SETTLE AGREEMENTS:
DIFFICULT ISSUES IN TRUSTS & ESTATE

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- "Fixing Real Estate Headaches: Deeds, Trusts, and Title Issues," presented at the 22nd Annual Estate Planning, Guardianship, and Elder Law Conference, 2020
- "How to Jump Ship When No One Is Willing to Take Over – Trustee/Guardianship Resignation," presented at the 44th Annual Advanced Estate Planning & Probate, 2020
- "Trustee, Personal Representative, and Guardian Resignation: How to Jump Ship," presented at the 21st Annual Estate Planning, Guardianship and Elder Law Conference, 2019
- "Mind Your Business: Confidential Information and Related Parties," presented at Intermediate Estate Planning and Probate, 2019
- "Funding Trusts," presented at Handling Your First (or Next) Trust in February 2019.
- "DSUE Uncertainty: Drafting to Avoid Conflict and Refine Rights, Remedies, and Obligations," presented at the 28th Annual Estate Planning and Probate Drafting Course on October 27, 2017.
- "Take Advantage of Exporting Incentives," West Texas A&M University SBDC, www.smallbusinessdevelopmentcenter.com, (August 2017).
- "Series LLCs: A business structure that provides new options to real estate investors and commercial clients," Texas Realtor Magazine (April 2017).

Published Cases

- *Archer v. Allison*, 2014 Tex. App. LEXIS 13364 (Tex. App.—Amarillo, November 4, 2014, no pet.).
- *Archer v. Allison*, 2015 Tex. App. LEXIS 12361 (Tex. App.—Amarillo, December 3, 2015, pet. denied).

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I. INTRODUCTION.

A compromise is an agreement whereby both parties get what neither of them wanted.

Settlement agreements are common in the practice of law, but drafting settlement agreements in trust and estate cases requires special attention to the nuances of trust and estate law. The "normal" approach taken in disputes outside of the trusts and estates realm may result in releases that are not effective and agreements that are not binding. The purpose of this paper is to provide a general overview of several provisions specifically relevant to trust and estate matters along with drafting tips and examples.

The sections in this paper are generally in the order they would likely appear in a typical settlement agreement.

II. PARTIES.

A. Consider the Nature of the Dispute.

The nature of the dispute will dictate the parties that should be included in any settlement agreement. If a beneficiary's interest is not affected by the terms of a settlement agreement, it is not strictly necessary for the beneficiary to be a party to the settlement agreement.[1] Conversely, any beneficiary affected by the settlement or the dispute being settled should be included as a party to the settlement agreement.

However, it is often advantageous to include *all* beneficiaries of a trust or estate; there is substantial value in making sure all related parties agree to the resolution of the dispute. For instance, consider the following hypothetical:

> Beneficiary A sends a demand letter to the Trustee seeking $50,000 in damages for some breach of fiduciary duty. Trustee settles with Beneficiary A for $10,000, and the settlement funds come directly from Trustee's share of the trust (Trustee is also a beneficiary). Upon final distribution, Beneficiaries B & C are unhappy that Beneficiary A is receiving $10,000 more…even though B & C will still receive 100% of their fair share.

In the above example, the Trustee should have considered requiring all beneficiaries to settle any claims related to the alleged breach. By doing so, the Trustee would cut off the parade of future claims that might be raised by the other beneficiaries.

B. Minor and Unascertained Beneficiaries.

While it is advantageous to get all beneficiaries of a trust or estate to join a settlement agreement, it is not always easy, practical, or even possible to do so. Beneficiaries might be minors, incapacitated, or unascertained; and each of those beneficiaries will generally not be bound by an agreement or judgment unless they are properly represented by virtual representation, a guardian ad litem, or a parent. Drafters must consider the best way to bind those beneficiaries. Typically, the only way to do so is non-judicial virtual representation, judicial virtual representation, or by a guardian ad litem.

C. Non-Judicial Virtual Representation.

Drafters should first consider whether incapacitated beneficiaries can be bound without the time and expense of a court order or guardian ad litem. If the beneficiary is a minor, the beneficiary can be bound by a written agreement if:

1. **the minor's parent, including a parent who is also a trust beneficiary, signs the instrument on behalf of the minor;**
2. **no conflict of interest exists; and**
3. **no guardian, including a guardian ad litem, has been appointed to act on behalf of the minor.[2]**

Additionally, an unascertained or unborn beneficiary may be bound if the settlement agreement is signed by a beneficiary "who has an interest substantially identical to the interest of the unborn or unascertained beneficiary."[3] Interestingly, the Estates Code provides a general rule that an unborn or unascertained beneficiary *only* has a substantially identical interest with a trust beneficiary from whom the unborn or unascertained beneficiary descends.[4] Moreover, the minor, unborn, or unascertained beneficiary may not be bound in an agreement to terminate or modify a trust unless the instrument is otherwise permitted by law.[5]

Drafters should be mindful of the limitations of the non-judicial virtual representation statute. For instance, minors may only be bound by a parent, and even then, only if no conflict of interest exists. Additionally, unborn and unascertained beneficiaries may only be bound by the signature of an ancestor. The following

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[1] *Fore v. McFadden*, 276 S.W. 327, 329 (Tex. Civ. App. 1925).
[2] Tex. Prop. Code 114.032(c).
[3] Tex. Prop. Code 114.032(d).
[4] *Id.*
[5] Tex. Prop. Code 114.032(e).

situations do not meet the requirements for non-judicial virtual representation:

1. **A guardian's execution of a settlement agreement will not (by itself) bind a minor;**
2. **An incapacitated adult may *never* be bound by virtual representation; and**
3. **The execution of a settlement agreement by three sibling beneficiaries will not bind a fourth sibling whose existence was unknown at the time of settlement.**

D. Judicial Virtual Representation.

Minors, unborn, and unascertained beneficiaries may also be virtually represented in judicial actions. Appropriately, judicial virtual representation is broader than non-judicial virtual representation. So long as there is no conflict of interest:

1. **An order binding a guardian of the estate or a guardian ad litem binds the ward;**
2. **If no guardian of the estate or guardian ad litem has been appointed, a parent may represent his minor child as guardian ad litem or as next friend; and**
3. **An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.[6]**

Notably, there is no requirement that unborn or unascertained persons be represented by ancestors, and there is no limitation on actions modifying or terminating a trust.

