

AMERICAN ARBITRATION ASSOCIATION

NICHOLAS ABAZA AND
JORGE BORUNDA

Claimant / Counter-Respondent

VS.

RICHARD ALLISON

Respondent/Counter-Claimant

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NO. 01-22-0000-9524

CAROLINE ALLISON

Claimant / Respondent

VS.

BORUNDA, P.C., JORGE BORUNDA,
NICHOLAS ABAZA, LAW OFFICES OF
NICHOLAS ABAZA, PC, MICHAEL
TREVINO and LAW OFFICE OF MICHAEL
A. TREVINO, PLLC

Respondent / Counter-Claimant

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NO. 02-22-0002-4507

REPORT, STATEMENT, AND DECLARATION OF SARAH PATEL PACHECO

TO THE HONORABLE ANNE ASHBY:

I submit the following as my Report and Statement regarding the above-captioned matter and identify the following as an accurate rendition of my factual knowledge and testimony.

I. BACKGROUND AND QUALIFICATIONS.

My biography is currently before the court as Clients' Exhibit No. 293. I have an undergraduate degree in accounting and graduated law school from Southern Methodist University in May 1993 and was admitted to the State Bar of Texas in November 1993. I have been licensed as an attorney consecutively since that date. I have been Board Certified by the State Bar of Texas in Estate Planning and Probate Law since December 1998. I am currently a partner with the law firm of Jackson Walker, LLP.

For approximately 30 years, I have been representing personal representatives, trustees, beneficiaries and other parties in matters relating to estates and trusts, including, but not limited to, trust contests and construction disputes, will contests and construction disputes, prosecution and defense of various fiduciary claims, fiduciary accountings, creditor and spousal claims, and matters relating to the administration and settlement of estates and trusts, including estate tax filings. I have handled numerous trust modifications. I have structured and implemented settlement agreements related to the foregoing. While I cannot give an exact estimate, I anticipate I have drafted in excess of 500 settlement agreements in my career. I have tried numerous cases to verdict involving will and trust contests, breach of fiduciary duty claims, including three in the last year.

I am a Co-Author of Thomson West's (i) Wills, Trusts, and Estate Planning Practice Guide and (ii) Texas Probate Practice Guide. I am the editor of the State Bar of Texas Guardianship Manual. I have been the Course Director for multiple probate and fiduciary litigation continuing legal education courses. I have written outlines and presented all numerous continuing legal education courses. One of the topics I frequently write and speak about is the settlement of will and trust disputes. My memberships and committee assignments are reflected on my biography as are my other associations, nominations, awards, speeches, and articles.

My practice has led me to handling probate disputes of virtually every nature throughout Texas. I have handled probate matters in Collin County and before Judge Weldon Copeland. I currently have two cases pending in Judge Copeland's court.

I am familiar with the interpretation of complex estate planning documents such as the trust documents created by Richard Allison, Sr. ("Decedent") titled "Richard Allison Trust as amended and restated," dated April 11, 2013 ("Trust Agreement") which was marked as Clients Exhibit No. 32. I am also aware of the application of the Texas Estates Code, the Texas Trust Code and common law to instruments such as the Trust Agreement.

II. ENGAGEMENT BY CAROLINE AND RICHARD ALLISON; OBSERVATIONS

In March 2022, I was engaged by Caroline Allison ("Caroline") and Richard Allison ("Rich") to advise regarding issues they were experiencing after the settlement of litigation involving their stepmother Robin Allison ("Robin") in Collin County, Texas.

I received and reviewed the trust and related agreements, retrieved copies of pleadings and orders from the probate case in Collin County, reviewed various docket filings and assessed other related documents, including:

1. The Richard Allison Trust Agreement, as originally drafted, and as amended in 2011 and 2013;
2. Mediated Settlement Agreement, dated April 13, 2021 ("MSA")
3. The Orders entered by Judge Copeland relating to the above-referenced litigation including the orders approving the Mediated Settlement Agreement and enforcement thereof;
4. Drafted and executed documents entitled Modification and Amendment to the Richard Allison Trust ("Modification Agreement"),

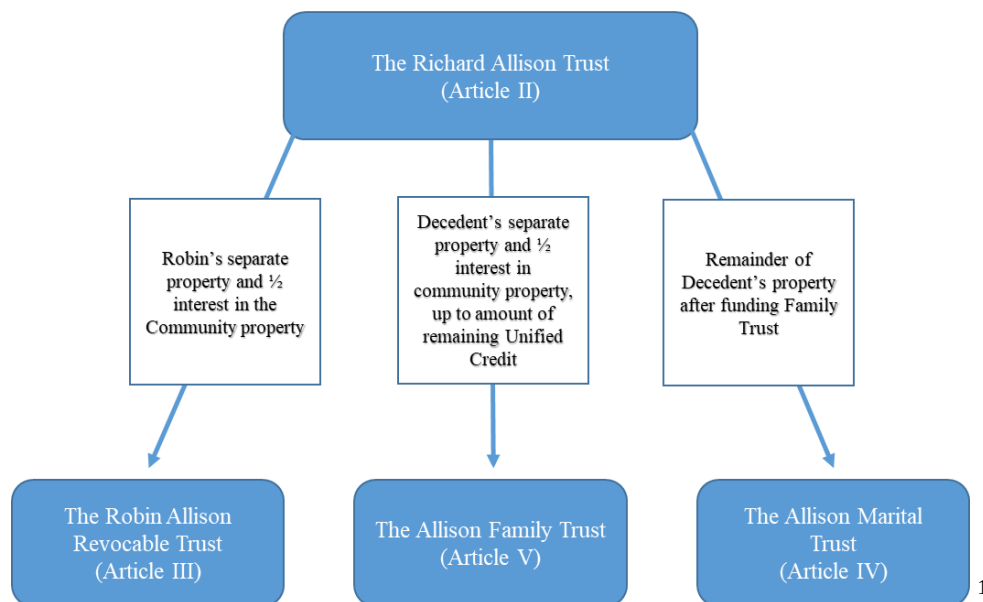
5. Demand Letters received from Mr. Collins purporting to represent Rich's son, Hunter, relating to the Family Trust;
6. Petition to Modify the Family Trust.

