USING INCENTIVE CLAUSES
TO INFLUENCE BEHAVIOR

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ADVANCED DRAFTING: ESTATE PLANNING
& PROBATE COURSE
October 26-27, 2000
Houston, Texas
CHAPTER 16-A
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Straight from a win for the Atlanta Braves this fall, star pitcher Tom Glavine is talking to his lawyer about how and when his two children will inherit his wealth. With an $8 million annual salary, the 33-year-old Mr. Glavine wants to set up a trust that provides for his children -- but on his terms.

"Obviously I'm concerned about giving my children that kind of wealth," says Mr. Glavine, who played in this year's World Series. "I don't want my kids to feel like they don't have to do anything in life." His solution: a "family incentive trust" that provides them with more money if they act in ways he approves.

To make sure his children work -- "I wasn't born with a silver spoon in my mouth," Mr. Glavine says -- he'll match their earned income up to $100,000. And though he vows "I'm not going to make my son play baseball," he is thinking about making extra money available to help his kids engage in sports.

When four-year-old Amber tells her father she wants to be an "animal doctor for lions, tigers and baby giraffes," Mr. Glavine has his attorney, John J. Scroggin, add another incentive: $200,000 to set up a veterinary practice or any other business, as long as she has done well in school.

But when Amber one day has children of her own, her father wants to offer a different incentive. "My mom was there for me every day when I got off the bus," the pitcher recalls. "There's great value in a mom staying home. I want Amber to be there for her kids." So he discusses a possible monthly payment of as much as $10,000 if Amber is a stay-at-home mother.

Say hello to the latest fad in estate planning for the affluent -- tying the transfer of wealth to descendants' acceptance of one's core values.

The notion is quickly catching on as an antidote to the "affluenza" of heirs afforded instant wealth. "Incentives are the new trend for the millennium," says Rodney Owens, a Dallas attorney whose clients are packing incentives -- and disincentives -- into their estate plans. Many of the trusts deny payments, for instance, if children don't set up prenuptial agreements or if they fail periodic drug tests, but reward charitable work or participation in family foundations.

"The desire to mentor after death is creating a whole new industry of trust babies," Mr. Owens says. "But these trusts have powerful strings attached."

Some billionaires such as Warren Buffett and Bill Gates in recent years have endorsed the idea of leaving a relatively paltry amount to offspring so they'll have the drive to make something of themselves. This new theory of incentive planning takes a different approach: Go ahead and give them the money -- as long as they play by your rules.

Of course, wealthy parents through the years have attached conditions to the passing of their fortunes. But what's new in the incentive approach is the wide-ranging and highly specific nature of the parental provisos. Indeed, parents are often picking incentives that correlate to strikingly idiosyncratic concerns. "The only limit is the imagination," says Renno Peterson, an attorney in Sarasota, Fla. "You can tailor it to the individual. One client whose son has dramatic anxiety attacks," he says, arranged for higher trust allotments "if he's in treatment." Another man whose brother was killed in a car crash instructed Mr. Scroggin to include in his children's trust a $10,000 payment for each year they don't have a driving violation.

Most of those interested in the incentive trusts have also made their fortunes in recent years, and have a negative bias against inherited wealth. And with scores of estate and financial planners holding seminars to attract business, the concept is proving enormously popular as a form of "financial parenting," as well as a good way to avoid estate taxes.

The topic is so in vogue that the premiere annual estate planning conference, coming up in January in Miami, will feature a presentation called "Planning to Influence Behavior: Guiding (Controlling) Your Children and Grandchildren." At a Charles Schwab Corp. conference in San Francisco last month, clients with multimillion-dollar accounts learned, with the
guidance of top lawyers, brokers and a psychotherapist, how to give children "more than financial wealth." The National Underwriter, a financial-services publisher, recently bought marketing rights to the "FIT-Family Incentive Trust" plan designed by Mr. Scroggin, Mr. Glavine's attorney, to roll out to financial planners and insurance agents across the country.

A carrot-and-stick approach to inheritance makes others uneasy. "Even if the parents try to make it sound positive by using 'incentives,' the whole notion implies distrust," says Catholic University sociology professor Dean Hoge. "Even after the parents are dead, a child will feel like, 'I'm still being put to a test.'"

Robert Franklin, head of the Interdenominational Theological Center in Atlanta, says that "while the actions being encouraged are laudatory, the motive and intent behind the actions are likely to be a selfish play for the money. You'll have children doing the right things for the wrong reasons."

Some parents acknowledge that the topic is so prickly they don't even want to broach the subject with their children. They get the lawyer to deliver the details of the incentive package, or wait for it to be a surprise after they're gone. At the other extreme are parents who make it an intensive project, hiring "facilitators" to help draft a "family mission statement."

Daniel and Charmaine Warmenhoven, for example, recently spent two days cloistered with a team of advisers at the Inn at Spanish Bay in Pebble Beach, Calif., hammering out an elaborate incentive arrangement. The couple, who met at Princeton University and married after graduation 26 years ago, raised two children while Mr. Warmenhoven moved up in the high-tech field. Today, largely due to the huge run-up in the stock of the company Mr. Warmenhoven now heads, Network Appliance Inc., the Warmenhovens are worth more than $200 million.

"We don't want the money to be a burden or a negative influence," Mr. Warmenhoven says. "We want to provide a positive structure with incentives for the children to make the most of their lives."

So the Warmenhovens, who are 48 years old and live in the San Francisco area, met with attorney and certified public accountant Robert A. Goldman, whose clients typically have net worth exceeding $30 million. Mr. Goldman played something of a psychologist, asking the couple to imagine what they would tell their unborn grandchildren about what mattered most to them.

"Money shouldn't be your goal," Mrs. Warmenhoven said. "We were happy before we had money. And happiness shouldn't be your goal -- it's the byproduct of a goal-oriented, full life." The attorney told them, "This language can be incorporated in your trust so it's passed down in future generations. They won't just know Grandpa was some guy who got rich with computers."

Mr. Warmenhoven, who believes his two teenage children are "well grounded," responded immediately. "This is a big issue to me. I've not yet met my grandchildren, but I'm concerned about how they will be raised with wealth in the family." And so, Warmenhoven descendants will have trusts with an on-off faucet for distributions based on their adherence to family philosophies.

For instance, if an heir isn't "doing something to the best of his or her ability," funds won't be readily available. "whatever you choose, be the best you can be," is one of Mr. Warmenhoven's trust requirements. However, to prevent an independent trustee from arbitrarily deciding whether the heir measures up, the Warmenhovens are putting in criteria such as business achievement, academic excellence or social contribution.

A family limited partnership will allow the children to learn how to manage investments, and a family foundation will require them to participate in charitable giving. "I want it to be kind of like the Kennedys or Packards -- a structure is in place with a certain set of expectations from the family," Mr. Warmenhoven says.

To increase the odds of family gatherings, the couple added a special incentive -- ownership ultimately by the children of two stunning beachfront compounds in Carmel, Calif., and Maui, Hawaii. "I want them to be kid magnets," Mr. Warmenhoven says.

As incentives to get the children active in making their own business plans, they are setting up a procedure under which the partnership will finance ventures "if at least 20% of the money comes from the outside," the CEO says.

But Mrs. Warmenhoven, who works part time at the Catholic Diocese of San Jose, Calif., doesn't want money to be given only if they are making money. "They could be a missionary," she says. So Mr. Goldman drafts language so "the incentive is to demonstrate you're a productive member of the family, for oneself or for others." The children's interests in the family partnership also aren't assignable or transferable. "It's a pre-prenup," the CEO says. "It's like we set up the prenuptial agreement before their selections of mates."
Another couple -- Microsoft millionaires who are both 38 years old -- had more initial qualms about setting up an incentive trust for their two-year-old triplets. "I don't want to be too controlling from the grave," Greg Tracy says.

Ultimately, Mr. Tracy says, his and his wife Monika's anxiety about inherited wealth -- and social conscience -- won out. The triplets "have to pretend the money isn't there and get about their lives," Mr. Tracy says. "We don't want them to live just waiting for the next trust distribution."