E. Guardians and Guardians Ad Litem.

At any point in a trust proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown.[7] The guardian ad litem may represent more than one party so long as there is no conflict of interest.[8] An order binding a guardian or a guardian ad litem binds each ward.[9]

III. RECITALS.

A. The Purpose of Recitals

A recital is typically a preliminary statement included in a contract or deed to explain the reasons for executing the document or showing the existence of particular facts.[10] However, recitals may also be used as a forum to present previously-disputed-statements that are now "agreed to" by all of the parties. For instance, a *fact* contained in a recital might be that a decedent died on a particular date. A previously-disputed-statement might be that the independent executor has administered the estate and accounted for all assets and liabilities of the estate.

In addition to providing context and "agreed to" statements, recitals are especially helpful in showing that beneficiaries are acting on full information. As discussed *infra*, releases from beneficiaries may not be valid if the beneficiary is not acting on full information.[11] By providing relevant facts and referring to relevant documents in the recitals, drafters can show that the beneficiaries were acting on full information. This alone makes recitals extremely important in nearly all settlement agreements involving trusts or estates.

However, it should be noted that recitals will not generally control any of the dispositive provisions of a settlement agreement unless the provisions are ambiguous and the recital is needed to ascertain the intent of the parties.[12] Moreover, if recitals contain broader terms or stipulations than the agreement itself, the recitals cannot be used to expand the terms of the contract.[13] Said another way, recitals "don't count" unless the agreement contains some provision binding the parties to the recitals.

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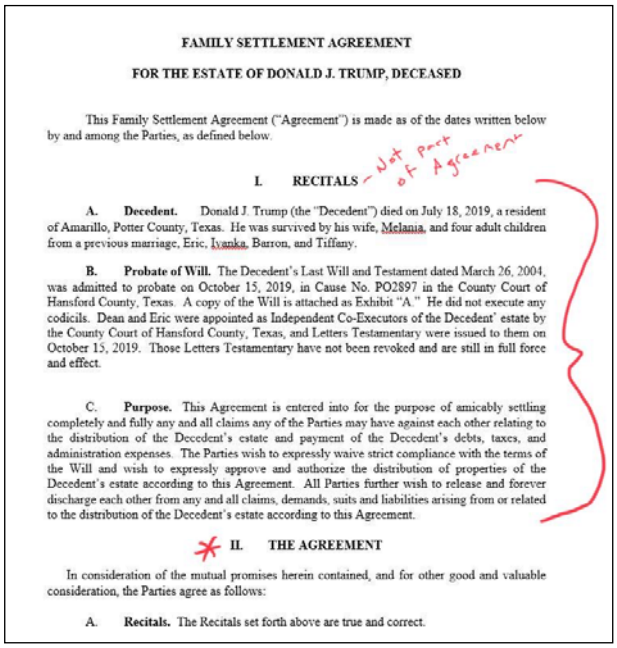
[6] Tex. Prop. Code 115.013.
[7] Tex. Prop. Code 115.015.
[8] *Id.*
[9] Tex. Prop. Code 115.013(2)(A).
[10] *Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011).
[11] *See* Section VI.
[12] *McMahan v. Greenwood*, 108 S.W.3d 467, 484 (Tex. App.—Houston [14th Dist.] 2003).
[13] Country Cmty. Timberlake Vill., L.P. v. HMW Special Util. Dist. of Harris & Montgomery Ctys., 438 S.W.3d 661, 669 (Tex. App.—Houston [1st Dist.] 2014)(where the recitals are broader than the contract stipulations, the former will not extend the latter).

Accordingly, recitals are typically contained in a separate section, prior to the beginning of the agreement as shown below:



FAMILY SETTLEMENT AGREEMENT

FOR THE ESTATE OF DONALD J. TRUMP, DECEASED

This Family Settlement Agreement ("Agreement") is made as of the dates written below by and among the Parties, as defined below.

I. RECITALS – Not part of Agreement

A. **Decedent.** Donald J. Trump (the "Decedent") died on July 18, 2019, a resident of Amarillo, Potter County, Texas. He was survived by his wife, Melania, and four adult children from a previous marriage, Eric, Ivanka, Barron, and Tiffany.

B. **Probate of Will.** The Decedent's Last Will and Testament dated March 26, 2004, was admitted to probate on October 15, 2019, in Cause No. PO2897 in the County Court of Hansford County, Texas. A copy of the Will is attached as Exhibit "A." He did not execute any codicils. Dean and Eric were appointed as Independent Co-Executors of the Decedent' estate by the County Court of Hansford County, Texas, and Letters Testamentary were issued to them on October 15, 2019. Those Letters Testamentary have not been revoked and are still in full force and effect.

C. **Purpose.** This Agreement is entered into for the purpose of amicably settling completely and fully any and all claims any of the Parties may have against each other relating to the distribution of the Decedent's estate and payment of the Decedent's debts, taxes, and administration expenses. The Parties wish to expressly waive strict compliance with the terms of the Will and wish to expressly approve and authorize the distribution of properties of the Decedent's estate according to this Agreement. All Parties further wish to release and forever discharge each other from any and all claims, demands, suits and liabilities arising from or related to the distribution of the Decedent's estate according to this Agreement.

II. THE AGREEMENT

In consideration of the mutual promises herein contained, and for other good and valuable consideration, the Parties agree as follows:

A. **Recitals.** The Recitals set forth above are true and correct.

When recitals are presented this way, it lends further credence to them not being part of the agreement.

If a drafter is relying on recitals to 1) show that the parties are acting on full information, or 2) bind the parties to any previously-disputed-statements, the agreement needs to say the recitals are true and correct. For instance, settlement agreements often contain a provision in the "Agreement" portion that states the "recitals set forth above are true and correct." This, of course, works just fine.

However, if the recitals are agreed to be true and correct, why not say so in the recitals provision? In fact, why not also move the recitals provision to be included in the actual Agreement? Why not even rename the recitals provision something more appropriate such as "Statements Agreed to by the Parties" or "Agreed Statements"? Remember: *Legalisms might seem precise, but they don't lend precision to the discussion.*[14]

If the agreement is ever litigated in front of a jury, the litigator's job will be easier if the recitals are clearly labeled for whatever they are intended to be.

Lastly, recitals can serve a vital role for lawyers that pick up the file many years down the road. Typically, a dispute is resolved following the settlement agreement, and the file is often closed. If any questions arise years or decades later, the settlement agreement will be one of the most recent documents in the file (or on the server). As such, the recitals can provide a roadmap for the new attorney by detailing each event in the probate, trust administration, or guardianship that led to the settlement.