Through reviewing the above-referenced documents, I learned that Decedent was Caroline and Rich's father and Robin's husband. The original Richard Allison Trust terminated upon Decedent's death (April 14, 2017), and its assets were to be distributed to three trusts:

1. The Robin Allison Revocable Trust ("Survivor's Trust"), governed by Article III of the Trust Agreement;
2. (2) the Allison Marital Trust ("Marital Trust"), governed by Article IV of the Trust Agreement; and
3. (3) the Allison Family Trust ("Family Trust"), governed by Article V of the Trust Agreement.

An illustration of the division is as follows:

Disposition of Assets Upon Decedent's Death



The Marital Trust and Family Trust became irrevocable upon Decedent's death.² Thus, as will be discussed further later, Robin, Caroline and Rich could have modified their terms by agreement.

Robin is sole beneficiary of the Marital Trust during her lifetime and the terms of the

¹ This chart is prepared based on my review of the Trust Agreement. *See* Clients' Exhibit No. 32 (Trust Agreement).

² Trust Agreement, Art. X, B.

Marital Trust provide that all trust income is to be distributed to Robin at least quarterly. This is required to comply with Internal Revenue Code Section 2056 which allows the Decedent's estate to take a marital deduction on its death tax return for assets passing in trust to a spouse if certain requirements are met.³ And while not required by Section 2056, the Trust Agreement also authorized the Trustee of the Marital Trust to make distributions of trust principal to Robin as *necessary* to provide for Robin's health, education, maintenance and support ("HEMS").⁴ In determining whether a principal distribution is necessary, the Trustee is required to consider all other sources of funds available to Robin. The relevant portion of the Trust Agreement provides as follows:⁵

C. **Distributions.** The Trustee shall distribute the net income of each trust created under this Article to the surviving Grantor at least quarter annually. The Trustee shall also distribute to the surviving Grantor such amounts of the principal of each trust created under this Article as are necessary, when added to the funds reasonably available to the surviving Grantor from all other sources known to the Trustee (excluding the trust created by Article V) to provide for the surviving Grantor's health, support, maintenance and education in order to maintain the surviving Grantor liberally in accordance with the standard of living to which the surviving Grantor was accustomed at the time of the deceased Grantor's death. The Trustee shall, to the extent possible, make any distributions of principal first from the Nonexempt Marital Trust and then from the Exempt Marital Trust. In addition, during the term of the trust or trusts created by

During her lifetime, Robin is also the beneficiary of the Family Trust, along with Caroline, Rich and the Decedent's grandchildren. The terms of the Family Trust authorize the Trust to make distributions of trust income and principal to Robin, Caroline, Rich or any of the Decedent's grandchildren as *necessary* to provide for each person's HEMS.⁶ In determining whether a distribution is necessary, the Trustee is required to consider all other sources of funds available to the beneficiary. The Trust Agreement specifically provides as to Robin that they must consider assets available in the Marital Trust. In other words, the Trustee should not be making a distribution to Robin from the Family Trust unless the assets of the Marital Trust (being

³ IRC Section 2056 provides for a deduction for "qualified terminable interest property" which is defined as follows:

- (i) In general The term "qualified terminable interest property" means property—
 - (I) which passes from the decedent,
 - (II) in which the surviving spouse has a qualifying income interest for life, and
 - (III) to which an election under this paragraph applies.
- (ii) Qualifying income interest for life The surviving spouse has a qualifying income interest for life if— (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property. . . .

IRC § 2056(7)(B)(i)-(ii)(I).

⁴ Trust Agreement, Art. IV, C.

⁵ Trust Agreement, Art. IV.C (in part).

⁶ Trust Agreement, Art. V, B.

\$5,797,845.00 at Decedent's death (see Schedule M to Clients' Exhibit 286, RAA 003564) and \$5,842,822.43 at the time of the last Whitley Penn Accounting identified as Lawyers Exhibit 140 at bates page RAA 007216) were exhausted and Robin's other assets were insufficient. The relevant section of the Trust Agreement provides as follows:⁷

B. Distributions. The Trustee shall distribute to the surviving Grantor such amounts of the income and principal of the trust created by this Article as are necessary, when added to the funds reasonably available to the surviving Grantor from all other sources known to the Trustee (which shall include, but not be limited to, the trust or trusts created by Article IV), to provide for the surviving Grantor's health, support, maintenance and education, taking into consideration the surviving Grantor's age, education and station in life. In addition, the Trustee, in the Trustee's discretion, may distribute to any one or more of the Grantors' descendants (other than a Special Needs Beneficiary) such amounts of the income and principal of the trust created by this Article as are necessary, when added to the funds reasonably available to the Grantors' descendants from all other sources known to the Trustee, to provide for their health, support, maintenance and education, taking into consideration their age, education and station in life.

Robin was also the sole beneficiary of the Survivor's Trust during her lifetime.

I reviewed the Form 706 which provided as follows;

1. The Marital Trust was initially funded with \$5,797,845.00 in assets (see Schedule M to Clients' Exhibit 286, RAA 003564) and it is not generation-skipping transfer tax ("GST") exempt, which means that future distributions to Decedent's grandchildren will be subject to a future 40% GST when distributions are made to Decedent's grandchildren.
2. The Family Trust was initially funded with \$5,785,948.24 in assets per the Whitley Penn Accounting (see Lawyers 140 at RAA 007195) and it is GST exempt, which means that future distributions to Decedent's grandchildren will not be subject to a future 40% GST when distributions are made to Decedent's grandchildren, provided the GST exemption is maintained.

