money to move the child toward greater independence). In terms of the concept of self-efficacy, the control is with the child and part of the focus is on maintaining a healthy relationship with the parent. The parent can then provide the emotional support to the child needed to continue to persevere in his task. Al is fostering self-efficacious children. That is, children who will heighten their efforts in the face of failure, approach challenges with a "can do" attitude, try again and again after a failure and believe in their ability to succeed in life.

This is really what's at stake in the emerging

³⁴Bandura. 10-31.

adult: is this a means of fueling valuable self-discovery and independence or is this prolonged self-indulgence and dependence?

Gallo and Gallo suggest that if you decide to provide financial assistance, you have to clarify whether such financial assistance is conditional or unconditional. If conditional, be clear to your child what the conditions are, and then they can choose to accept or not. If you decide to help your child buy a car, be clear whether you are giving him the money only if he buys a hybrid or an American car. Or, would it be fine with you if he used the money to buy an old 1987 Mercedes? Financial assistance with strings is navigating a slippery slope of control. The conditions may be important but if so, the assistance is unlikely to foster mastery, autonomy or purpose; rather the assistance is likely remedial in nature.

Gallo and Gallo also have developed a list of areas where financial support tends to foster independence rather than extend dependence.

- *Education.* Many parents provide for all expenses related to education, but research suggests children may have more value to the child if they make a nominal economic contribution to educational costs. One client of the Gallos, had a policy that their college children work during summer vacation and contribute 10% of their earnings toward their college expenses. The children felt in doing so, college made their college experience more of a personal achievement.
- *Vocational Testing.* The Highlands Ability Battery is one comprehensive assessment tools for measuring individual abilities between the ages of 18 and 25.
- *Paying for emerging adult's insurance.* Particularly, health insurance. This can give the parent peace of mind, but is not likely to make the emerging adult feel dependent.
- *Psychotherapy and Rehabilitation.* Depression and substance abuse form the dark side of emerging adulthood—addressing these may be necessary.
- *Assisting your child in Creating a Business Plan.* If the emerging adult demonstrates a viable business plan and a commitment to the business, then possibly provide seed money.

2. Drafting Considerations Now that we have discussed what types of financial support would be beneficial to an emerging adult, what does this mean in drafting trust provisions? How do we incorporate this value system into a distribution provision?

Ideally, in this situation, the parents would be alive to make a nuanced decision about whether to provide financial support for their child. In the case at hand, however, the parents are deceased and the trust is forced to make this nuanced decision about support during this transitional time. If one of the parents is still alive, then the trustee can consult with the parent regarding distributions during emerging adulthood.

In general, the trust should address decisions regarding distributions during the child's emerging adulthood, as well as give the beneficiary some control and engagement in the process. In addition, the trust is intended to be transitional, and so the beneficiary should eventually transition into a position with more control at the time when they are able to act as a steward of the wealth.

The components of a transitional trust for the emerging adult:

- Purpose Statement outlining the role of the trust during emerging adulthood.
- Guidelines (if grantor considers important) providing more specific considerations to inform how the trustee is to exercise their discretion
- Trust Administration process which involves the beneficiary, and utilizes a dialogue between the trustee and the beneficiary
- Flexibility for the trust to transition into a trust which provides the beneficiary with general control once the beneficiary is no longer an emerging adult, but a responsible adult.
 - a. Purpose Statement. A purpose statement allows the grantor the opportunity to provide guidance as to which endeavors the grantor would like the trust to provide financial assistance for. To develop a purpose statement, talk to your clients about this phenomenon of emerging adulthood and explain the risks associated with certain types of financial assistance (those that may "bail out" the child), as well as financial assistance that will likely foster independence, e.g. education.

Ask the client whether they are willing to provide support for the child to take an unpaid internship? What type of support would the client be willing to provide? What about community service programs like City Year, AmeriCorp, or the Peace Corp? What if the child chooses to take a low-paying but emotionally rewarding job with Teach for America for a two year commitment? Would the client like to subsidize the child's lifestyle? What constitutes educational

expenses? Yoga teacher training? Pottery classes? Vocational Training? In what circumstances would the client not be willing to provide financial support. To pay off credit card debt? To bail them out of a frivolous business endeavor? Pay a speeding ticket?

Will support be contingent upon anything? A college degree? The maintenance of a certain GPA while in college? These questions provide the framework for the Purpose Statement. The specific requirements such as the breadth of educational expenses and the maintenance of a certain GPA would not be included in the Purpose Statement. If the grantor feels that it is important to provide this additional framework then these items can be included in the Guidelines.

Encourage the client to discuss his vision of the trust's role during this time with his or her children. This conversation can help clarify the grantor's intent, and it can prevent the children from engaging in litigation if they are denied a distribution. In addition, this communication can give the child some perceived control over the process, a valuable component in the child developing self-efficacy. In addition, it can help clarify for the client whether there is a family assumption or story he is attempting to incorporate into the trust. For example, if the grantor insists that the beneficiary maintain a certain GPA in high school in order to attend college, this may be because the grantor believes that otherwise the money spent on a college education would be wasted due to a lack of motivation.