B. What should be included in recitals?

Recitals are not strictly necessary, but as discussed above, it is good practice to use recitals to provide context to the settlement agreement and demonstrate the parties are acting on full information. Drafters should consider including the following information:

1. **Who died, became incapacitated, etc.?**
2. **When did they die, become incapacitated, etc.?**
3. **Was there a will, and when was it signed?**
4. **Was the will probated?**
5. **What claims have been asserted?**
6. **Was a lawsuit filed, and is so, when and where?**
7. **What assets are at stake?**

C. Everyone desires to settle to avoid litigation.

If the recitals (or "Agreed Statements") provision is several pages long, that's 'ok.' If and when the document surfaces many years after execution, the recitals will provide valuable context for the client, the client's heirs, or the new lawyer looking at the document.

D. "Whereas"

Many drafters begin each recital with the word "whereas." This is commonplace, but drafters should consider abandoning "whereas" in favor of a simple list format. "Whereas" is included in Bryan Garner's list of words that should be banned from legal documents[15], and using "whereas" may communicate to opposing counsel that the drafter has not reviewed the drafter's form settlement agreement in quite some time.

E. Recitals - Drafting Tips

Drafters should consider incorporating the following into their recitals section of agreements:

1. **State that the recitals are agreed to by all parties. Most settlement agreements include a separate provision affirming the recitals, but it is much simpler to include a prefacing statement in the recitals provision itself. Any recitals regarding the**

[14] Garner, Bryan, *Legal Writing in Plain English*, pg. 46, second edition, 2001.

[15] Bryan Garner, *Ax these terms from your legal writing*, ABA JOURNAL (April 1, 2014) at https://www.abajournal.com/magazine/article/ax_these_terms_from_your_legal_writing.

intent of the parties will remain purely contextual.

2. **Move the recitals provision inside the "Agreement" portion of the settlement agreement. This furthers shows that the parties are affirming the truth of the recitals.**
3. **Drop the "whereas" from recitals and simply present the recitals in a list form.**
4. **Do not be afraid of lengthy recitals provisions. For releases in trusts and estates to be effective, the parties need to be acting on full information; the recitals provision is a convenient place to provide information.**

A sample recitals provision is contained on Exhibit A of this paper.

IV. FIDUCIARY ISSUES: ARCHER, SCHLUMBERGER, AND HARRISON

In both trusts and estates, drafters must be very wary of the fiduciary issues that can affect the enforceability of the settlement agreement. If agreements are drafted without fiduciary issues in mind, the releases and waivers contained in the settlement might not be effective. No settlement agreement involving a fiduciary should be finalized without considering the presumption of unfairness and the affirmative duty to disclose material facts.

A. Archer.

Consider *Harris v. Archer*. In *Archer*, three partners owned a building, and one partner, Archer, became aware of an opportunity to sell the building at a substantial profit.[16] Archer offered to purchase his partners' interests without disclosing the opportunity to them.[17] The partners agreed to sell their interests to Archer, and an agreement was signed that contained broad mutual releases of all claims, known and unknown.[18] Several days after the agreement was executed, Archer sold the building for a profit of around $300,000.[19] Despite the broad release language of "all claims", the court held "there is no language in [the agreement] specifically disclaiming reliance on statements, representations, or *non-disclosures of material information* by the other parties."[20] The court further explained that, despite the release of "all claims", the "record does not support Archer's position that, as a matter of law, the agreement was intended to release claims for breach of a fiduciary duty to disclose material information."[21]

As *Archer* demonstrates, the duty to disclose material facts cannot simply be released with boilerplate language.

B. Schlumberger.

Although it does not actually involve fiduciaries, *Schlumberger* is a seminal case that created a five-factor analysis that is critical when considering the enforceability of disclaimers and whether an agreement with a fiduciary is fair and valid.[22] *Schlumberger* involves the dissolution of a joint venture to mine diamonds off the coast of Africa; Schlumberger eventually negotiated the buy-out of another owner of the joint venture.[23] During negotiations, Schlumberger made misrepresentations about the value of the project, specifically stating the venture had no value. The seller was a sophisticated, knowledgeable party and disagreed with Schlumberger about the value of the project throughout negotiations.[24] Eventually, a price was agreed to and the parties executed an extensive settlement agreement negotiated by the lawyers representing each side; the agreement contained a statement that the sellers were not relying on any representations made by Schlumberger.[25]

After the sale was closed, Schlumberger sold the mining project for significantly more than it paid, and the original sellers sued claiming they were "induced by misrepresentations about the value and feasibility of the sea-diamond project."[26] The *Schlumberger* opinion highlights competing concerns: on one hand, misrepresentations are bad. On the other hand, parties should generally be bound to contracts they sign and be able to fully and finally resolve disputes among each other.[27] *Schlumberger* holds that parties must be allowed to disclaim reliance in certain situations. As such, the court identified several factors to weigh when determining whether a disclaimer of reliance provision will preclude a fraudulent inducement claim. The court noted that during the negotiations both sides were represented by "highly competent and able" legal counsel, the parties were dealing at arm's length, both

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[16] *Harris v. Archer*, 134 S.W.3d 411, 419-20 (Tex. App.—Amarillo 2004).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id* at 431.
[21] *Id.*
[22] *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997).
[23] *Id.*
[24] *Id* at 180.
[25] *Id.*
[26] *Id* at 179.
[27] *Id* at 180.

sides are "knowledgeable and sophisticated", and the language in the disclaimer was clear.[28]

Following *Schlumbeger*, several appellate courts disagreed on how to interpret the *Schlumberger* opinion, so the Supreme Court of Texas clarified its holding in *Forest Oil Corp. v. McAllen*.[29] *Forest Oil* confirmed that a disclaimer of reliance will not always bar a fraudulent inducement claim.[30] A disclaimer of reliance will be effective only if there is "clear and unequivocal expression of intent necessary to disclaim reliance on the specific representations at issue."[31]

In determining whether the required expression of intent exists, *Forest Oil* clarified that the following five factors should be considered:

1. **the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute;**
2. **the complaining party was represented by counsel;**
3. **the parties dealt with each other in an arm's length transaction;**
4. **the parties were knowledgeable in business matters; and**
5. **the release language was clear.**[32]

If present, each of the above factors will weigh in favor of upholding the disclaimer of reliance. There is no bright-line guidance for weighing the factors, and *Forest Oil* and *Schlumberger* did not provide meaningful instruction as to how to weigh the factors.[33] However, it is clear that not all of the factors must be met for a disclaimer to be enforceable.[34] Rather, it seems the totality of the circumstances of each case should be examined to determine whether disclaimer is enforceable.