The Tracys both started at Microsoft in 1985 and quit a few years ago after their stock became worth millions. "It was like hitting the lotto, but we worked hard and climbed up the ladder," Mr. Tracy says. "Now we just do the triplets."

His lawyer Dennis Brislawn proposed placing the stock and real estate in a master family limited partnership with gradual gifts of the partnership to trusts for each triplet.

"The whole estate becomes like a big family business," says Mr. Tracy, who lives in the Seattle area. "The triplets won't just get lump sums. They'll get parts of it as they do certain things."

So the trusts require that the children -- Peter, Sophie and Charlotte -- demonstrate financial responsibility, gainful employment and lack of harmful dependencies. Money will flow depending on their behavior. If a child is getting an education or working, the trust can make liberal distributions for things like buying a house or starting a business. And the Tracys, who underwent in vitro fertilization to have their triplets, will allow trust distributions if any child needs infertility treatments to have children. "Starting a family is just as valid as starting a business," Mr. Tracy says.

But the distributions are curtailed if the child is on drugs, abusing alcohol, in a cult or following the "beach bum" lifestyle, according to Mr. Brislawn. Mr. Tracy, who already sees major personality differences in his three toddlers, wants to add some flexibility in the "gainful employment" requirement. "If one of them wants to be an artist or a musician and stay in a studio, that's okay," he says.

They plan to incorporate language to encourage charitable giving, but want certain restrictions. "I definitely don't want our money to go to militaristic, gun-toting extremists," Mr. Tracy says.

Other trusts are blunt in approach. Durward Owen, an accountant in Pine Bluff, Ark., is giving his son a single but very powerful message: Don't blow the inheritance. Mr. Owen will first give his son only half of his distribution. After five years, the son's assets will be audited. If the equity is the same or greater than the first distribution, he can have the rest; if it's less, he can't get the remainder. "The whole purpose is to give my son an incentive to manage his assets well," Mr. Owen explains.

Robert Esperti, an attorney in Tucson, Ariz., drafted a trust for one client that all but requires the beneficiaries to stay in their marriages. "Devotion to family was a big issue to this client," he says. "Greater distributions will be made if the descendant is married to the person who is the mother of his children and they're living together in the same house."

Florida real-estate developer Lamar Seals, who started as a teacher, made education a primary focus of his trust. He would give $15,000 a year for spending money if an heir is pursuing an education full-time, and $5,000 for each degree obtained. His trust also would provide a $15,000 income supplement for any descendant who becomes a teacher.

Despite these individual variations, the clear impetus for the growth of incentive-based planning is the effort to prevent the children from becoming the old-fashioned trust fund baby -- the classic ne'er-do-well who hangs out at the country club or has money to burn on bad habits. In capital letters in Mr. Seals's trust document, he states: "No descendant shall be allowed to live off this trust."

Mr. Glavine, the Braves pitcher and two-time Cy Young Award winner, will require beneficiaries to submit their W-2 tax forms to the trust for documentation of employment and earnings. "I want my kids to realize they need to work," the baseball star says. "They won't get a free ride in life."

To Mr. Glavine, the key is tying distributions to positive incentives so "they can't just take whatever they want," he says. "They can't say, 'I feel like a Ferrari today.'"
When Bernard Manger died in 1995, he left behind a will that disinherited two of his four children from his $48 million estate. The reason: They had married people who weren't born Jewish. He counted on his nephew to enforce his wishes.

His nephew is Sen. Joseph Lieberman, the vice presidential candidate.

"He was like an older brother to me," says Mr. Lieberman, a Connecticut Democrat, in an interview. Nevertheless, he adds, "I was shocked by the will and in a certain sense embarrassed by it."

The Manger will is an intriguing family tale, but also something more. It thrust Mr. Lieberman into a family role that is in many ways a metaphor for the role he now plays on a national stage: as a conciliator trying to bridge the world of Orthodox Jews and the more secular society of millennia America.

Ben Manger was a self-made man who parlayed a trade-school education and a stint working on airplane wiring in the Army into a small business started in his mother's garage. Over the years, his company, Manger Electric Co., became an international supplier of high-tech wiring, and Mr. Manger, who lived in Stamford, Conn., amassed a fortune through frugality and hard work.

Mr. Lieberman lived with his parents in his grandmother's home in Stamford as a young boy, for years bunking in the same room with his "Uncle Bennie," his senior by 22 years. The two men remained close, and in the early 1990s, Mr. Manger informed the senator that he had named him executor of his estate.

During his lifetime, Mr. Manger gave away large sums, sometimes anonymously. Learning that a cemetery for the poor in New York lacked proper markers, he donated enough to put tombstones on the existing graves and to finance proper burials for future deceased paupers, says his niece Judith Bragin, the senator's cousin. He never let anybody pick up a check. He played golf and racquetball and boated, and "he had a dry sense of humor," Ms. Bragin says. "He was a big tease."

Mr. Manger was a strict but devoted and caring father, relatives say, though at times the relationship with some of his children could be stormy. "Any parent has a stormy relationship with his children at times over certain subjects," says his youngest daughter, Renee Manger. "But he was a good, loving father."

As he grew older, Mr. Manger became more and more concerned that intermarriage was threatening the existence of the Jewish people. And he worried that his own family was contributing to the diminution because his eldest daughter and son married people who weren't born Jewish. Both spouses converted to Judaism, though not in the Orthodox fashion Mr. Manger would have liked. Though he "strongly disapproved," as he said in his will, Mr. Manger attended their weddings.

In 1976, he disinherited his daughter Joyce Maskart, now 50 years old. Three years later, he cut out his son Marc Manger, now 46. When he rewrote his will in 1994, he made his intentions as clear as they could be. "I deliberately and intentionally bequeath and devise nothing [to the two] since they have already departed from the Jewish religion," he stated. To make sure, he prohibited reinstating anyone who failed his standards, even for a short time, and included a provision barring anyone who contested the will from getting any money.

Mr. Manger's two other children, twins Stephen and Renee, now 41 years old, were to receive $50,000 a year for life, adjusted for inflation -- so long as neither married outside the faith and each lived "as a Jew."

"Those of us who were closest to him pleaded with him to leave it open enough" so the two disinherited children could become beneficiaries, says Ms. Bragin, the niece, to whom Mr. Manger willed $25,000. "I pleaded with him, 'Ben, don't do it. You'll be sorry for it afterward.' But he said, 'Judy, if any kids are allowed to do this, this will be the end of the Jewish people,' " she recalls. "Once he made up his mind, there was no way he was going to change it."

In the spring of 1995, Mr. Manger got up from bed one night to fetch a glass of orange juice, fell down some stairs and hit his head on the tile floor. He lapsed into a coma and died about two weeks later at the age of 75. Two surprises awaited Mr. Lieberman, the executor: His uncle had amassed
a $48.2 million estate -- far more than anyone had figured -- and his two beloved cousins weren't legally entitled to any of it.

"I was upset about it and troubled about it, and I felt badly for my cousins," Mr. Lieberman recalls. "These were my cousins and I love them."

Especially puzzling to Mr. Lieberman was the fact that "my uncle was not strictly observant himself." Moreover, he says, "People in my family married non-Jews, and we're still close."

The will requires Mr. Lieberman to play a rather intrusive role in the lives of his cousin's families. Mr. Manger pledged to pay his grandchildren's college tuition -- so long as they attended Sabbath services twice a month and joined a campus-based Jewish organization. He also required his beneficiaries to either have jobs or care for their young children. He authorized Mr. Lieberman "to incur all reasonable expense and to hire all services and persons" needed to enforce the will. But the senator says, "We're not going to hire inspectors; we're family."

The senator quickly moved to try to modify the will's harshest provisions, interpreting his own appointment as trustee and executor as a signal from the grave. "He knew who he was making the executor," Mr. Lieberman says. "He knew that these were my cousins and that I love them, and that by my nature I'm not as hard as the will was. He knew what I would do."