Robin is named to serve as the sole Trustee of all three trusts.⁸ Additionally, the Trust Agreement gives Robin the power to remove and replace any trustee of the Family Trust or Marital Trust with or without cause, and she has the right to receive an accounting or inspect the books and records of any trust created under the Trust Agreement.⁹

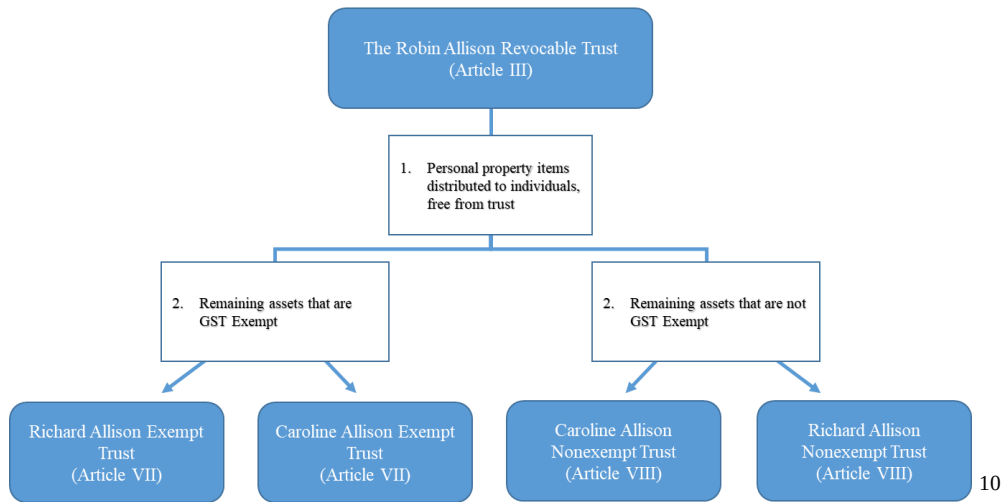
The Marital Trust, Family Trust and the Survivor's Trust all terminate upon Robin's death, and the remaining assets, save and except a few specifically bequeathed personal property items, pass to trusts benefitting Caroline and Rich:

⁷ Trust Agreement, Art. V.B (in part).

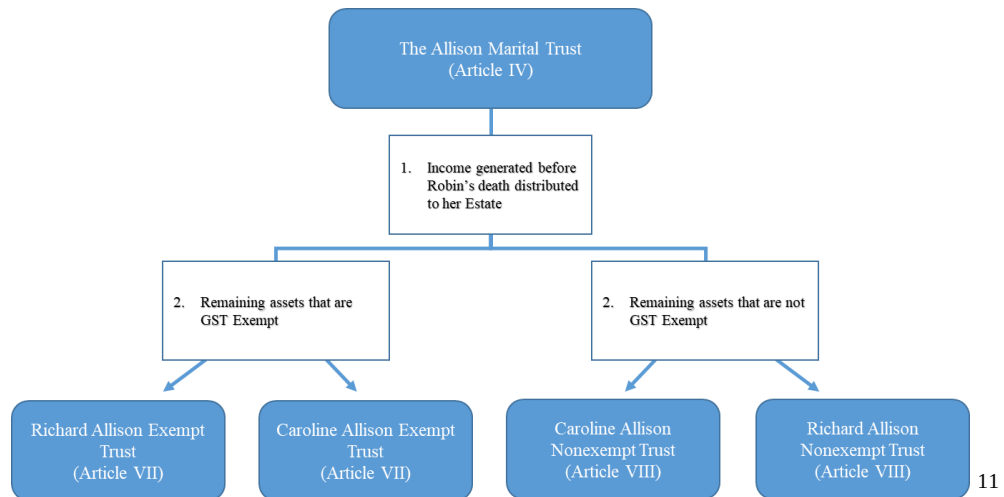
⁸ Trust Agreement, Art. IX, A.

⁹ Trust Agreement, Art. IX, E (removing and replacing trustee) and Art. XI, B (inspection of records and accountings).

Disposition of Assets Upon Robin's Death



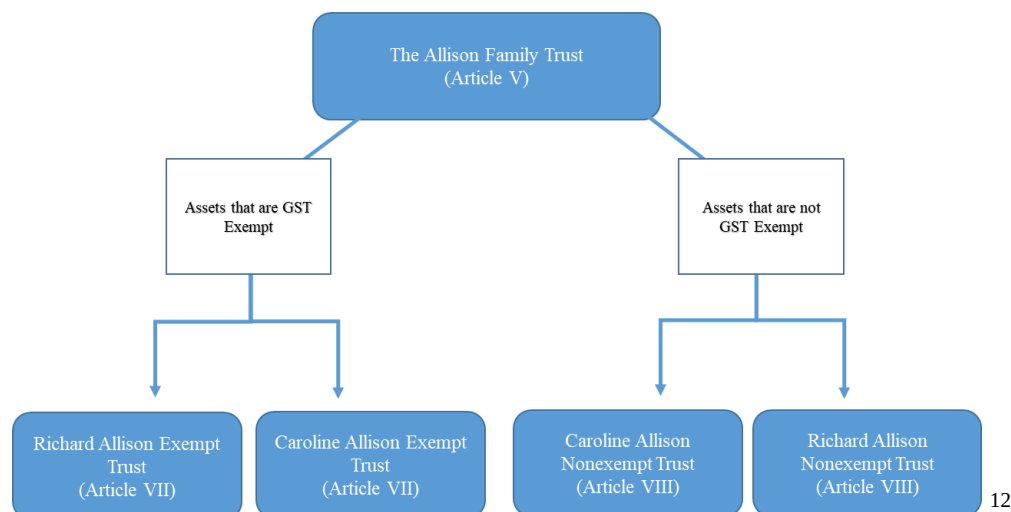
Disposition of Assets Upon Robin's Death



¹⁰ This chart is prepared based on my review of the Trust Agreement, Art. III, D (specific bequests) and G (residuary distributions). *See* Clients' Exhibit 32 (Trust Agreement).

¹¹ This chart is prepared based on my review of the Trust Agreement, Art. IV, D (payment of income) and E (residuary distributions). *See* Clients' Exhibit 32 (Trust Agreement).