An example of a possible purpose statement about distributions during the emerging adulthood is included in the Appendix as Example #11 of the Purpose Clauses.

b. **Guidelines.** The trust could also contain guidelines to assist the trustee in exercising their discretion as to whether to make a distribution. If the grantor desires to include additional guidance but does not want to render the trust inflexible in its operation, then non-binding guidelines could be included. The grantor may include in this section his desire that his children obtain a college education, maintain a certain grade point average, work independently of the trust for a period of time, engage in volunteer work or philanthropy, live without credit (or within his means) or postpone large financial commitments such as a home. All of the guidelines would be expressed as ones that the grantor has found helpful to himself and to friends or family but with the recognition that each person must find his own path.

A danger in including guidelines is that they can leave the beneficiary feeling as if the guidelines will become the rules for the distributions of the trust. In so doing, the beneficiary will feel he has no control over the process—a passive victim of the trustee's discretion. This effect would defeat the purpose of fostering autonomy, mastery and purpose in the beneficiary. To minimize the negative effect of the Guidelines, the beneficiary should be given the input to change the Guidelines to ones which will better carry out the Grantor's stated purpose for the trust.

IX. IT'S NOT JUST ABOUT DRAFTING: OTHER KEY COMPONENTS TO AN EFFECTIVE TRUST.

A. Communication

1. **Attorney-Client Communication.** Drafting a trust for a client should be a product of the relationship between the client and the attorney and their conversations about the client's desired legacy and his vision for his heirs. The attorney who meets with a client, categorizes him into one of his standard will forms and efficiently produces the estate planning documents will not have provided for the client's legacy. This type of practice will be replaced by automation within the next 10 years.

The attorney needs to listen and hear what is said and what is not said. We can have certain checklists to facilitate the conversation but not to be answered as yes/no or multiple choice and a form selected. A system, a checklist is what we are comfortable with, what we prefer. The bad news is that there is no such automated way to create a trust that provides for the client's legacy. The good news is that the creation of a trust to carry out the client's legacy is not something to be automated.

2. **Parent-Child Communication.** Above all, how the parents communicate with their child can be key. Consider two trusts with the exact same provisions. When one child asks whether he can use the trust to travel to Africa for the summer, he is told he needs to determine whether that's how he wants to spend the money in the trust—and whether he can afford to do that and pay for college, get cosmetic braces, and other things he wants to use the trust for.

As compared to the child who is doled out checks for every endeavor—whether frivolous or not. The child who is educated about the funds in the trust, and that choices about how to spend the trust money have consequences, has attached value to his decisions

and makes conscious decisions. The child who passively receives money without any discussion of whether this is a meaningful endeavor, or whether the trust can afford to pay for both this endeavor and other valuable experiences, has no value attached to the decision. He simply does things with little regard or investment in whether this is a valuable experience.

3. Trustee-Beneficiary Communication. The first element of control is information. The beneficiary who has no actual control but who is provided with information on the structure and administration of the trust will have a perception of control. The beneficiary will know what to expect and can plan his life accordingly. In addition to this communication, the relationship of the trustee with the beneficiary can be a powerful one, one which promotes mastery, increases self efficacy. If the trustee functions as a mentor, then the beneficiary will have a person to serve as a model, a person who understands him and can provide the necessary encouragement as the beneficiary continues on his path to discovering his own areas of mastery, goals and purpose in life.

B. Administration of the Trust.

Incentive trusts never mention the administration of the trust. The focus is entirely on a checklist of distributions. For the skills trust, a purpose statement is set forth and then the beneficiary is given autonomy on how to acquire those skills. The goal during this period of the beneficiary's life is to empower him to take control over his life and his future, and define what it is he wants in a career, a value system, and relationships. If the best indicator of the beneficiary's empowerment or self-efficacy is his perceived ability to control the outcomes in his life, then it is important that the beneficiary have some level of control in the trust administration. Control by the beneficiary, not by another, is the goal. This shift in control can only occur if the beneficiary is involved.

Rarely is the beneficiary a part of the drafting process, but all indications are that the beneficiary's involvement would be a positive, productive one. This does not mean the beneficiary is given a "say" in the structure of the trust, but rather, that the beneficiary is part of the conversation. The beneficiary should be kept informed of the administration of the trust, the investment of the trust assets and the distributions that are to be made. The beneficiary should be involved in the discussions. This period of administration should be considered a "transition" period, a period during which the beneficiary is being prepared to become increasingly involved in, or to take over the trust,

The trustee and beneficiary should meet semi-regularly to insure they have a dialogue and that expectations and information are clear. As a part of this process the Trustee should meet with the beneficiary at least once a year to discuss the beneficiary's personal situation and any request for distributions from the trust. If there is a request for a distribution, the Trustee will meet with the beneficiary at least once a month to obtain new information from, or provide new information to, the beneficiary until the distribution has been made, the issue resolved, or the distribution is rejected.