Mr. Lieberman was aided in his search for guidance by what he now calls a "miraculous expression of what my uncle wanted." Going through the father's effects shortly after the accident, the disinherited son, Marc, found an unsigned draft of a more recent will in his father's briefcase. According to Mr. Lieberman, that document offered to reinstate the two children, as long as their spouses converted to Judaism according to Orthodox rites. "He mellowed out in the end," explains Renee Manger, the daughter.

The senator then convened a series of family meetings and telephone conferences to work out an amendment to deal with the disinherited children, based on the unsigned draft. The two spouses subsequently converted according to Orthodox customs, and the children now are beneficiaries. Marc and Joyce couldn't be reached for comment.

Though humanely motivated and approved by a probate court, the senator's actions raise a question: Did he have the right to overturn the wishes of a dead man who had trusted him to carry out his will?

Estate lawyers talk of what they call the "dead hand of the grave theory" -- the idea that the deceased shouldn't be able to unduly tie up the lives of those they have left behind. "The more unusual and restrictive a will becomes, the more doctrinaire it is, the greater the chance it will be disputed" in court, says Robert Shapiro, head of trusts and estates at Ropes and Gray, the Boston law firm that specializes in managing estates of the wealthy.

Mr. Lieberman says simply, "I felt what I was doing was right; I was carrying out his intentions."
I. SCOPE

Trusts containing provisions designed to encourage beneficiaries to conduct themselves appropriately (at least in the eyes of the settlor) by relating their conduct directly to trust distributions have been used by many generations of draftsmen. The use of customized provisions to control behavior, to preserve family heritage and values, and to protect beneficiaries from their worst impulses has long been the accustomed practice among the very wealthy, who knew with certainty that they would be passing along estates more than adequate to meet the basic needs of their descendants.

The explosive economy of the past decade has spawned countless new millionaires and even billionaires. These clients typically acquired their wealth the old-fashioned way - they earned it. Unaccustomed to having such wealth, many are understandably uncomfortable with the negative effects that such wealth may have on their children and grandchildren. Thus, the use of incentive clauses in trusts has gained a new popularity among the _nouveau riche_ who are our clients, persons who did not inherit wealth but rose from modest means to find themselves possessed of more money than they ever thought possible.

Clients who now have wealth far beyond their expectations invariably say to us something like “We know what it means to have to work hard to make a living, and we want our children to learn those important lessons themselves. It is important to us that our children/grandchildren grow up to be worthy adults. We don’t want _our_ money to spoil _their_ characters.” From statements like these evolve the notion of using incentive trust clauses, which make perfect sense to our clients and make us look like heros when we can provide just the right language.

Incentive clauses, while well-intentioned, can be very dangerous and very damaging and thus must be considered and used judiciously. In this arena, our skills as counselors must be called upon, as we should advise our clients of all of the permutations of the use of such clauses, even when the clients do not wish to hear what needs to be said. That is the purpose of this article - to share some insights and observations about the use and misuse of incentive clauses and to provide some examples (good and bad) of clauses currently in use.

I would like to thank Craig Adams, Art Bayern, Professor Gerry Beyer, Ron Cresswell, John Gruener, Barney Jones, Professor Hank Lischer and Hal Moorman for contributing stories and examples of good clauses that they have used and bad clauses that they have encountered in their practices. The excellent sample clauses at the end of this article that are marked with a ** were taken from a compilation of forms submitted by Fellows of the American College of Trust and Estate Counsel and assembled by Jon J. Gallo and Anne K. Hilker for presentation at ACTEC Meetings in 1993, 1994, and 1995.

II. “DO AS I SAY, NOT AS I DO”

Many of our clients who have worked for their wealth have observed, or heard stories of, members of younger generations born into wealth who have proceeded to lead wasteful, profligate lives. Regrettably, children born into wealth often _do_ take it for granted and grow into adulthood without the work ethic or drive to achieve that motivated their parents. The fault may lie entirely with them, although just as often the blame should be shared by the parents. People who are driven to succeed at the highest levels spend long hours at work and sacrifice their personal lives for their careers. The financial rewards might be meaningful, but the personal costs to all members of the family are equally meaningful. Back in the day (as my son likes to say), fathers and sons, mothers and daughters worked side by side or, at the very least, spent time around the family dinner table learning from one another. In those ways skills and ideals were passed along while working together, moral
lessons were passed from one generation to the next along with the mashed potatoes, and children heard of and often observed first-hand the commitment and sacrifices of their parents that ensured the financial well-being of the family. Many children of wealthy families today have little idea of what their working parents actually do each day to earn a living and have virtually no appreciation of the hard work, commitment and personal sacrifices that have contributed to the family’s success.

It is ironic that often the clients who are most interested in directing the behavior of their descendants are now leading the very lifestyles of conspicuous consumption that they do not wish to provide for their children, once grown. The difference, of course, is that the clients have earned the right to drive expensive cars, have vacation homes on each coast, and live in mansions. They would be delighted if their children could succeed just as fabulously on their own, but they are fearful of creating monsters who want the best and expect someone else to pay for it. Thus the use of the carrot and the stick - encourage and even reward education and other accomplishments, punish failures to achieve.

Incentives tend to assume that children and grandchildren all have the same potential and that they just need to be properly motivated to achieve. Inherent also in most incentive clauses is a judgment - only if you live up to my standards are you worthy. A little overstated, perhaps, but as counselors we should not disregard the messages that are sent with our drafting. As the sample clauses at the end of this article show, a well thought out clause can encourage all types of productive behavior; a poorly thought out clause can breed resentment or a sense of failure with negative consequences far beyond the expectations of the client.

III. WHAT TO ENCOURAGE?

While certain types of behavior or achievement are typically included in almost all incentive clauses, the circumstances, life experiences and idiosyncrasies of the particular client often give rise to creative incentives and disincentives. Be cautious - the more unusual or inflexible the client’s expressed desires are, the more difficult it will be to draft a clause that will work truly and fairly and that will not backfire on the family or the draftsman.

A. Education.

Most parents and grandparents want to assure that their descendants have access to quality educations, believing that a good education lays the foundation for success in life. The most common provisions of this kind are directions to trustees to give preference, when making distributions, to the educational needs and desires of the beneficiaries. Often trusts for classes of beneficiaries are structured as “pot” trusts that will not break into separate shares for each beneficiary until the youngest of the class has reached a certain age (typically 21 or 25, when their educations might be complete), thus encouraging beneficiaries to proceed with their educational plans while the related expenses are being shared by all in the class. This type of provision gives beneficiaries access to education by providing the necessary financial resources, the settlors hoping that the goal of acquiring an education will be a sufficient end in itself. Well-drafted provisions today encompass varied types of education, including vocational and non-conventional training, and may provide for living expenses to be paid with trust assets as well.

Difficulties arise, I believe, when provisions designed to encourage education go beyond the traditional forms described above, especially when the beneficiaries to whom they will apply are not yet known to the settlors. Who among us can predict the forms that higher education will take in the future, given the incredible changes brought about by the e-revolution? Will the terms that we use today to describe successful
education accomplishment (e.g., a 4-year degree from an accredited educational institution) even make sense when an infant grandchild reaches that stage in his or her life? How do we describe a “virtual” education? On a different front, who can anticipate the disabilities, mental or physical, that may confront beneficiaries yet to be born, or the special abilities that may lead an exceptional child away from traditional education. Facilitating education by making funds available is one thing; rewarding or punishing beneficiaries based on specific performance criteria applied far in the future is quite another.

B. Self-sufficiency.

When asked, most parents and grandparents who are establishing trusts for their descendants want the trust assets to be no more than a supplement to better the lives that their descendants are making for themselves. No clients, when asked, want their descendants to live entirely off of the trust assets unless injury or disability leaves no other recourse. Yet crafting an objective criteria for determining self-sufficiency is very difficult. Do you leave the judging to future employees of corporate trustees whose identities are unknown or, perhaps even worse, to other family members (who can seldom be impartial). Who among us can determine whether any person is living up to his or her “full potential”? The difficulties of assessing which beneficiaries are properly self-sufficient has led to the currently popular use of income-matching distribution provisions, which now appear in many incentive clauses. The concept is to allow the beneficiary to establish his or her own access to trust distributions by tying those distributions to the beneficiary’s own earned income. If the beneficiary is earning a lot, the distributions to her can increase. If the beneficiary is earning little, trust distributions will match his income but probably will not result in a financial windfall. In other words, the rich get richer and the poor stay poorer. As the sample clauses at the end of this article show, while tying trust income to W-2 statements certainly provides a verifiable and ascertainable standard for distributions, it is a minefield that can produce very unexpected and unwanted results.