Disposition of Assets Upon Robin's Death



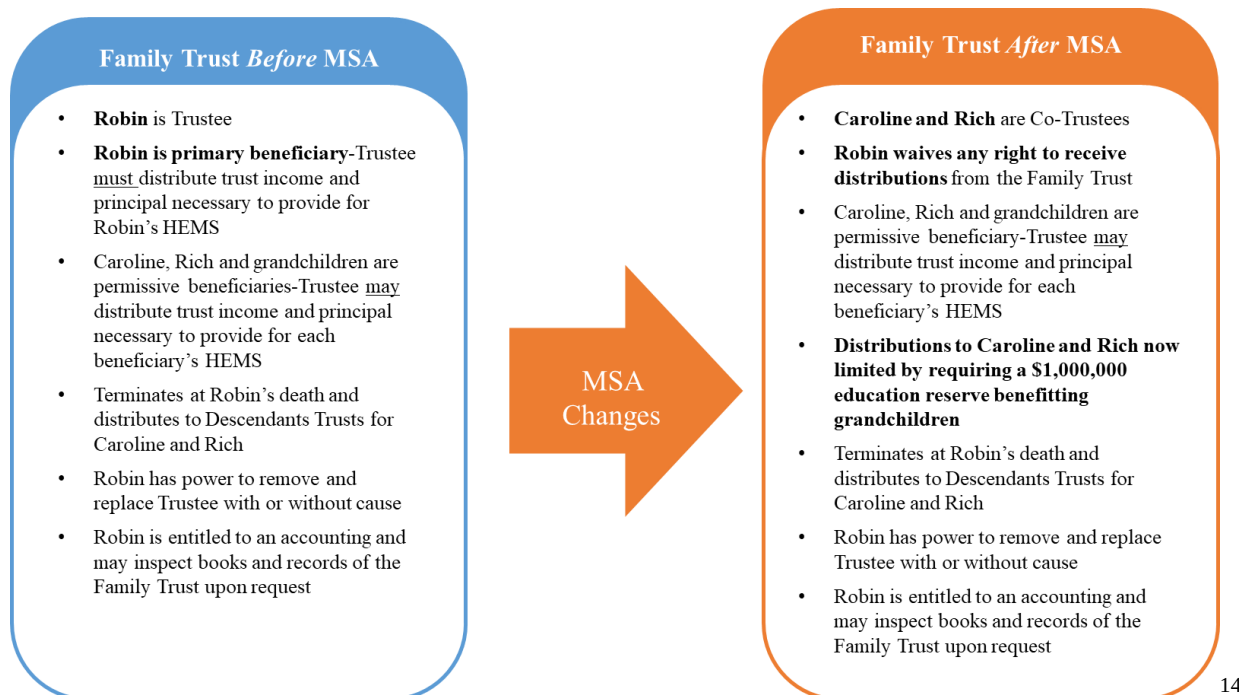
I also reviewed the MSA, where Robin, Caroline and Rich made certain agreements relating to the Marital Trust, Family Trust and Survivor's Trust, including: (i) Robin's resignation as the Trustee of the Family Trust; (ii) Robin's waiver of all rights to receive interest, income and/or principal from the Family Trust; (iii) Caroline and Rich's appointment as co-trustees of the Family Trust; (iv) the establishment of a minimum balance and education reserve for the Family Trust of \$1,000,000 until the youngest of Decedent's grandchildren attains 25 years of age; and (v) confirmation of Caroline and Rich's access to principal and income distributions from the Family Trust, other than the \$1,000,000 educational reserve.

The MSA provided that the Marital Trust, Family Trust and Survivor's Trust, were all to continue holding assets in trust for the benefit of the respective beneficiaries. Although the MSA provided for certain trust assets to be distributed to Robin, there was no agreement or contemplation of specific distributions to Caroline or Rich. The MSA only confirmed that Caroline and Rich would continue to have the right to request principal and income distributions from the Family Trust (which they were entitled to do before the MSA), so long as the Family Trust was able to maintain the \$1,000,000 education reserve.¹³

Paragraph 3.1(p) of the MSA expressly provides for the amendment of the Family Trust, and paragraph 3.5 requires an Agreed Judgment confirming the terms of the MSA and amending the trusts. Below is a comparison of how the agreements made in the MSA modified the administration of the Family Trust:

¹² This chart is prepared based on my review of the Trust Agreement, Art. V, C. *See* Clients' Exhibit 32 (Trust Agreement).

¹³ MSA, paragraph 3.1(p).



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At the time of the MSA, Caroline and Rich were represented by attorneys Trevino, Borunda, and Abaza (hereafter the “Lawyers”). Paragraph 3.1(w) of the MSA required Lawyers to prepare amendments to the Family Trust to facilitate the terms of the agreement within 14 days from the Court approving the settlement. The Court approved the MSA on June 14, 2021.¹⁵ Thus, I calculate that the deadline to have prepared modification documents would have been June 30, 2021.

In this case, the modification document would have required the following:

1. An amended pleading setting out the grounds to modify the Marital Trust and the Family Trust and the proposed modifications to the terms of the Marital Trust and the Family Trust;
2. A Judgment granting the requested modification of the Marital Trust and the Family Trust and the confirming the modified terms of the Marital Trust and the Family Trust.

Per Judge Copeland’s order dated December 7, 2021, the “documents” to effectuate the modifications “were tendered to counsel Trevino in early June 2021, revisions were completed on June 14, 2021 [by email].” See Lawyers Exhibit #277.

However, I confirmed that Lawyers never sought to amend the live pleadings on behalf of Caroline and Rich or filed a Judgment following the MSA’s approval by Judge Copeland. Rather, they appeared to have revised some documents that were drafted by Robin’s counsel that purported to “modify” the Marital Trust and the Family Trust in a manner that did not comply with Texas

¹⁴ This chart is prepared based on my review of the Trust Agreement and the MSA. *See* Clients’ Exhibit 32 (Trust Agreement) and Clients’ Exhibit 158 (MSA).