C. *Harrison.*

So how do the *Schlumberger* factors apply to transactions with fiduciaries? Answer: caselaw subsequent to *Schlumberger* commandeers the five factors and uses it in cases involving the presumption of unfairness.

The presumption of unfairness generally applies in any transaction between a fiduciary and party to whom the fiduciary owes a duty of disclosure.[35] If the presumption applies, the burden is on the fiduciary to show the fairness of a transaction if the transaction is ever attacked.[36] Courts have struggled to weigh the presumption of unfairness against the public policy of freedom of contract.[37] There is no bright-line rule as to when the presumption will apply, and showing that an agreement was negotiated at arm's length does not guarantee the agreement will avoid the application of the presumption.[38]

The *Harrison* case is particularly instructive. In *Harrison*, an eighteen year old beneficiary entered into a "Master Agreement" to effect a premature distribution of trust assets and provide releases to the independent co-executors and co-trustees.[39] The Master Agreement was "a sophisticated all-encompassing settlement agreement involving numerous concerns."[40] The beneficiary refused to comply with a provision of the agreement and filed suit attempting to avoid releases contemplated by the Master Agreement.[41] The beneficiary argued that the Master Agreement was presumed to be unfair and the fiduciaries were required to rebut that presumption.[42]

The *Harrison* court acknowledged that, because the release was obtained during the course of the fiduciary relationship, the fiduciary had the burden to show the release was fair or valid.[43] To determine whether the release was fair, the *Harrison* court used the five *Schlumberger* factors.[44] In applying the factors, the court found that the following facts weighed each factor in favor of release being fair:

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[28] *Id.*
[29] *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, (Tex. 2008).
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *See Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 385 (Tex. App.—Houston [1st Dist.] 2012).
[34] *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753, 775 (Tex. App.—Houston [14th Dist.] 2012)
[35] *Harrison v. Harrison Interests*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677, at *8 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017).
[36] *Fitz-Gerald v. Hull*, 150 Tex. 39, 49, 237 S.W.2d 256, 261 (1951).
[37] *Harrison v. Harrison Interests*, at *11.
[38] *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753, 775 (Tex. App.—Houston [14th Dist.] 2012).
[39] *Harrison v. Harrison Interests*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677, at *11 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017)
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id* at *10.
[44] *Id.*

1. **The beneficiary had attended several years of college and studied business;**
2. **The beneficiary was represented by counsel who specialized in trust and estate matters;**
3. **The beneficiary was actively involved in negotiations and suggested several terms himself;**
4. **The releases were disputed and specifically discussed during negotiations; and**
5. **The final release language was clear and unequivocal.**[45]

V. DRAFTING TO ADDRESS THE FIVE FACTORS.

Drafters should address each of the five factors when crafting settlement agreements. Many of the factors cannot be "drafted around," but rather, the settlement agreement will provide evidence and recite facts demonstrating that the factors weigh in favor of the settlement agreement being enforceable.

A. Factor #1: Negotiated Terms, Not Boilerplate.

The first factor is that the terms of the contract were negotiated, rather than boilerplate, and the parties specifically discussed the topic being disputed.[46] At a minimum, this means *not* using a one-sided form settlement agreement and release. The recitals provision should provide specific context to the agreement. The representations and warranties should be specific to the parties executing the settlement agreement. The release should specifically refer to the parties and the alleged claims. Consider the following example.

A boilerplate release might state:

> Donald hereby fully ACQUITS, DISCHARGES, and RELEASES State Bank, Amarillo, Texas, as Independent Executor of the Estate of John Smith, Deceased, and as Trustee of the John Smith Trust from and against any and all possible claims, demands, or causes of action, whether known or unknown, that Donald may have with respect to or in any way connected with the Estate or Trust, or by reason of or in any way connected with any other act, manner, or thing done or omitted from being done by State Bank, Amarillo, Texas, in connection with the Estate or Trust. This release shall extend not only to State Bank, Amarillo, Texas, but also to its officers, employees, agents, attorneys, and representatives (collectively, the "Released Parties"). This Release shall extend to and be binding upon Donald, his heirs, executors, administrators, successors and assigns, and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the Released Parties.

A drafter should consider replacing the above representation and warranty with something specific to the parties, such as:

> Donald hereby fully ACQUITS, DISCHARGES, and RELEASES State Bank, Amarillo, Texas, as Independent Executor of the Estate of John Smith, Deceased, and as Trustee of the John Smith Trust from and against any and all claims or causes of action including claims for breach of fiduciary duty resulting from State Bank's decision to invest the majority of the assets of the estate and trust in Iraqi dinar.
>
> Donald also releases State Bank's employees, including Trust Officer Joe, for any actions taken during State Bank's administration of the trust and estate, such as wiring trust funds to Iraq to purchase Iraqi dinar.
>
> This Release shall extend to and be binding upon Donald, his heirs, executors, administrators, successors and assigns, and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the released parties.

The revised provisions above are specific to the actual circumstances of the settlement agreement and not merely boilerplate, all-encompassing provisions. As such, they weigh in favor of the first of the five factors.

B. Factor #2: Represented by Counsel.

A boilerplate provision regarding attorney representation might state:

> He or she has been given the opportunity to be adequately represented by competent counsel in connection with the negotiation and execution of this settlement agreement, and in any and all matters relating thereto.

A drafter should consider replacing that representation with something specific to the parties, such as:

> John Smith was represented in this transaction by Dewey, Cheatum, & Howe during the

[45] *Id* at *12-13.

[46] *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008).

> negotiation and execution of this settlement agreement. John Smith and his counsel participated in three phone conferences with the Trustee regarding the terms of this settlement agreement, and John Smith participated in those multiple settlement discussions regarding the terms of this agreement. Dewey, Cheatum, & Howe specializes in trust and estate litigation, and the lead attorney for John Smith, Chester Cheatum, is board certified in estate planning and probate law.

The revised provision confirms that the party was represented by counsel that specializes in estates in probate law. As such, it will weigh in favor of factor #2.