C. Worthy Character/Contributions to Society.

While hard work and financial self-sufficiency may be the only accomplishments some parents and grandparents wish to reward, many others would like to recognize and support the efforts of those descendants who do not choose to pursue high-income careers but follow, instead, careers that render important service to others. Few clients, when asked, will want to penalize, even inadvertently, the beneficiary who chooses to be a teacher or a social worker instead of a doctor or lawyer. The difficulties arise, of course, in trying to describe such beneficiaries and to separate the worthy from the deemed unworthy. After all, isn’t a ski instructor a teacher? And isn’t a member of a grunge rock band just as much of an artist as a ballerina dancing with an established company?

D. Preserving Family Values and Beliefs.

The desire to influence and even control this type of behavior beyond the grave is perhaps the very strongest in some parents and grandparents. There are endless cases dealing with will and trust provisions that penalized beneficiaries who married outside of the settlor’s faith or who married a person of another specified faith which the settlor particularly abhorred. For the most part these provisions (which are almost always punitive) have been upheld, the courts believing that a donor should be able to establish certain criteria to define with whom he wishes to share his bounty. The line is drawn when the provision is deemed to encourage illegal (i.e., contrary to public policy) behavior, such as a clause that excludes a beneficiary until such time as she divorces her current husband. But clauses that are not aimed at specific individuals but seek generally to preserve religious or moral
beliefs are typically upheld by the courts when challenged.

Having said that, our challenge is to encourage the client who wishes to include such a provision to objectively review the possible consequences of his or her dead-hand control, for the results on the beneficiaries are often unnecessarily cruel and not what the client would have intended, had he been there to judge for himself. See, for example, the excerpt from the Wall Street Journal article on the estate of Senator Joseph Lieberman’s uncle, who sought to disinherit those of his children who married persons not born into his chosen faith. Does such a provision work to preserve the religious traditions of the family, or encourage relationships outside of wedlock? Will a provision that seeks to preserve the family unit by penalizing a beneficiary who divorces serve to keep a family together for the right reasons or trap a beneficiary in an abusive or unfaithful union?

IV. WHAT TO DISCOURAGE?

A. Self-destructive Behavior.

What client wishes his or her money to be used to support a lifestyle of substance abuse? This is the one disincentive upon which all clients can agree. When a beneficiary is known to have a substance-abuse problem, the drafting of the criteria for discerning inappropriate conduct is made somewhat easier, for appropriate tests and behavioral criteria can be arrived at by consultation with the family, doctors, etc. The drafting difficulties, of course, are compounded when a client wishes to include punitive disincentives that will be applied to beneficiaries currently without such problems, perhaps even beneficiaries yet to be born. How do you establish the method by which a trustee sometime in the future can ascertain whether a beneficiary is living a substance-free life? Must all beneficiaries undergo periodic tests, being presumed guilty until proven innocent? What psychological impact might that have on a beneficiary? Can the trustee use his or her own judgment to determine when and how often testing is needed? What trustee, other than perhaps a family member, will be willing to undertake the duty of exercising such judgment?

B. Profligate lifestyles.

Few parents wish to reward their children or grandchildren for laziness, lack of initiative or living beyond their means, but how can such traits be discouraged through drafting? With all of their pitfalls, incentive clauses which match earned income to trust distributions might serve to motivate a beneficiary who otherwise sees no need to exert himself or herself in the working world. If even income-matching is not likely to motivate a beneficiary whose lazy propensities are already well established, the client who believes in “tough love” might wish to provide the beneficiary with only a fixed stipend adequate to provide him or her with the basic essentials, but no more. Such a stipend provides no incentive, of course, but it prevents trust assets from being wasted supporting a lazy beneficiary who the donor does not wish to support.

As an aside, while some people are assuredly just born lazy and good-for-nothing, most become that way because they are allowed to. It is ironic how many wealthy clients who are unmindful of their children during their formative years or who are unable to practice tough love themselves are anxious to put the burden of exercising discipline and tough love on others.

V. DOs AND DON'Ts FOR DRAFTING INCENTIVE CLAUSES

A. DO ASK WHY?

Are your clients talking with you about incentive provisions after having given them a great deal of thought, or are they simply reacting to the latest article in the Wall Street Journal or story heard at a social gathering? Incentive clauses always sound great in concept; why wouldn’t every responsible donor want to tie them into their gifts? On
closer examination, however, clients might see them as the minefields that they can be, and modify their desires accordingly. We should not assume that clients really understand what they are asking for.

B. DO ASK WHAT?

What do your clients really hope to accomplish, in their own words and not in quotes from others. Has this truly been thought out? Do they appreciate the difference between what they hope will come to be and what they can/should try to influence?

C. DO ASK TO WHOM THE INCENTIVE WILL APPLY?

Are the characters of the persons whose behavior will be rewarded/influenced known to your clients, or are they still infants or yet to be born? Drafting to influence the conduct of persons whose characters, abilities, strengths and weaknesses are known or at least suspected is vastly different from drafting to influence the conduct of generations yet to be.

D. DO ENCOURAGE FLEXIBILITY & DISCOURAGE CONTROL FROM BEYOND THE GRAVE.

Counsel with your clients about the psychological impact on beneficiaries who must live up to a certain standard or dance only to the clients’ particular tune in order to be deemed worthy. Teach them that the future is always impossible to predict accurately.

E. DO ENCOURAGE REWARDS & DISCOURAGE PUNISHMENT.

No only are rewards more likely to encourage the desired behavior, they are far easier to draft and administer. Punishments are crueler psychologically and more likely to give rise to a challenge. What trustee wants the burden of proving a negative, such as defending its decisions that the beneficiary has failed to be a serious student or is not a productive member of society?

F. DO URGE FINANCIAL REASONABLENESS.

To whose benefit is tying up a multi-million dollar trust fund with criteria fairly certain to assure that the corporate trustee will benefit most? Why should an entire $50 million estate be dedicated to providing a mere stipend of $50,000 a year to those beneficiaries who toe the line? If the client truly does not want to support his descendants in the lifestyle to which he himself has become accustomed, encourage him to give the money to someone else. There are certainly more than enough needy people and worthy causes who could benefit by sharing in his success. Also, be sure to provide gifts-over in the event incentives are not met or penalties are triggered, so that someone worthy, whether other individuals or charities, will benefit.

G. TEST THE CLAUSE !!!!

As lawyers, we are trained to draft with the end result in mind. Where incentive clauses are involved, that means drafting to encourage the desired behavior. Often we do not stop to think of how our clauses will impact the beneficiaries who do not need such financial encouragement to lead productive lives. A perfect example arises with the use of an income-matching clause. It makes perfect sense when applied to a known under-achiever, but what of the child or grandchild who grows up to earn $1 million + a year? Does he really need (or want) an additional $1 million taken from his trust? And should he receive such a windfall when his sibling, who is a teacher, receives only $35,000 in matching funds?

We should test each incentive clause that we draft. Ask a colleague unfamiliar with the client’s circumstances to review it objectively. Better yet, choose four or five other multi-generation families (some functional and some dysfunctional) that you are familiar with and apply the clause to
them. Are the results in all cases what the client seems to want? Finally, don't fail to look objectively at the persons who, as trustees, will be asked to implement these clauses. Family members are sometimes forgiving, sometimes far more judgmental than your client would have been. Is it fair to ask a family member to take on the burden of determining the relative success and worth of other beneficiaries, especially when a negative conclusion might result in a lawsuit? Institutional trustees may be no better. Corporate trustees are increasingly unwilling to exercise discretion to make the tough decisions without a mutual release or approving judgment to protect them. Does the client understand the administrative delays and expenses that may be associated with implementing an incentive plan? Does he realize that, in all likelihood, a thirty-something trust officer may be the one actually making the decisions?