¹⁵ *See* Clients’ Exhibit 197 (Order Approving Mediated Settlement Agreement).

law and further provided different language than the MSA. I have seen no indication that these documents were signed by Judge Copeland.

On October 14, 2021, Judge Copeland entered a show cause order requiring Caroline and Rich to appear for a hearing.

On December 7, 2021, Judge Copeland entered on Order on Applicant's Motion for Enforcement and For Sanctions against Caroline and Rich. On that same day, Mr. Jeffrey Crouch substituted in as counsel for Caroline and Rich, replacing the Lawyers as their counsel or record.

After I was hired to consult, I spoke with Mr. Crouch about what occurred during this period of time. He advised was he hired by Caroline and Rich to attempt to address the unfinished work and the sanctions motions. To avoid continued sanctions of \$1,000 per day, Mr. Crouch then arranged for them to sign the purported Modification Agreement demanded by Robin's attorneys in December 2021. The Modification Agreement again contained different language than the MSA.¹⁶ I have seen nothing that suggests the Modification Agreement was never presented to the grandchildren or Judge Copeland and the Trust Agreement has been properly modified.

Based on my review of the documentation, including the Trust Agreement, the MSA and the Modification Agreement, my knowledge of the Texas Trust Code and applicable Texas law and my education and experience as a Board Certified Estate Planning and Probate Law lawyer in Texas and an experienced fiduciary litigation attorney focusing on trust and estate matters, I have identified multiple problems associated with the settlement reached in the MSA, the attempts to effectuate the settlement and purported modification of the Family Trust.

As of March 2022 when I was first engaged, the Family Trust had not been modified as it was agreed to in the MSA and no judicial modification had been approved by Judge Copeland. As a fundamental matter, modification of the *irrevocable* Family Trust requires a judicial proceeding. Furthermore, the MSA provided for the continuance of the Family Trust. That by its express terms recognized that the Family Trust was to continue. And there would be no need to "modify" the trust if in fact the real objective was to grant Caroline and Rich unrestricted access to the trust assets. If that was the object, the MSA should have provided for a termination of the Family Trust.

It is my opinion that the Petition to Modify Trust Instrument prepared by my office on behalf of Caroline and Rich is necessary to modify the Family Trust and effectuate the terms of the MSA in a manner that avoids detrimental effects to the beneficiaries and conforms with the Decedent's intent. Lastly, it is my opinion that Caroline and Rich received no value by agreeing to the MSA, and the MSA was not—and is not—in their best interests as beneficiaries of the Family Trust.

All of these problems will need to be addressed by Caroline and Rich.

¹⁶ Modification Agreement, Paragraphs 1.B (distributions) and 1.C (termination). See Lawyers' Exhibit 275 (Modification Agreement).

III. OPINIONS REGARDING THE MEDIATED SETTLEMENT AGREEMENT, THE TRUST MODIFICATION AGREEMENT AND THE JUDICIAL MODIFICATION SOUGHT.

A. The Family Trust had not been properly modified by the Lawyers when I was engaged in March 2022.

After reviewing the Trust Agreement, the Modification Agreement and the pleadings and orders from the underlying litigation, I have determined that the Family Trust was never modified and amended, as required by the MSA. Any drafted amendment by the Lawyers, including the Modification Agreement, is indisputably ineffective to modify the terms of the Family Trust under Texas law.

The Family Trust became irrevocable upon the Decedent's death. Article X Section B of the Trust Agreement states the following:

“After the death of the deceased Grantor, then except for the Surviving Grantor's Trust created under Article III, the trusts created under this Trust Agreement shall become irrevocable, and the surviving Grantor shall thereafter be without power to revoke or amend any of the provisions of such trusts.”

The Texas Trust Code provides the sole mechanism for modifying an irrevocable trust such as the Family Trust. Section 112.054 states the following:

- (a) On the petition of a trustee or a beneficiary, a court may order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part, if:
 - (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
 - (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;
 - (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or impairment of the trust's administration;
 - (4) the order is necessary or appropriate to achieve the settlor's tax objectives or to qualify for a distributee for governmental benefits and is not contrary to the settlor's intentions; or
 - (5) subject to subsection (d):
 - (A) continuance of the trust is not necessary to achieve any material purpose of the trust; or
 - (B) the order is not inconsistent with a material purpose of the trust.

TEX. TRUST CODE Section 112.054. In fact, the MSA also required compliance with Section 112.054 of the Texas Trust Code in modifying the terms of the Family Trust by requiring the terms of the MSA to be effectuated in the form of an Agreed Judgment:

3.5. Resolution of all Lawsuits. All Parties agree to effectuate the terms of this Agreement in the form of an Agreed Judgment confirming the terms of this Agreement and amending the Trust in accordance with terms set forth herein.

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Still, once the MSA was signed, the Lawyers never took any steps to amend their pleadings to seek a modification of the Trust Agreement and even allowed for the dismissal of all Caroline and Rich's claims without first obtaining a judgment pursuant to the MSA. Instead, the Lawyers attempted to modify the MSA provisions through drafting the ineffectual Modification Agreement, without notifying Judge Copeland or the grandchildren who would be directly affected by the revisions.

As discussed more fully below, Texas law would preclude Caroline and Rich, as co-trustees and primary beneficiaries, from making distributions to themselves without an ascertainable standard. But even if the Trust Agreement was permitted to be modified in accordance with the terms of the ineffectual Modification Agreement, the failure to notify the grandchildren and Judge Copeland of these changes after the MSA was approved by the Court would have serious impacts on the terms of the Family Trust and subjects Caroline and Rich to claims of breach of fiduciary duty, loss of estate tax exemption, loss of the GST exemption, and loss of the spendthrift protection.

It is my opinion, based on my review of the documents, pleadings and my experience and knowledge of Texas law relating to trusts, that the Family Trust has not been modified from the original terms set forth in the Trust Agreement. Currently, Robin is still the named primary beneficiary of the Family Trust, Caroline, Rich and their children are all permissive beneficiaries of the Family Trust, entitled to request distributions under a HEMS standard, and the authority of Caroline and Rich to serve as co-trustees of the Family Trust has not been confirmed. Each of these issues will need to be corrected by Caroline and Rich, because the trust modification was not validly completed by the Lawyers.