If a party is not represented by counsel, it is still worthwhile including a representation that the party had an opportunity to be adequately representing. If a party regularly uses an attorney and has the opportunity to consult with the attorney, then this factor might still weigh in favor of enforcing a release or disclaimer of reliance provision.[47]

C. Factor #3: Arm's Length Transaction.

Drafting to show the agreement is an arm's length transaction can be difficult because, typically, "arm's length" is the antithesis of "fiduciary." However, the negotiation of a release or disclaimer can "bear aspects of an arm's length transaction."[48] As such, wherever possible, drafters should consider inserting facts showing that the settlement agreement was an arm's length transaction. For instance, the above provision regarding representation recites that the agreement was negotiated by a beneficiary represented by counsel. Additionally, wherever it is located, the provision should be written in plain language.[49]

D. Factor #4: Knowledgeable in Business Matters.

Much like showing the agreement is an arm's length transaction, drafters should consider reciting or documenting facts showing that the parties are knowledgeable in business matters. In *Harris*, the court specifically noted that the beneficiary had "attended college for several years and studied business."[50] Drafters might even consider a specific representation and warranty about a party being knowledgeable in business. For instance, consider the following provisions.

Beneficiary agrees that he is knowledgeable in 1) the business matters related this settlement agreement, and 2) the disputes being settled. Beneficiary holds a B.A. in Russian Literature and studied several business courses as a part of attaining his degree. Beneficiary has managed a portfolio of investments through Robinhood for over 5 years and has attained returns exceeding the S&P 500.

Obviously, the facts may vary, and drafters should continue to draft tailored provisions specific to the party in question. Drafters should avoid global statements such as "the parties affirm that they are sophisticated investors capable of evaluating the merits and risks of business matters."

E. Factor #5: Clear Release Language

Writing in plain language is almost always preferable. The releases contained in any settlement agreement need to be clear and unequivocal. Drafters should avoid repetitive language and prioritize clear drafting over excessive legalese.

However, if drafters are worried that a plain-language release may leave too many holes that are otherwise addressed in a lengthy, traditional release, the drafter should consider placing the lengthy language *after* the plain language release. For instance, if a drafter is concerned that a settlement agreement releases a party from all claims and not all claims, demands, causes of action, etc., he can consider adding the lengthy, traditional language after the release as follows:

> To clarify, Donald is releasing State Bank from any and all possible claims, demands, or causes of action, whether known or unknown, that Donald may have with respect to or in any way connected with the Estate or Trust, or by reason of or in any way connected with any other act, manner…

As a side note: fiduciaries cannot require a beneficiary to release the fiduciary as a condition of delivery to property to the beneficiary.[51] As such, attorneys should draft settlement agreements and releases in a manner that makes it clear the delivery of trust or estate property is not conditioned on release.

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[47] *See RAS Grp., Inc. v. Rent-A-Center E., Inc.*, 335 S.W.3d 630, 640 (Tex. App.—Dallas 2010, no pet.).

[48] *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753, 776 (Tex. App.—Houston [14th Dist.] 2012).

[49] J.K. Aitken, *The Elements of Drafting and Forms*, 12 (4th Ed. 1938).

[50] *Harrison v. Harrison Interests*, No. 14-15-00348-CV, 2017 Tex. App. LEXIS 1677, at *12 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017).

[51] Tex. Estates. Code 405.002.

VI. FULL INFORMATION AND DUTY TO DISCLOSE.

In addition to worrying about the five factors, drafters must be mindful that fiduciaries have an affirmative duty to fully disclose all material facts related to a transaction.[52] As to trustees, only a beneficiary acting on full information is able to effectively release a trustee.[53] "Acting on full information" means that the beneficiary had full knowledge of all the material facts the trustee knew.[54] Additionally, the beneficiary must not be under the influence of misrepresentation, concealment, or other wrongful conduct on the part of the trustee or another person.[55]

Full information is quirky. Any release given by beneficiaries of a trust to a trustee are not binding unless full information is given.[56] Additionally, releases given in other fiduciary contexts may be useless if the duty to disclose is not followed, and even then, the fiduciary will need to satisfy the five factors.[57] Lastly, even if a judgment is obtained releasing a fiduciary from "all liability," the judgment might not be effective unless it is preceded by evidentiary hearings regarding the actions being complained about.[58]

While drafters should attempt to provide full releases of all duties, claims, etc., there is no good way to draft around the duty to disclose all material facts. Rather, fiduciaries should endeavor to provide full information and disclose all material facts, and settlement agreements should actively show 1) that all facts were disclosed, and 2) the parties have reviewed and understand the disclosures.

There is no "best way" to show full information, but here are some helpful tips.

A. Full Information Tip #1: Use Plenty of Exhibits.

In providing full information, it is almost impossible to have too many exhibits. In fact, if your 20-page agreement contains 500 pages of exhibits, that is perfectly fine. If the settlement agreement discloses EVERYTHING, then it will be very hard for a party to later complain something was not disclosed. In any trust or estate settlement agreement, consider attaching the following as exhibits:

1. **Copies of the Trust or Will in question;**
2. **All related probate document (order, affidavit of facts, etc.);**
3. **Any accountings that exist;**
4. **ALL tax returns…the estate tax return, estate income tax returns, the decedents final income tax returns, etc.;**
5. **Bank statements for all accounts;**
6. **Contracts entered into by the fiduciary such as contracts to sell real estate, leases, contracts to employ agents, etc.; and**
7. **Any valuations obtained for any property owned by the trust or estate.**

When considering whether enough exhibits have been included, try the following exercise: identify a complaint or issue a party might raise, and test whether you can connect-the-dots using the documents disclosed by the settlement agreement (this is essentially playing Six Degrees of Kevin Bacon with the exhibits). For instance, if the trustee leased property to the trustee's siblings, you might be able to trace the relevant facts as follows:

1. **The accounting disclosed the amount of rent that was received from the lease (so the beneficiary knew how much the trust was receiving).**
2. **The accounting referred to the bank statements which were also included as an exhibit.**
3. **The bank statements contained check images showing the trustee's sibling was the person paying rent.**

B. Full Information Tip #2: Timing of Execution.

If the settlement agreement attaches hundreds of pages of information as exhibits, drafters should acknowledge that it may take substantial time to review and understand the exhibits. As such, despite any urgency to execute settlement agreements, drafters should resist the urge to execute settlement agreements concurrently with (or very shortly after) delivering the settlement agreement and all of the exhibits attached to it. Rather, the agreement and exhibits should be delivered, and the parties should be given a sufficient period of time to review the documents *prior* to executing the settlement agreement.