VI. AN ALTERNATIVE TO USING INCENTIVE CLAUSES

It is curious that clients who were not themselves “spoiled” by wealth and want so badly to protect their children from the evil consequences of having too much too soon are still so intent on leaving all of their assets to their descendants. Perhaps the examples of parents like Warren and Susan Buffet and Bill and Melinda Gates, who are open about their decisions to leave the vast majority of their wealth to charities, will lead others to consider the options of dividing their estates among several categories of worthy recipients. Leaving descendants with an adequate safety net for the catastrophes of the future while setting the example of generosity to others in need is surely better for all concerned than tying up significant wealth in trusts that are so near and yet unattainable to beneficiaries who fail to pass each test.

VII. SAMPLE INCENTIVE CLAUSES

The clauses and forms that are included at the end of this article range from the simple to the sophisticated, from the mandatory and punishing to the flexible and encouraging. They were assembled from a variety of sources and are presented for the purpose of sparking a discussion of whether, when and how such clauses should be used. Most persons who offered suggestions or contributed clauses for this presentation opined that they had no idea whether their clauses would actually work or not, as they had not yet been tested, but they were anxious to see how others dealt with these problems. NEITHER I NOR THE STATE BAR OF TEXAS WARRANT (OR WOULD DARE EVEN SUGGEST) THAT THE CLAUSES APPENDED TO THIS ARTICLE WILL ACCOMPLISH THE PURPOSES FOR WHICH THEY ARE INTENDED. THEY ARE NOT INTENDED TO, AND CANNOT, REPLACE THE INDEPENDENT JUDGMENT OF EACH ATTORNEY WITH RESPECT TO THEIR APPLICABILITY, ACCURACY, VALIDITY, AND CONSEQUENCES, TAX AND OTHERWISE. The commentaries in italics are my own, and are offered to attract your attention to what I perceive as the good and/or bad attributes of the clauses presented.
PROMOTING EDUCATION

Education clauses are probably the most used (and most appropriate) incentive clauses. The types of permitted expenditures/distributions are fairly specific, as are the criteria for continuing distributions.

CLAUSE NO. I.

This is a fairly typical educational clause. Some clarification of “high performance level” should be added, however. Does it refer to the level of the educational institution, or the level of the beneficiary’s performance? Note that only a C+ average is required for continued distributions.

- Settlor desires that the beneficiaries be motivated to pursue educational studies at a high performance level. In that regard, distributions shall be liberally made from the trust estate to enable a beneficiary to pursue his or her educational objectives. Appropriate educational expenses shall include, but not be limited to, tuition, books, supplies, fees, room and board while living away from home, and miscellaneous expenses appropriate to the pursuit of education. However, the beneficiary shall maintain a minimum grade point average of C+ [is this a “high performance level?”] and shall demonstrate that he or she is setting forth substantial efforts fulfilling his or her educational goals.

CLAUSE NO. II.

This is another typical education clause which includes a reasonable living allowance (thus teaching the student to live within a budget) and the option for a cash reward upon graduation. Good faith and not performance is the standard. It might need to be broadened to include alternative forms of education, especially for the youngest generations.

- It is my desire to provide particularly for the educational support of a beneficiary for so long as such beneficiary is actively and in good faith pursuing an educational objective, whether it be an undergraduate or postgraduate program and I direct the trustee to provide financial assistance to a beneficiary of a trust in amounts reasonably required to assist in achieving such objective. Such assistance should include tuition and direct costs, and also a reasonable living allowance. [As an incentive to the beneficiary for whom a trust is established, the trustee shall distribute X dollars in cash to such beneficiary as of the date he or she obtains a degree from any four-year accredited college or university of such beneficiary's choice.]

CLAUSE NO. III.

The following clause was used in a trust intended to provide an educational fund for all of the Settlor’s many grandchildren (some not yet born) and contains a different description of educational commitment. It also allows the Trustee to take into account other available sources for the payment of educational expenses. This provision was followed with one that provided that, after all grandchildren had had the opportunity for an education, any remaining funds would pass to charity. Thus those beneficiaries who pursue an education benefit, no one is harmed or benefitted by the cost of another’s education (or lack thereof), and there is no penalty attached (beyond the disadvantages associated with the lack of a proper education).

- When a grandchild of mine is enrolled in a private school for elementary or high school education or is attending a college or university for the purpose of obtaining an
undergraduate or graduate degree, the Trustee shall distribute from the income or corpus of this trust to or for the benefit of my grandchild such amounts as the Trustee deems appropriate to be applied toward his or her expenses for tuition, room and board and books and supplies, taking into account the financial resources or abilities of my grandchild or my grandchild's parents to contribute toward those education costs, scholarships or other financial aid which may be available to my grandchild from other sources, and any other factors which the Trustee deems pertinent to the decision of what distributions from the trust would be appropriate. The Trustees shall consult with my child regarding the amounts, manner and timing of distributions made for his or her children from this educational fund. However, in no event shall distributions be made to or for a grandchild during any period that that grandchild is on academic or social suspension or probation or for any other reason is not actively or successfully pursuing his or her education. It is my intention in creating this education fund to assure each of my grandchildren the opportunity for a quality education. I do not intend, however, to provide an expensive or prolonged college or university education to a grandchild who is not willing to make a serious commitment to learning. I am mindful, however, of the difficulty of the Trustees' tasks in determining the appropriateness of each distribution in light of the factors enumerated above, while apportioning the amounts distributed and investing the balance so that, hopefully, my youngest grandchild will have the same opportunities as my eldest grandchild. Therefore, I leave to the sole and absolute discretion of the Trustees the determination of how, when and how much this trust shall contribute toward the educational expenses of my grandchildren.

CLAUSE NO. IV.

This clause includes distributions for non-traditional expenses, including travel and computer equipment. Since none of us can predict what form education may take in the future, the inclusion of some flexibility and non-traditional expenses is certainly appropriate.

- In determining whether it is necessary, appropriate or desirable to pay or not to pay any income and/or principal of any Family Education Trust to any individual included among my issue at the time of such determination, I request, but do not direct, that my disinterested Trustee determine to pay all expenses incurred in educating such individual, including, but not limited to, all expenses incurred in connection with or by reason of such individual's attendance at public or private grammar or high school, college, university or vocation, technical or other educational institution, whether or not such institution shall be a fully-accredited educational institution, and all expenses incurred in providing such individual with an education in a non-institutional setting, including, but not limited to, the expense of travel and charges for tutoring, tuition, room and board (whether or not charged by an educational institution at which such individual shall be a student), laboratory fees, clothing, books, laboratory or other equipment or tools (including computer hardware and software) or other material or activities that the Trustee shall determine to be of educational benefit or value to such individual.

CLAUSE NO. V.

This clause rewards educational achievement with appropriate “goodies” from the trust. I like the concept of an appropriate gift, but I question whether the beneficiary should be the one to decide what “appropriate” means. What recent graduate doesn't think a Viper or Porsche is appropriate?

- The beneficiary shall be rewarded upon achieving milestone educational events (such
as successful graduation from grammar school, high school, college, graduate school, and/or vocational school), by perhaps being provided with a vacation of his or her choice fully paid for (including travel expenses as well as reasonable spending money) from this trust for such beneficiary and his or her selected adult companion. Additionally, the beneficiary shall \[may?\] be rewarded upon achieving educational awards or recognitions (such as honor society, Dean’s List, and academic scholarships or other honors) by perhaps being given an appropriate present selected by such beneficiary, which present is paid for from this trust.

**CLAUSE NO. VI.**

This clause punishes the beneficiary who fails to complete his or her education. While the concept may be sound, the drafting is not. Who determines when a beneficiary has completed his/her education and whether he/she did so at a “high performance level”? Is the beneficiary who leaves school in good standing to get married to be penalized? Is the beneficiary who tries but fails to complete a doctorate worse off for having tried at all? And what are the “psychological limitations” that will excuse the lack of educational accomplishment?