B. Contrary to the Lawyers advice, the MSA and Trust Modification Agreement did not provide Caroline and Rich unbridled access to the assets of the Family Trust.

As I understand it, the Lawyers advised Caroline and Rich at and after the April 2021 mediation that the settlement documents would legally permit them (Caroline and Rich) as the new co-trustees to distribute to themselves personally (with unfettered discretion) as much money from the Allison Family Trust as desired save and except for a \$1,000,000.00 set aside for their children. This was not correct advice. It is, in fact, wrong under the law.

¹⁷ MSA, Paragraph 3.5.

The MSA called for Caroline and Rich to be co-trustees of the Family Trust. And although Caroline and Rich were to be “removed” as remainder beneficiaries of the Marital Trust, the MSA clearly provides that the Family Trust will continue and that Caroline and Rich’s children will continue to be permissive beneficiaries of the Family Trust.

Caroline and Rich were already beneficiaries of the Allison Family Trust together with their children before the MSA was signed. It appears that the Lawyers were attempting to have Robin give up her right to receive or take a beneficial interest in the Family Trust and make Caroline and Rich both co-trustees and primary beneficiaries of the Family Trust instead of Robin. However, that would not allow Caroline and Rich, as co-trustees, to make distributions to themselves without considering the necessity of such distribution under the HEMS standard. This is made clear by Article V, Section B of the Trust Agreement as well as Texas law.

Robin, as the Trustee of the Family Trust at the time the MSA was executed, and Caroline and Rich, as named co-trustees of the Family Trust to succeed Robin, were and are bound by their fiduciary duties. Texas Trust Code Section 113.029 restricts a beneficiary that is also a trustee’s rights to grant themselves distributions from the Trust:

- (b) Subject to Subsection (d) and **unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:**
 - (1) **a person, other than a settlor, who is a beneficiary and trustee, trustee affiliate, or discretionary power hold of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee’s, the trustee affiliate’s, or the discretionary power holder’s personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee’s, the trustee affiliate’s, or the discretionary power holder’s individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986.**

TEX. TRUST CODE §113.029. (Emphasis added).

As co-trustees, Caroline and Rich would hold the Family Trust assets for the benefit of all beneficiaries: themselves, individually, and their children. As fiduciaries, any distribution to themselves that was not necessary to provide for their health, education, maintenance and support, taking into consideration all funds reasonably available to them, would breach the fiduciary duties they owe to the remaining beneficiaries, their children.

Neither the Trust Agreement, the MSA, nor the ineffectual Modification Agreement expressly indicated that the requirements of Section 113.029 did not apply. In fact, the basic language of the Trust Agreement confirms Caroline and Rich were not settlors of the trust, they were to be beneficiaries and trustees, and following the MSA, they purportedly held a power to make discretionary distributions to or for their own personal benefit. Thus, Section 113.029 of the Texas Trust Code governs the distributions Caroline and Rich can make to themselves, regardless of what is stated in the Modification Agreement.

Caroline and Rich cannot simply deplete the Family Trust assets down to \$1,000,000.00 merely because they feel like doing so; an ascertainable standard must be in place, and it is. As discussed *infra*, the Petition for Modification of Trust Instrument that I prepared reflects the mandatory legal limitations imposed by section 113.029. In fact, it uses as precisely as possible the HEMS standard language that already existed in the Trust Agreement prior to the settlement.

It would be disingenuous for me or any reasonable practitioner to urge that a modification under section 112.054(a)(3) was needed to prevent waste or impairment while simultaneously asserting that the new amendment was designed to allow two new trustees (Caroline and Rich) to promptly strip the overwhelming majority of the assets away from the Family Trust for their own benefit without any applicable or ascertainable standard in place (in violation of section 113.029). As this is not a permissible modification basis under the law, it is a problem that we encountered in preparing an appropriate and lawful trust modification petition against the backdrop of the advice that the Lawyers had given to Caroline and Rich Allison.

The existence of a spendthrift provision raised additional issues against the advice the Lawyers gave that Caroline and Rich had unfettered ability to withdraw monies. Ignoring the applicability of Texas Property Code Section 113.029, the issue encountered is the applicability of spendthrift trust provisions. Article XIII-B contains the following language:

After the death of the last to die of the Grantors, each trust created by this Trust Agreement shall be a spendthrift trust to the fullest extent allowed by law. Prior to the actual receipt of trust property by any beneficiary, no property (income or principal) distributable under any trust created by this Trust Agreement shall, voluntarily or involuntarily, be subject to anticipation or assignment by any beneficiary, or to attachment by or to the interference or control of any creditor or assignee of any beneficiary, or be taken or reached by any legal or equitable process in satisfaction of any debt or liability of any beneficiary, and any attempted transfer or encumbrance of any interest in such property by any beneficiary hereunder prior to distribution shall be void.¹⁸

Under Texas Property Code Section 112.035(b), “a declaration in a trust instrument that the interest of a beneficiary shall be held subject to a “spendthrift trust” is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by this subtitle.” And the purpose of Texas Trust Code Section 113.029 is to restrict distributions to a person that is both a trustee and a beneficiary to a HEMS standard to ensure that the spendthrift protects apply to the trust when it is not self-settled.

The MSA specifies that Caroline and Rich have the right to access the principal and income. But that right must come in the context of the restrictions found at Texas Property Code Section 113.029, the distribution standards set forth in the Trust Agreement and the spendthrift provision. Likewise, the MSA does not distinguish between Caroline and Rich accessing the principal and income as trustees with duties to diversify assets or the ability to access the funds as needed for purposes of HEMS standard.

¹⁸ Trust Agreement, Art. XIII, Section B.