Alternatively, if execution cannot be delayed, drafters might consider borrowing from the consumer protection playbook by including a right of rescission. In certain consumer transactions, lenders are required to give the consumer a right rescind the agreement for a

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[52] *Johnson v. Peckham*, 120 S.W.2d 786, 787 (1938).
[53] Tex. Estates. Code 114.005.
[54] *Slay v. Burnett Tr.*, 187 S.W.2d 377, 390 (1945).
[55] *Alexander v. Martin*, No. 2:08CV400, 2010 U.S. Dist. LEXIS 97755, at *48 (E.D. Tex. 2010).
[56] Tex. Prop. Code 114.005.
[57] *See Harris v. Archer*, 134 S.W.3d 411, 419-20 (Tex. App.—Amarillo 2004).
[58] *See Tex. State Bank v. Amaro*, 87 S.W.3d 538, 544-45 (Tex. 2002).

period of time.[59] This allows consumers the opportunity to carefully consider and review the terms. In a trusts and estates settlement agreement, the drafter can delay all performances for some amount of time after execution and allow certain parties to rescind the agreement. The intent for this provision can be explained in a recital as follows:

> A right to rescind this agreement is contained in Section X to allow the parties to fully review and understand each exhibit and assure that all parties are acting on full information. Prior to the expiration of the rescission period each party will:
>
> 1. **Review the settlement agreement and all exhibits with the party's lawyer;**
> 2. **Notify the other parties of any questions the party may have as a result of reviewing the settlement agreement and attached exhibits; and**
> 3. **Rescind this agreement if the party does not understand the information contained in the exhibits or if the party requires more time to review this agreement or the exhibits attached to it.**

C. Is it too complex?

If the settlement agreement is too complex or if the five factors very obviously weigh against enforcement of the settlement agreement, drafters should consider requiring an agreed judgment. An agreed judgment, if done correctly, cannot be set aside because a beneficiary did not have full information. If any of the following facts are present, an agreed judgment *might* be appropriate.

1. **Beneficiaries refuse to hire counsel to represent them;**
2. **The settlement agreement includes a complex accounting that is difficult for beneficiaries to understand;**
3. **The beneficiaries are not knowledgeable in business;**
4. **The beneficiaries are relying on the trustee/executor to "tell them what to do";**
5. **The beneficiaries refuse to review any exhibits or documents (e.g., "just tell me where to sign").**

VII. JUDICIAL DISCHARGE – AGREED JUDGMENT.

A court may review a fiduciary's action and discharge him from liabilities related to those actions.[60] The release by the court is not conditioned on full information or disclosure of facts; rather, the court's discharge of liability will cover any actions reviewed by the court in an evidentiary hearing.[61]

If a drafter is worried about the enforceability of a settlement agreement due to lack of full information or the presumption of unfairness, the drafter should consider requiring the parties to cooperate in obtaining an agreed judgment from the proper court. The settlement agreement may condition the agreement upon the court granting the agreed judgment:

> The parties will cooperate in filing the Petition to Approve Accounting and Other Actions attached as Exhibit B. The parties agree to schedule an evidentiary hearing on the petition, and following the evidentiary hearing, the parties agree to execute an agreed judgment in substantially the same form as Exhibit C. The obligations of First Bank contained in this settlement agreement are conditioned upon the agreed judgment being signed by the court.

Following the execution of the settlement agreement, a petition or motion must be filed. In a typical trust case, the petition will seek approval of the trustee's accounting and any other actions the parties desire to present to the court. MOST IMPORTANTLY, the petition must 1) ask for discharge from liability from all actions, and 2) place those actions in front of the court.

Following the filing of the petition, either an agreed order may be submitted, or even better, the parties can schedule an evidentiary "prove up" hearing. Although res judicata generally applies to agreed judgments,[62] an agreed judgment is interpreted as if it is a contract between the parties.[63] Additionally, agreed judgments may be attacked if a party claims fraudulent inducement or failure to disclose material facts.[64] As such, it may be

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[59] 12 CFR Part 1026 (Regulation Z).

[60] *Tex. State Bank v. Amaro*, 87 S.W.3d 538, 545 (Tex. 2002).

[61] *Id*.

[62] *St. Raphael Med. Clinic, Inc. v. Mint Med. Physician Staffing, LP*, 244 S.W.3d 436, 440 (Tex. App.—Houston [1st Dist.] 2007).

[63] *Direct Advert., Inc. v. Willow Lake, LP*, No. 13-14-00212-CV, 2016 Tex. App. LEXIS 3542, at *6 (Tex. App.—Corpus Christi Apr. 7, 2016).

[64] *See Authorlee v. Tuboscope Vetco Int'l, Inc.*, 274 S.W.3d 111, 131 (Tex. App.—Houston [1st Dist.] 2008).

worthwhile to have an evidentiary hearing to assure that all issues are presented to the court.

Two cases provide especially good insight to the value of evidentiary hearings: *Coble Wall Trust Co. v. Palmer* and *Tex. State Bank v. Amaro*. In *Coble*, an entity, Coble Wall, was appointed the guardian of the estate for an elderly incompetent person. After the ward's death but prior to the guardian's final accounting, the administrator of the ward's estate raised several objections to the fees paid to the guardian.[65] The probate court held a full hearing on Coble Wall's accounting as well as the objections raised by the guardian.[66] After the hearing, the probate court approved the final accounting and discharged Coble Wall of all liability.[67] The legatees later brought consumer law and negligence claims against Coble Wall regarding its "exorbitantly expensive fees."[68] Because full evidentiary hearings had been conducted on the fees charged by Coble Wall, the Texas Supreme Court held that the order discharging Coble Wall of liability was not subject to collateral attack, and the claims were barred by res judicata.[69]

Conversely, in *Amaro*, a trustee, Texas State Bank, submitted a final accounting for approval by the court.[70] After a hearing on the accounting, the court discharged Texas State Bank and released it from any liability to the trust or its beneficiary.[71] When the beneficiary appealed the court's liability release, the Texas Supreme Court held that the court's approval was proper, but absolving Texas State Bank from tort liability was not.[72] Because Texas State Bank did not ask the court to adjudicate its potential tort liability, and because no evidence was presented as to Texas State Bank's tort liability, the court did not have jurisdiction over the issue.[73] Therefore, the release from *all* liability was not within the scope of the relief requested by Texas State Bank.[74]

Considering *Coble* and *Amaro*, a fiduciary should consider preceding an agreed judgment with an evidentiary hearing that places its accounting and any controversial issues in front of the court. By doing so, the court can discharge the trustee from all liability associated with the claims.[75]

A sample Petition to Approve Accounting and Other Actions is attached as Exhibit B.