- If the beneficiary does not complete his or her educational studies at a high performance level (e.g., the beneficiary drops out of school or appears to be unable to successfully complete and obtain a degree at a suitable educational organization after a reasonable time period), then the Trustee shall reduce such beneficiary’s ongoing trust distributions, so as not to reward the beneficiary’s unsuccessful or incomplete educational pursuits. However, if the lack of such educational pursuits or accomplishments is due to the beneficiary’s physical or psychological limitations, then the Trustee shall have the discretion not to reduce the beneficiary’s ongoing trust distributions.

**MATCHING EARNED INCOME**

These clauses strive to encourage productivity and work ethic by tying distributions to a beneficiary’s earnings. Keep in mind that, whatever the formula, these clauses create a mandatory distribution. A truly productive beneficiary may not need or want the distribution and would prefer the trust assets to be accumulated in a spendthrift, perhaps generation-skipping protected trust. And, ironically, the productive beneficiary who needed the incentive of matching funds the least will see his/her spendthrift trust drained the quickest!

**CLAUSE NO. 7.**

The following clause uses Form 1040 income for matching purposes. It is certainly an objective criteria, but the reference to the line of the Form 1040 must be made carefully. For example (using the 1999 Form 1040), line 7 [Wages, salaries, tips, etc.] includes employee compensation but excludes income earned by a business owner, partner or sole proprietor that is not paid as wages. Line 22 [Total income] would also include at least part of the trust distribution from the prior year, with the result that the trust distribution in effect matches itself each successive year. After a few years of this doubling effect, the beneficiary may be able to retire! Using line 33 [Adjusted gross income] penalizes the beneficiary who makes maximum contributions to IRAs and other retirement plans.

- The Trustee shall distribute the net income and principal of this trust as set forth in this paragraph. The Trustee shall distribute to the beneficiary an amount equal to the Total
Income of the beneficiary. The distribution shall be made first from the net income and then from the principal of this trust. In addition to the foregoing, the Trustee is authorized to distribute so much of the net income and principal of this trust as it, in its sole discretion, may deem reasonably necessary and appropriate to adequately provide for the health and maintenance of the beneficiary. Such discretionary distributions shall be made only if the beneficiary has no reasonable resources to provide for such needs and is Incapacitated. “Total Income” shall be total income as calculated on line «return line» of the «return year» Form 1040, U.S. Individual Income Tax Return, plus any tax-exempt income. Total Income shall include the Total Income of the beneficiary’s spouse. Settlers realize that tax laws and tax forms may change in the future. In order to give the Trustee an objective standard, Settlers direct that the Trustee utilize the calculation methods set forth on the above return. The beneficiary must give the Trustee full authorization to verify Total Income, including authorizing release of information from the Internal Revenue Service. The Trustee shall withhold all distributions until such authorization and verification is obtained. Total Income for one (1) calendar year shall be used in determining distributions for the following calendar year.

CLAUSE NO. 8.

While this clause is a little less specific about the determination of earned income (are sole proprietors technically “employed”?), it avoids matching trust distributions from certain trusts and puts a limit on annual matching distributions. Without such limits, the matching distribution to a truly successful beneficiary who becomes the CEO of a major company could deplete the trust.

- Settlor desires that a matching program be implemented by the Trustee based on a beneficiary’s earned income from employment. Trust distributions equal to the amount of the beneficiary’s earned income from employment (less the amount of such matching distributions that such beneficiary receives from any other trust created by Settlor) shall then be distributed each year to the beneficiary; provided that such matching distributions for a beneficiary in any given year shall be no greater than 1% of such beneficiary’s then remaining trust estate, and such matching distributions shall be limited to no more than $300,000 (as adjusted for cost of living) considering all trusts created by Settlor for the benefit of such beneficiary.

CLause NO. 9.**

This clause presents yet another approach to matching income, in that a distribution is made only in those years when the beneficiary’s net earnings exceeds his income from the prior year, and then the matching distribution is only a portion of his net earnings. The definition of net earnings is a little less exact than in some of the other clauses presented here.

- I give and bequeath to my Trustees, in trust, cash or property in kind equal to the value of X Million Dollars ($X,000,000) for each son of mine who survives me (or who predeceases me leaving issue who survive me) for the purpose of providing a fund to encourage my sons to strive for increased earnings from year to year. Consistent with this purpose, the Trustees shall hold, apply and distribute the trust estate of each such trust upon the following terms and conditions. Until the death of my son for whose benefit the trust is held, the Trustees shall make distributions of income and principal of the trust to or for the benefit of my son to the following extent: If in any year my son has net earnings which exceed his net earnings for the immediately preceding year, the Trustees shall distribute to or for the benefit of such son an amount equal to one-half (1/2) of his
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net earnings for such current year. If his net earnings exceed three-fourths (3/4) of his net earnings for the preceding year, the Trustees shall distribute an amount equal to one-third (1/3) of his net earnings for such current year to him or for his benefit. The term "net earnings" as used above means, with respect to either of my sons, his salary, if any, from employment, plus his earnings, if any, from self-employment, net of all ordinary and necessary business expenses incurred in connection with said self-employment. In calculating net earnings, there shall be no reduction on account of Federal, state or local income taxes. Any payments pursuant to this Section shall be made by the Trustees promptly upon receipt of documentary evidence, acceptable to the Trustees, including income tax returns, sufficient to demonstrate to the satisfaction of the Trustees, the recipient son’s income for both years involved in the calculation of such payment.

CLAUSE NO. 10. **

This clause takes the reverse approach by limiting distributions to no more than the earned income of the beneficiary and his/her spouse. By doing so, it avoids the problems of unnecessary yet mandatory distributions discussed above while rewarding the beneficiary who earns more. The clause also leads off with a good statement of the creator’s overall intention regarding the purpose of trust distributions to the beneficiaries, which provides the Trustee with solid support when not making distributions to certain beneficiaries.

- It is the Grantor’s intention that her children, grandchildren, and more remote descendants, and, more importantly, the spouses of her children, grandchildren, and more remote descendants, shall not depend upon the trusts hereunder for their support and maintenance, if they are mentally and physically capable of earning a living themselves. If a beneficiary has financial difficulties because of his own, his spouse’s, or even his parents’, lack of industry, the Grantor believes that those difficulties should be addressed not by the trusts hereunder but by the beneficiary, the beneficiary’s spouse, or the beneficiary’s parents. In such cases, it is the Grantor’s intent that the Trustee be circumspect in making substantial distributions in these circumstances. On the other hand, if a beneficiary is unable to earn a significant income because of age, mental or physical incapacity, or, for example, because the beneficiary is a [single] parent and feels a commitment to raising children, the Grantor would not wish distributions to the beneficiary to be limited to the beneficiary’s and his or her spouse’s earned income. This trust is not, therefore, intended to support the Grantor’s children, grandchildren and more remote descendants without regard to their particular circumstances and industry, and no decision by a Trustee to withhold or limit a distribution may be challenged by a beneficiary. With these circumstances in mind, and notwithstanding any provision herein to the contrary, prior to the termination of the trusts hereunder, except in those cases where the Trustee, in its discretion, determines that all the circumstances warrant an exception to the limitation herein provided, the Trustee shall not distribute to any child, grandchild, or more remote descendant of the Grantor in any calendar year, from the income or principal or both of this trust, amounts in excess of the earned income (said earned income not to include, by way of example and not of limitation, dividends, interests, payments from other trusts, or rental income) of the beneficiary and the beneficiary’s spouse for the prior year as finally determined for federal income tax purposes; provided that this limitation shall not apply to payment made to or for the benefit of a beneficiary prior to the first to occur of (i) the date upon which such beneficiary attains the age of twenty-one (21) years, or (ii) the date upon which such beneficiary attains a Bachelor’s Degree, and provided that the Trustee may, in its discretion, determine not to apply such limitation for the support and education of a
beneficiary who is enrolled in a legitimate program leading to a Masters' Degree [or other advanced professional degree?] and is in the Trustee's judgment, performing in a satisfactory matter.