The grandchildren expressed consent to the MSA as it was written, and the problem was that the MSA did not allow Caroline and Rich the unfettered ability to distribute all of the Family Trust funds to themselves aside from the \$1,000,000.00 set aside.

Presumably in an attempt to rectify this issue, the Lawyers added language in the Modification Agreement that was not included in the MSA. That document included a sentence that “[t]he Trustee(s), as defined in the MSA, shall distribute the income and principal of the trust to the Beneficiaries in such amounts as the Beneficiaries, in their discretion, may direct.” This new language was never sent to the grandchildren to approve, and none of the grandchildren signed the document. Also, the modification document says “[i]n the event any provision of this Modification and Amendment to the Richard Allison Trust is found to conflict with the terms of the MSA, the terms and intent of the MSA control.”

It is my opinion, based on my review of the documents, pleadings and my experience and knowledge of Texas law relating to trusts, that the advice given to Caroline and Rich that they would be able to access all assets of the Family Trust without restriction, save and except for the \$1,000,000 educational reserve, was wrong. Regardless of what is stated in the ineffective Modification Agreement, Texas law requires that each distribution that Caroline and Rich, as co-trustees of the Family Trust make to themselves as beneficiaries must be made in accordance with the ascertainable HEMS standard and not otherwise.

C. The Petition for Modification of Trust Instrument is necessary to modify the terms of the Family Trust and protect the best interests of the beneficiaries in the aftermath of the MSA.

As previously stated, I have prepared the Petition to Modify Trust Instrument which seeks to modify the provisions of the Family Trust to conform with the spirit of the agreements made in the MSA without creating detrimental consequences to the Family Trust Beneficiaries and thwarting the Decedent’s estate tax saving objectives.

The Lawyers have stated that a Petition for Trust Modification would be and is a simple process. *Vol 4. Trevino testimony at pages 804-805*. I disagree that this is the case, nor have I found in my experience with Judge Copeland that he would not follow the law. Generally, trust modification lawsuits are not simple. They are frequently costly, require technical compliance with mandatory provisions of the Texas Trust Code and are often contested based on small details. I am currently scheduled for a trial on a trust modification in January of 2024. In that case, by way of example, the only modification my clients are seeking is to allow the beneficiaries to remove and replace the trustee.

With regard to the Trust Agreement at issue in this case, the trust modification proceeding has been complicated because attorney Michael Collins has indicated his view that the grandchildren, who are not all residents of Texas, would be necessary parties to the proceeding. Likewise, Collins has stated that even though he represents Robin Allison, he likewise represents one of the grandchildren – Hunter Allison. Collins has written a letter demanding an accounting and asserting that a lawsuit seeking the removal of Caroline and Rich would be brought on behalf

of Hunter Allison. (Clients' Exhibit 243). Given this letter, I am not at liberty to speak with at least one of the grandchildren regarding the Petition for Trust Modification.

Moreover, to modify the terms of the Family Trust in a way that allowed Caroline and Rich unfettered access to the trust assets would create serious income tax and inclusion issues for Caroline and Rich and strip away all of the tax-saving mechanisms the Family Trust and subsequent Descendants Trusts were intended to provide.

First, the assets that were transferred to the Family Trust are owned by the Family Trust rather than Caroline and Rich, individually. So long as Caroline and Rich can only access the trust's assets in accordance with an ascertainable standard, the assets of the Family Trust will not be includable in either individual's taxable estates upon their deaths.

One of the reasons for the Decedent to distribute his assets to the Family Trust and Marital Trust rather than outright to individuals is to maximize the Decedent's estate, gift and generation-skipping transfer tax exemptions. When the Decedent died, the assets of the Family Trust were included in his taxable estate and were the beneficiary of Decedent's unified credit (i.e. estate tax exemption). So long as the power to dispose of the Family Trust's assets remains subject to an ascertainable standard, then the Family Trust's assets are not includable in the beneficiaries' taxable estates because the assets are not their property.

However, if Caroline and Rich are permitted too much control over the distribution, use and management of the Family Trust's assets, including the elimination of an ascertainable distribution standard, then the value of these assets would be included and taxes upon their deaths under IRC Sec. 2036. In other words, modifying the Family Trust to allow Caroline and Rich to have unfettered control would cause taxes to be paid that the Decedent's estate plan was created to avoid.

This would also mean that the exemption for Generation-Skipping Transfer Taxes would also be wasted, causing the grandchildren who will ultimately receive the remainder of the Family Trust assets to pay taxes on the assets, unnecessarily. If the Family Trust assets are deemed to be the property of Caroline and Rich under IRC Sec. 2036, all of the GSTT exemption afforded would be wasted because the Decedent's children are not valid "skip persons". The GSTT exemption cannot be applied to the Marital Trust, so the grandchildren are already going to pay 40% GSTT on those assets. This is also why the Family Trust must terminate upon the death of Robin.

It is my opinion that seeking to modify the Family Trust to allow for Caroline and Rich to have unfettered control over the trust's assets would be malpractice, as it would cause the Decedent to lose the benefit of applying the Decedent's estate tax credits.

Also, with no valid judicial trust modification, Caroline and Rich will continue to face issues and avoidable costs in the administration of the Family Trust. Currently, Robin is still the named primary beneficiary of the Family Trust, and she still holds the right to remove and replace the trustee. Additionally, Robin cannot “assign” her interests as a beneficiary of the Family Trust due to the spendthrift provision. Thus, a corporate trustee will not accept the role of successor trustee of the Family Trust if asked, as it is not clear who they would owe fiduciary duties to in administering the trust.

Another problem left unresolved was the ability of Rich Allison, Jr. to serve as a trustee. The Trust Agreement excludes Rich from being able to serve as trustee of a trust for which he is a beneficiary of. These paragraphs were not addressed by the MSA. This necessitated an additional modification request to Article IX by the inclusion of a new section as set forth in paragraph 27 of the Petition for Trust Modification. Again, it would need to be proven that this modification permitting Rich to serve as co-trustee would be necessary to carry out Richard Allison, Sr.’s intent and avoid inefficiency and a waste of resources as was asserted in paragraph 28 of the Petition for Modification of Trust Instrument.