VIII. TAX ISSUES.

The specific tax consequences of settlement agreements is beyond the scope of this paper, but drafters should always be mindful of tax consequences and tax "opportunities." For instance, the IRS generally will not respect the terms of a settlement agreement unless the agreement resolves a bona fide dispute.[76] As such, drafters should craft the settlement agreement in a manner that documents the bona fide dispute and clearly shows the IRS that the agreement is not merely some scheme to save tax purposes.

The following are "tips" to consider when addressing tax provisions in settlement agreements.

A. Disclaim, Disclaim, Disclaim.

Every settlement agreement in trust and estates should contain a disclaimer regarding tax consequences. In that disclaimer, each party should represent and warrant that he or she is relying on his or her own advisors and is aware of any tax consequences that might exist as a result of the settlement agreement.

B. Draft with the IRS in mind.

As mentioned, draft to show that the agreement is actually settling a bona fide dispute. In the recitals, include the background of the dispute and all the actions taken by the parties. Consider including the factual basis for any claims or disputes, the dates any lawsuits were filed, and the amount of discovery conducted.

C. Will a "Tax Bomb" go off?

Drafters should *always* be on the lookout for "tax bombs."[77] For instance, consider the following hypothetical:

> Decedent executes several documents on his deathbed, including a will and IRA beneficiary designation that leave everything to his wife. Following his death, the decedent's children (the wife's step-children) challenge the will and beneficiary designation for lack of capacity. Following mediation, the parties agree that the kids will receive the IRA and the wife will receive the assets in the probate estate.

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[65] *Id*. at 478.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 480.
[69] *Id*.
[70] *Tex. State Bank v. Amaro*, 87 S.W.3d 538, 541 (Tex. 2002).
[71] *Id*.
[72] *Id*. at 545.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Reed's Est. v. Comm'r*, 171 F.2d 685 (8th Cir. 1948).
[77] A "tax bomb" is anything that might unintentionally trigger a large amount of taxes.

In the above hypothetical, the mediated settlement might set off an IRA tax bomb. If the agreement is not respected by the IRS, or if the terms are executed incorrectly, the wife might 1) be required to pay income tax on the entire amount of the IRA, and 2) be deemed to have made a gift of the proceeds to the kids, using up some of her basic exclusion amount.

The following is a non-exclusive list of potential tax bombs that drafters should be wary of:

1. **Any settlements involving tax deferred accounts or qualified retirement funds;**
2. **Any settlements or modifications involving non-exempt trusts;**
3. **Any settlements involving the transfer of low-basis assets; and**
4. **Any settlements involving the liquidation of a corporation or distribution of valuable assets from a corporation.**

D. Initial "Hot" Provisions.

For any provisions with significant tax consequences, consider taking a page from real estate closings and require the parties to initial the provision. Especially if a settlement agreement is long and complex, initialing a provision can make doubly sure that a beneficiary acknowledges its terms and is acting on full knowledge.

E. Anticipate Future Disputes.

Consider future tax issues in each agreement you draft. For instance, consider the following hypothetical:

Surviving spouse and step-children have been fighting over an estate for 9 months. Finally, the parties agree to a division of assets and desire to settle the estate. A settlement agreement is signed allowing step-son to serve as independent executor to administer the estate and distribute the assets. Several months after settlement, the surviving spouse calls her lawyer and asks how to file a DSUE return.

In the above example, the parties might have an entirely new fight related to whether a DSUE return will be filed and who pays for it. Drafters should try to anticipate those future disputes and address them in any current settlement agreement.

F. Look for Opportunities.

If all interested parties are executing a settlement agreement, a drafter should be on the lookout for tax "opportunities" that can be addressed in the agreement. Below is a non-exclusive list of potential opportunities:

1. **Can an IRA be directed to an eligible designated beneficiary?**
2. **Can non-exempt assets be directed to non-skip persons?**
3. **Can low-basis assets be directed to upstream beneficiaries or older beneficiaries?**
4. **Do the claims being settled have different tax consequences? Can we push more money towards the claims with more favorable consequences?**
5. **Can we take action to turn a bypass trust into a QTIP trust?**

EXHIBIT A - RECITALS

I. FACTS AGREED TO BY THE PARTIES.

The parties agree that the following recitals are true and correct:

Decedent. John J. Jefferson (the "Decedent") died on July 1, 2020, a resident of Gruver, Hansford County, Texas. He was survived by his wife, Joan, and four adult children from a previous marriage, Brian, John Jr., Eric, and Amy.

Probate of Will. The Decedent's Last Will and Testament dated _____, was admitted to probate on _____, in Cause No. _____ in the County Court of _____ County, Texas. A copy of the Will is attached as Exhibit "_." Decedent did not execute any codicils. _____ were appointed as Independent Co-Executors of the Decedent' estate by the County Court of _____ County, Texas, and Letters Testamentary were issued to them on _____. Those Letters Testamentary have not been revoked and are still in full force and effect.

Dispositive Terms of the Will.

1. **Section II of the Will gives to _____ all of the Decedent's interest in the following properties:**
    a. Household goods and furnishings;

    b. All motor vehicles;

    c. The home located on Section 134, Block 45, H&TC RR Co., Hansford County, Texas, including two acres of land surrounding the house.

Section III of the Will gives to the Children all of the Decedent's interest in Sparks Brothers, a partnership, comprised of Dean and the Decedent.
Section IV of the Will gives to Dean all of the Decedent's interest in Sparks Brothers Drilling Company, a Texas corporation.
Section V of the Will gives the residue of the Decedent's estate to Dean.
Accounting. An accurate and full accounting is attached to this agreement as Exhibit A. The parties have each reviewed the accounting and agree and affirm that the accounting is complete, accurate, and correct.

Assets. At the time of his death, the Decedent owned, or owned an interest in, among others, the following assets, which had been accumulated prior to and during Decedent's marriage to Merry:

Residence plus 2.958-acre tract located in the Southwest Quarter of Section 134, Block 45, H&TC RR Co. Survey, Hansford County, Texas.
Household furniture and personal effects.
2006 Chevy pickup, 77,000 miles.
2010 Dodge Journey, 148,000 miles.
2012 Dodge Durango, 150,000 miles.
Fifty percent (50%) general partnership interest in Jefferson Brothers, a Texas general partnership.
Fifty percent (50%) of the issued and outstanding shares of stock of Jefferson Bros. Spraying, Inc., a Texas corporation.
Fifty percent (50%) of the issued and outstanding shares of stock of Jefferson Brothers Water Company, a Texas corporation.
Beneficial interest in the Jane Jefferson Trust established under the Last Will and Testament of Jane Jefferson, Deceased, dated May 20, 1995.
Marital Agreement. Jane has represented that no prenuptial or marital agreement exists between the Decedent and Jane.