ENCOURAGE PRODUCTIVITY

Less specific than the matching income clauses, these clauses encourage beneficiaries to be productive and are often part of a laundry list of items that the Trustee should consider when deciding whether a beneficiary is worthy of a distribution.

CLAUSE NO. 11.

This clause is short, sweet and to-the-point. In many cases, it may be all that is needed to support the Trustee’s decision to curtail trust distributions to lazy beneficiaries. But is the Trustee the appropriate judge of whether the beneficiary is a “productive member of society?”

- The trustee should exercise his discretion in such a manner that the beneficiary does not become so financially dependent on the trust as to lose motivation to become educated, to labor and be a productive member of society.

CLAUSE NO. 12.

The clause below includes uncompensated volunteer work, a wise addition in many circumstances and particularly appropriate for the very wealthy. It also speaks to full-time parenting, but what is “bona fide active parenting” and why only for children under the age of 8? Parenting my teenager is just as full time and demanding as parenting any 8 year old! And couldn’t the provision re parenting be broadened to include caring full-time for an elder family member (who just might turn out to be the settlor herself).

- Settlor desires that the beneficiaries be motivated to pursue productive lifestyles and self-fulfilling careers, as opposed to passively providing for their support needs exclusively from trust distributions. In that regard, a beneficiary shall be encouraged to maintain a full-time or part-time career (working a minimum of 20 hours per week) so that the beneficiary can be a contributing member of society. Such career may be one for which the beneficiary receives compensation or may involve uncompensated volunteer work within the beneficiary’s community. However, this factor shall not apply to a beneficiary who is not maintaining a full-time or part-time career, due to his or her bona fide full-time active parenting of one or more of his or her children who are either under the age of 8 or disabled.

CLAUSE NO. 13.

This clause “punishes” the beneficiary who gets the education and then fails to capitalize upon it.

- If the beneficiary has obtained an educational degree but thereafter does not pursue active employment in fulfillment of such educational training in his or her chosen field or any other, then ongoing trust distributions for such beneficiary’s support shall be reduced, to the extent necessary, to encourage the beneficiary to become a more productive member of society. However, if the lack of such productivity is due to the beneficiary’s physical or psychological limitations, then the trustee shall have discretion not to reduce the beneficiary’s ongoing trust distributions.
CLAUSE NO. 14.

The following clause is, in my opinion, more supportive and less judgmental. Because the goal of self-sufficiency” is described very generally, it allows the Trustee to exercise discretion given the particular persons and circumstances involved. I really like this approach.

- I do not want the support provided by a trust to cause a beneficiary to become so dependent on the trust that he or she loses an incentive to become financially self-sufficient. “Self-sufficiency” is a term that is not easily defined, and I believe that a beneficiary should be considered to be “self-sufficient” even though the career selected by that beneficiary may yield a low or modest income level so long as the beneficiary actively pursues such career. I request the trustee to make an independent evaluation, in its absolute discretion, as to whether a beneficiary is pursuing a productive personal career (including a career as a homemaker) and if, in the trustee’s judgment, a beneficiary is sufficiently productive, the trustee shall be authorized to make distributions to or for such beneficiary to contribute to the continued support and maintenance of such beneficiary.

WORTHY CHARACTER/CONTRIBUTIONS TO SOCIETY

These are perhaps the hardest incentive criteria to draft, for who can truly judge the worth of another? We all make our own judgments, of course, but where the judgment is to be impersonally made by a fiduciary and the consequences are financially significant, the language of these clause might be too subjective to be workable.

CLAUSE NO. 15.

This clause is framed in the context of a reward for appropriate behavior, so it will be easier to administer. But exactly how does an unrelated Trustee know if a beneficiary is exhibiting high ethical and moral standards? The situation of a certain sitting president comes to mind, and look at how long and expensive the process of getting to that truth was!

- Settlor desires that the beneficiaries be motivated to be good citizens. They should exhibit high ethical and moral standards, while demonstrating a charitable giving philosophy (either through monetary contributions or volunteer work). In that regard, the Trustee shall seek to reward a beneficiary exhibiting the desired types of behavior by providing liberally for the beneficiary’s support needs as long as such beneficiary is fulfilling the other criteria.

CLAUSE NO. 16.

This is the reverse of the prior clause, and exacts a punishment for inappropriate behavior. Do you suppose the parent of a difficult teenager requested this clause? This would be an incredibly difficult clause to administer, because the trustee must prove a negative and guilt by association issues are thrown in as well. I would not recommend using it.

- The Trustee shall be encouraged to exercise discretion so as to withhold support distributions from a beneficiary who is not exhibiting high ethical and moral standards, or a beneficiary who is exhibiting unreasonably rebellious behavior, or criminal or anti-
social conduct (such as violent behavior, juvenile delinquency, or truancy), or a beneficiary associating with individuals exhibiting such undesirable behavior or conduct.

CLAUSE NO. 17.

This penalty clause was included in an irrevocable trust created by a surgeon with a relative who was a traveling revival minister and was, in the doctor’s view, a complete fraud. Thus, he had a bias against the clergy (and chiropractors as well) and wanted to provide the appropriate disincentive for his children. The “conviction of spirit dampened by wealth” language was added by the draftsman in a valiant attempt to avert a challenge to the clause as illegal as against public policy.

- Because a career as a priest, minister, rabbi, or other clergyman requires a conviction of spirit that can only be dampened by the availability of generous financial assets, if any child of mine ever becomes a priest, minister, rabbi, or other clergyman, or a chiropractor, that child shall cease to be a beneficiary and this trust shall be disposed of as if the child had died on the relevant date.

ENCOURAGING FAMILY RELATIONS

CLAUSE NO. 18.

Does the phrase “dysfunctional family” come to mind when reading this clause? It makes me sad to think that this Settlor felt it necessary to provide a financial inducement to keep the family together. I assume that it might be appropriate in certain family situations, but what are “good family relations” and can they truly be bought with trust distributions?

- Settlor desires that the beneficiaries be encouraged to maintain good family relations with Settlor, with Settlor’s descendants, and with Settlor’s siblings and their descendants. In that regard, in making distributions to a beneficiary, the Trustee shall consider the following: whether the beneficiary maintained a close and respectful relationship with Settlor during Settlor’s lifetime, and whether the beneficiary has a harmonious relationship with Settlor’s other descendants, Settlor’s siblings, and their descendants (disregarding those other descendants who are not meeting the performance criteria set forth in this trust agreement).

DISCOURAGING CERTAIN FAMILY RELATIONS

CLAUSE NO. 19.

There is clearly a story behind this clause, for not only is the black sheep of the family excluded, but anyone who uses trust funds to aid (in whatever manner) the black sheep is also excluded. When a Settlor feels this strongly about excluding a beneficiary, this clause ought to accomplish the desired result.

- Settlor is adamant that the Trustee be prohibited from directly or indirectly using trust funds (or income or proceeds thereof) to provide any benefit to BLACK SHEEP or any spouse or descendant of BLACK SHEEP, and the Trustee shall exercise the utmost caution in making trust distributions to a beneficiary to ensure that no such direct or indirect benefit results. Moreover, the Trustee shall be authorized to utilize trust funds to investigate how trust distributions are in fact being used by a beneficiary to ensure that
no such direct or indirect benefit results. If the Trustee believes that a beneficiary is using any trust funds to directly or indirectly benefit BLACK SHEEP, then the Trustee shall suspend further trust distributions to such beneficiary until such time as the Trustee is satisfied that future trust distributions will not be used to provide any such direct or indirect benefit; provided that such trust distributions shall not be suspended for more than a thirty day period within any given year unless the Committee [established elsewhere in the document and composed of individuals] concurs in the Trustee’s determination.

ENCOURAGE (?) MARITAL HARMONY

CLAUSE NO. 20.