D. Caroline and Rich gave up valuable rights and interests as individuals in exchange for the possible right to become trustees of a trust with a HEMS distribution standard.

Rich and Caroline gave up their interest in several assets for the purpose of swapping Robin Allison out as trustee of the Allison Family Trust and being able to take over that role subject to a HEMS standard under Texas Property Code Section 113.025. It is structurally not a good deal at all for Caroline and Rich Allison.

Caroline and Rich gave up their rights to several assets, including their remainder interest in the Marital Trust, which according to Whitley Penn accountings had a principal value of \$5,842,822.43 as of December 31, 2019 (Lawyers’ Exhibit 140). At the time of the MSA, Caroline and Rich were remainder beneficiaries of the Marital Trust and Robin, who was 67 years old at the time, was the primary beneficiary. Robin could not invade the principal of the Marital Trust unless she first exhausted her personal assets, and then she could make a distribution subject to a HEMS standard (Clients’ Exhibit 32 at page 10, Article IV-C).

To have evaluated this remainder interest properly, the Lawyers should have compelled information to ascertain the value of Robin’s assets outside of the Richard Allison Trust. This would have allowed for the assessment of the likelihood that Robin would ever need to invade the principal. She inherited \$790,526.00 (Client’s Exhibit 142) when her mother died on January 12, 2015. She also received at least \$246,000.00 of income distributions from the marital trust according to the Whitley Penn accounting (Lawyers’ Exhibit 140). But the Lawyers did not uncover the balance of her net worth.

This is significant because Caroline and Rich (together with their children) were present beneficiaries of the Allison Family Trust subject to a HEMS distribution standard. While Robin was likewise a beneficiary of the Family Trust, she could not take a distribution from those funds until she first exhausted her own personal non-trust assets and the \$5,842,822.43 in principal that was in the Marital Trust.

So, what Caroline and Rich had under the 2013 version of the Richard Allison Trust was (a) a remainder beneficiary interest in the Marital Trust which had at least \$5.8 million (Clients Exhibit 26 and Lawyers Exhibit 140), (b) a present right to distributions according to a HEMS standard under the Allison Family Trust which had at least \$10.6 million (See Clients' Exhibit 26), (c) rights to accountings, and (d) the right to have a trustee comply with his/her fiduciary obligations and statutory duties.

While Robin was the trustee, she did not have unqualified discretion to deny distribution requests under Texas Property Code Section 113.029(a), which states the following:

Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute," "sole," or "uncontrolled," the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

TEX. TRUST CODE Section 113.029(a).

Robin's decision on whether to make a HEMS distribution under the Family Trust had to be measured in the context of not only the request being made, but also the value of the assets she had to exhaust prior to invading the Family Trust. There would be little basis to withhold a distribution from Caroline, Rich, or grandchildren out of concern that Family Trust assets may be needed to sustain Robin Allison under a HEMS standard when there are plentiful assets in the Marital Trust and elsewhere in her possession that must first be exhausted. That, coupled with the fact that Robin Allison owed Caroline and Rich a fiduciary duty to exercise her discretionary power in good faith and in accordance with the HEMS standard made Caroline and Rich's right to receive distributions valuable and one that could have been aggressively enforced.

In 1958, the Supreme Court of Texas held that a trustee (even one that is given wide latitude by the governing instrument) does not have unbridled discretion. A trustee may not act arbitrarily in this manner. "[A trustee's] discretion must be reasonably exercised to accomplish the purposes of the trust according to the settlor's intention ***and his exercise thereof is subject to judicial review and control.***" *State v. Rubion*, 308 S.W.2d 4, 9 (Tex. 1958)(emphasis added). This was later elaborated upon when the Amarillo Court of Appeals specified that a trustee's decision on distributing income or corpus for a beneficiary's support and maintenance could not be exercised at a whim. *In re Estate of Dillard*, 98 S.W.3d 386, (Tex.App.—Amarillo 2003, pet. denied). The Court in *In re Estate of Dillard* held the following:

"Instead, the trustee was obligated to base his decision after considering indicia such as (1) the size of the trust estate, (2) the beneficiary's age, life expectancy, and condition in life, (3) his present and future needs, (4) the other resources available

to him or his individual wealth, and (5) his present and future health both mental and physical, to name a few.”

Id. citing *State v. Rubion*, 308 S.W.2d at 10-11.

This is what makes the MSA puzzling. After executing the MSA, Caroline and Rich were to be trustees and beneficiaries of the Family Trust able to make the HEMS distribution decisions for themselves and grandchildren. The only difference from beforehand is that Robin Allison is no longer the trustee making those decisions. So, to swap Robin out of that position, Caroline and Rich gave up their interest in multiple assets including their remainder interest in the Allison Marital Trust that had at least \$5.8 million of principal in it.

The MSA gives Caroline and Rich “the right to access all principal and income from the Family Trust with the exception of the \$1,000,000 in principal set aside for the grandchildren’s educational expenses set forth above at the discretion of the co-trustees.” This language does not provide Caroline and Rich broader access to distributions from the Family Trust. In fact, it further limits their right to receive distributions under the Trust Agreement before the MSA was signed. It seems entirely unnecessary that to become co-trustees, Caroline and Rich had to give up these valuable rights and put themselves in the position of being fiduciaries to other beneficiaries with exposure to demands such as those made against them by Mr. Collins (Clients’ Exhibit 243). I do not believe this was a good outcome for Caroline and Rich Allison.

My name is Sarah Patel Pacheco. I am over the age of eighteen, and I am not under a disability of any kind. My address is 1401 McKinney St., Suite 1900, Houston, Texas 77010 in the United States of America. I declare under penalty of perjury that the foregoing is true and correct, and that this statement constitutes my declaration regarding facts of which I have knowledge and opinions that I hold.

Executed in Tarrant County, State of Texas on the 20th of December 2023.



Sarah Patel Pacheco, Declarant