C. Shifting Control to the Beneficiary - One Step at a Time.

1. Obsolescence is the Goal. When the goal of a trust is to facilitate the development of independent, productive, self efficacious individuals, if the trust is successful the accomplishment of its purpose renders it obsolete. Therefore, the key to this trust is to make it transitional. Once a child has developed self-efficacy and has found a passion, and become a productive member of society, there is no need to continue the more restrictive provisions in the trust. Indeed, the child should be given increased control over the trust. One method of shifting control is for the beneficiary to become a co-trustee and eventually the sole trustee.

2. Information - with respect. The more information that the beneficiary has with respect to the structure, terms, financial investments, current and projected income, growth, management, permissible and planned distributions and future of the trust, the better. None of this information amounts to actual control. However, the beneficiary who has this information has the perception that he/she has control. In fact, the beneficiary does have control over his/her own life. The beneficiary knows what to expect (and not to expect) both now and in the future. The benefit of the information is gained even if the information received is that the beneficiary will not receive any distributions for the next ten or more years. Knowledge is a type of power. I added the phrase "with respect" for several reasons.

As we have seen the interaction of another person regarding information can impact the effect that information has. For example, a beneficiary can learn about coping strategies and even though he may perform better, the information will not increase his sense of self efficacy. However, if another person notes that the increase in performance was due to the use of the new

strategies, the use of the coping strategies significantly increased the individual's sense of self efficacy.

If the beneficiary is treated with respect and the trust provisions discussed with the beneficiary, the information will be more positive than if the beneficiary is provided the information as a defensive reaction to the beneficiary or if the beneficiary is simply sent the trust document alone. In addition, frequently trustees will send out packages of information that are voluminous reports technically containing all relevant information but which are incomprehensible. This information is not a respectful providing of information. It is better to invite the beneficiary to a meeting and have the information provided in an understandable manner while discussing with, and inviting questions from, the beneficiary.

3. Involvement. The beneficiary can be involved in the trust administration or decisions in a number of ways. The beneficiary can be invited to provide input even though the input need not be followed. The beneficiary can be one member of a trust committee that meets to discuss the trust. Having this position provides the beneficiary with more involvement even though the beneficiary cannot control any of the administration.

4. Perceived to Actual Control - Trustee Position. When the trustee is made a co-trustee, the beneficiary has a position of authority and control. However, since co-trustees must act by majority vote, the beneficiary does not have any actual control in terms of making distributions to himself. However, the beneficiary can prevent action from being taken. The beneficiary can then be named as sole trustee. His position as trustee can be one that is reviewed periodically or can be one that is not reviewed.

5. Unconditional Distributions. Mandatory distributions also provide the beneficiary with a level of control. The beneficiary cannot control the distributions but the beneficiary can rely on the distributions and know that they will not be withheld. No strings attached distributions are effective in putting the beneficiary in control of his/her life. The distributions can be a mandatory distribution of income, a percentage of the value of the trust that are either level or increase at certain ages and/or mandatory distributions of principal.

6. Conditional Distributions within Beneficiary's Control. Conditional distributions can easily slide into a "if then" distribution. However, having a mandatory distribution of a percentage of the trust after the beneficiary reaches certain benchmarks can be effective if the benchmarks are not rigid. For example, mandatory

distributions begin when the beneficiary has either 1) graduated from college, 2) been actively employed for a number of years or 3) achieved certain savings goals, provides the beneficiary with more control than any one of these would alone.

7. Withdrawal Rights. The trust can have discretionary distribution of income and principal and the beneficiary can have no power to change the investment process of the trust, but still have a sense of control if the beneficiary is given withdrawal rights from the trust. The beneficiary could have the right to withdraw a percentage of the corpus each year and the withdrawal amount could increase at certain ages or on the occurrence of certain events (e.g. college completion, employment goals, savings goals, drug free status for a number of years). The trustee may be making regular distributions to the beneficiary each year but the ability to withdraw a percentage from the trust provides the beneficiary with the perception that of control and disconnects the beneficiary from the perceived whims of the trustee.

8. Input on Carrying out Distributions. The beneficiary can be given the ability to provide guidance on the type of distributions that are appropriate to carry out the purposes of the trust. The purpose can be stated in general terms but the beneficiary can be authorized and encouraged to develop a personal plan that carries out the purposes for the beneficiary.

9. Guideline Revisions. If the trust contains guidelines for the distributions from the trust to carry out the stated purpose of the trust, the beneficiary can be given the ability to modify these guidelines.

10. Flexibility to "Restart" the Trust. A way to rework the structure of the trust to one that considers the beneficiary's changed circumstances, personality and objectives is to have the trust include a decanting provision. Decanting is when the trustee distributes the trust principal to another trust pursuant to a trustee's discretionary authority. Decanting can be used to address changes in state law, modifications that will not affect the grandfathered GST-exempt status of a trust, or a change in circumstances that affect the management or administration of the trust. Here, decanting can be a means to build flexibility into a trust as the beneficiary develops. The decanting provision can be one that the Trustee can exercise at any time or can be conditioned on the beneficiary having met certain benchmarks. Any kind of "if then" provision for turning control over or decanting will always run the risk of decreasing the motivation of the child.

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