In my opinion, this clause goes too far. It should not be any of the Settlor’s business who a beneficiary marries, much less whether an acceptable prenuptial agreement is entered into. There are other, less intrusive ways to protect a beneficiary’s inheritance from becoming marital property. If the Settlor is so concerned about preserving the separate property nature of his gift, why not require just a simple prenuptial dealing only with his gifted property. How the spouses agree to handle their other assets ought not to be his concern, or the Trustee’s. And the penalty of failing to please the Trustee with an appropriate prenuptial is very severe.

- Settlor desires that trust funds be available for distribution in connection with reasonable expenses related to a wedding and honeymoon for a beneficiary, as long as the beneficiary is satisfying [the criteria for a worthy beneficiary stated elsewhere] and the beneficiary enters into a prenuptial agreement which is acceptable to the Trustee. The beneficiary shall be reimbursed from the trust assets for all reasonable legal expenses incurred by the beneficiary in connection with entering into such prenuptial agreement. If no such prenuptial agreement is entered into prior to a beneficiary’s wedding or if a prenuptial agreement is entered into, but is not acceptable to the Trustee, then the Trustee shall view the lack of such acceptable prenuptial agreement as a negative factor when evaluating the criteria for distributions from the trust, and the Trustee shall be encouraged (but not required) to cease making distributions to such beneficiary.

CLAUSE NO. 21.

This is a variation of the prior clause, drafted to outwit the beneficiary who chooses to have a significant relationship outside the bonds of wedlock (perhaps to defeat the prior clause?).

- If a beneficiary cohabitates with a significant other for a period in excess of one year, then the Trustee shall direct the beneficiary to enter into a written agreement (the “Palimony Agreement”) with the beneficiary’s significant other. The Palimony Agreement would be intended to avoid potential palimony issues and/or common law marriage claims which might otherwise be subsequently raised by such beneficiary’s significant other. The beneficiary shall be reimbursed from this trust for all reasonable legal expenses incurred by such beneficiary in connection with entering into such Palimony Agreement. If no such Palimony Agreement is entered into within a reasonable time after the beneficiary receives a direction from the Trustee to do so (or if a Palimony Agreement is entered into, but it is not acceptable to the Trustee), then the Trustee shall view the lack of such acceptable Palimony Agreement as a negative factor when evaluating the criteria for distribution, and the Trustee shall be encouraged (but not required) to cease
making distributions to such beneficiary.

DETER SUBSTANCE ABUSE

CLAUSE NO. 22.

Substance abuse is such a growing problem in America that it is wise for any Settlor to make provisions to try to assure that gifted funds are not used to support a habit. This clause is commendable in allowing trust expenditures for purposes of treatment and rehabilitation. All beneficiaries are not presumed guilty; the Trustee is given discretion in determining which beneficiaries may be in trouble and establishing means for testing and retesting. The penalty for refusing to voluntarily submit to testing is also imposed at the Trustee’s discretion.

- Settlor desires that the beneficiaries be deterred from excessive use of legal or illegal alcohol or drugs. In that regard, Trustee is authorized to withhold trust distributions for support of a beneficiary who is suffering from a substance abuse problem significant to the beneficiary’s lifestyle (except for trust distributions necessary for suitable medical care and other rehabilitative purpose). The Trustee may consult with medical doctors and/or psychologists in determining whether or not a beneficiary is suffering from a substance abuse problem, with any fees relating to such consultation to be paid from the trust. If the Trustee suspects that a beneficiary is suffering from a substance abuse problem, then the Trustee may request that such beneficiary voluntarily submit to testing to enable the Trustee to determine whether or not a substance abuse problem exists. However, if such beneficiary refuses to voluntarily submit to any such testing requested by the Trustee, then his or her continuing eligibility to receive trust distributions may be indefinitely suspended by the Trustee.
COMPREHENSIVE INCENTIVE TRUST PROVISION **

The following form includes all of the usual incentive triggers (education, employment, worthy pursuit) without too many complicated specifications. Paragraph 2 permits periodic rights of withdrawal at certain ages, provided the beneficiary is complying with one or more of the criteria of paragraph 1.

1. **Income and Principal.** While the Grantor's children are living, the Trustee shall be authorized to distribute to any one or more of the Grantor's children such part or all of the net income or principal of their respective trusts as the Trustee shall determine in its sole discretion, without restriction as to purposes or amounts, provided that the child falls within one of the following descriptive subparagraphs:

   a. the child is a full time student at an accredited college, university, vocational school or similar institution and maintains the equivalent of a grade point average of 2.5 or better on a scale in which 4.0 is an "A1 grade, and the child's course of study is progressing towards the completion of an undergraduate or other degree at the rate of a full time student;

   b. the child is employed full time in an occupation to which the child devotes at least 35-40 hours of work per week or the child is pursuing a career, which is socially productive on a full time basis, such as a career as an artist or a musician, to be determined solely by the Trustee in the Trustee's discretion;

   c. the child is disabled and such disability prevents him or her from being a productive and self-supporting member of society as determined by the Trustee in the Trustee's sole discretion;

   d. the child is pursuing an educational, scientific or charitable goal which the Trustee has determined, in its sole discretion, is in the best interest of the child and the general public and which makes the child a productive member of society as determined by the Trustee in the Trustee's sole discretion; or

   e. the child is occupied full-time caring for other family members such as children or other relatives and the Trustee determines in its sole discretion that such obligation reasonably precludes the child from earning a living (an example of such occupation would include motherhood).

It is the Grantor's intent that a child not receive distributions of income or principal from the trust if the child is not complying with the provisions of one or more of the foregoing five paragraphs, provided, however, that the Trustee may make distributions of income or principal to any child or his or her lineal descendants in the event of medical (including psychiatric) emergency, as the Trustee shall determine, in its sole discretion.

2. **Withdrawals After Certain Ages.** After each child has complied with the provisions of one or more of the five subparagraphs of paragraph 1 herein above for a period of five years and after each child of the Grantor shall have attained the age of forty (40) years, such child shall have the right to withdraw at anytime and from time to time, by specific reference to this right in a written request delivered to the Trustee, from the principal and accumulated income, if any, of the respective trust of such child, without restriction as to purposes, all or any part of an amount equal to one-fourth of the value
of such trust on the date such child attained such age, on the date of the aforementioned division of the Trust, or on the date of completion of the five year compliance requirement, whichever is later. After each child has complied with the provisions of one or more of the five subparagraphs of paragraph 1 herein above for a period of ten (10) years and after each child shall have attained the age of forty-five (45) years, the aggregate amount so subject to withdrawal shall be increased to one-third the value of such trust on the date such child attained the age of forty-five (45) years, on the date of the aforementioned division of the Trust, or on the date of completion of the ten-year compliance requirement, whichever is later. After each child has complied with the provisions of one or more of the five subparagraphs of paragraph I herein above for a period of fifteen (15) years and after each child of the Grantor shall have attained the age of fifty (50) years and after the aforementioned division of the Trust, the entire balance of the respective trust of such child shall be subject to withdrawal in such manner. If a child attains any of the above-described ages of withdrawal and has not complied with the Trust provisions sufficiently to enable such child to make a withdrawal but is making a good faith effort to do so as determined by the Trustee in the Trustee’s sole discretion, the Trustee in its sole discretion may delay the ages at which the child may make such withdrawals, provided, however, if the child has not qualified for all such withdrawals by the time the child attains the age of sixty (60) years, such assets shall no longer be subject to withdrawal by the child but shall be held by the Trustee for the benefit of such child and the child's lineal descendants and the Trustee shall distribute to such child or any one or more of his or her lineal descendants such part or all of the income or principal as the Trustee shall determine necessary for the maintenance of such beneficiary(ies). The Trustee shall distribute to a child exercising his or her rights of withdrawal cash or assets equal in value to the amounts designated in such requests and subject to withdrawal under this subparagraph. In the event such child shall die having qualified to exercise such right of withdrawal and having failed for any reason to have fully exercised such right of withdrawal, the Trustee shall distribute to the estate of such child such part or all of the remaining assets of such trust as is equal in value to the amount subject to withdrawal by such child as death and as is not distributed pursuant to the exercise, if any, of the limited powers of appointment hereinafter described.