Form 706 Estate Tax Return. In 2019, the year of the Decedent's death, the applicable exclusion amount from federal estate taxes was $11,400,000. The Decedent made no taxable gifts during his lifetime which used any of his exclusion amount. Based on the gross value of the Decedent's estate as of his date of death, no federal estate tax return is due. The Parties have determined and hereby agree that a federal estate tax return will not be filed for the Decedent's estate pursuant to Rev. Proc. 2017-34 to make the portability election under Section 2010(c)(5)(A) of the Internal Revenue Code.

Purpose. This Agreement is entered into for the purpose of amicably settling completely and fully any and all claims any of the Parties may have against each other relating to the distribution of the Decedent's estate and payment of the Decedent's debts, taxes, and administration expenses. The Parties wish to expressly waive strict compliance with the terms of the Will and wish to expressly approve and authorize the distribution of properties of the Decedent's estate according to this Agreement. All Parties further wish to release and forever discharge each other from any and all claims, demands, suits and liabilities arising from or related to the distribution of the Decedent's estate according to this Agreement.

EXHIBIT B – PETITION TO APPROVE ACCOUNTING AND OTHER ACTIONS

NO. _____

IN RE: THE MICHAEL SCOTT TESTAMENTARY TRUST	§	IN THE ____ JUDICIAL DISTRICT COURT
WARREN BUFFET TRUST COMPANY,	§	IN AND FOR
PEITIONER	§	RANDALL COUNTY, TEXAS

PETITION TO APPROVE ACCOUNTING AND OTHER ACTIONS AND TO APPOINT SUCCESSOR TRUSTEE

TO THE HONORABLE COURT:

The Warren Buffet Trust Company ("Petitioner" or "Warren Buffet"), as Trustee of The Michael Scott Testamentary Trust established by the last will and testament of Michael Scott (the "Trust") files this Petition to Approve Accounting and Other Actions and to Appoint Successor Trustee. In support of this petition, Petitioner respectfully shows the Court as follows:

I. DISCOVERY

A. Pursuant to TEX. R. CIV. P. 190.1, discovery in this matter is intended to be conducted under Level 3 of this rule.

II. JURISDICTION AND VENUE

A. This court has jurisdiction to grant the relief requested in this petition pursuant to §115.001(a)(3), (4), and (8) of the Texas Trust Code.

B. Venue lies in Randall County, Texas, under Section 115.002(c-1)(2) of the Texas Trust Code because the administration of the estate of Michael Scott is still pending in Randall County Court Case No. 1234-P.

III. CLAIMS FOR RELIEF

A. This is an action approval of an accounting and other actions and appointment of a successor trustee. Petitioner seeks monetary relief of $100,000 or less and non-monetary relief. The relief sought is within the jurisdictional limits of the court.

IV. PARTIES

A. Petitioner Warren Buffet Trust Company, is a Foreign Corporate Fiduciary qualified to serve in a fiduciary capacity in the State of Texas.

B. John Smith is an individual who resides at _____. John Smith is the current income beneficiary of the Trust and a necessary party within the meaning of Section §115.011(b)(2) of the Texas Trust Code.

C. Joe Smith is an individual who resides at _____. Joe Smith is a named contingent beneficiary and a necessary party within the meaning of Section §115.011(b)(2) of the Texas Trust Code.

V. BACKGROUND

A. The Michael Scott Testamentary Trust was established by the last will and testament of Michael Scott (the "Will"). The Will provides that:

> "Jim Halpert and Dwight Schrute, acting together, or either them acting alone, shall have the power to remove any corporate trustee, with or without court approval and to appoint a successor corporate Trustee."

On July 20, 2010, prior to any Trustee serving, Jim Halpert exercised this power to appoint Warren Buffet Trust Company to serve as trustee of the Trust. Warren Buffet accepted the appointment on October 31, 2010, and served as the sole trustee of the Trust until its resignation on February 1,

2020. Copies of Warren Buffet's appointment as Trustee and Warren Buffet's resignation are attached hereto as Exhibits A and B, respectively.

B. Following the resignation of Warren Buffet, Dwight Schrute declined to appoint a successor trustee. Jim Halpert died on November 25, 2014. Because the Trust does not name a successor trustee, and because Dwight Schrute is unwilling to appoint a successor trustee, Warren Buffet files this action to appoint a successor trustee and discharge Warren Buffet from its duties pursuant to §113.081 of the Texas Trust Code.

VI. REQUEST FOR APPOINTMENT OF SUCCESSOR TRUSTEE

A. Petitioner requests this Court appoint a successor trustee to serve in Warren Buffet's place and stead pursuant to Section 113.083(a) of the Texas Trust Code, and to discharge Warren Buffet from any further responsibilities, duties, or liabilities related to its service as trustee in accordance with §115.001(a)(4) and (8) of the Texas Trust Code.

VII. REQUEST FOR APPROVAL OF ACCOUNTING AND OTHER ACTIONS

A. Warren Buffet has filed an accounting that complies with § 113.152 of the Texas Trust Code, and Warren Buffet asks the court to approve the accounting, including the approval of distributions, fees, costs, and expenses contained in the accounting.

B. Additionally, Warren Buffet asks that the court review certain actions of Warren Buffet in administering the Trust and discharge Warren Buffet from any liability related to those actions.

VIII. RELIEF REQUESTED

Petitioners pray that the Court:

a) Appoint a successor trustee to serve in Warren Buffet's place and stead;

b) Discharge Warren Buffet from any further responsibilities or duties related to its service as trustee;

c) Direct Warren Buffet to transfer the assets of the Trust to the successor trustee;

d) Approve the Warren Buffet's reasonable legal fees and necessary and reasonable expenses of this proceeding and authorize they be paid out of the Trust;

e) Approve Warren Buffet's accounting and discharge Warren Buffet from any liability associated with the accounting or any transactions, facts, or actions contained in the accounting;

f) Approve Warren Buffet's actions in administering the Trust and discharge Warren Buffet from any liability associated with those actions; and

g) Award Petitioner such other and further relief to which they may show themselves justly entitled.