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SAMPLE DOCUMENTS

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SAMPLE TRUST NO. ONE

[Irrevocable Trust by a Sole Trustor
with Income to a Sole Beneficiary]¹

TRUST AGREEMENT

THIS TRUST AGREEMENT is entered into by J. P. MORGAN, SR., of San Antonio, Texas, hereinafter referred to as "the Trustor," and JACK FROST, of San Antonio, Texas, hereinafter referred to as "the Trustee."

ARTICLE I. TRUST ESTATE

Transfer to Trust

1.01. The Trustor has transferred and delivered to the Trustee, without consideration on his part, the property described in Schedule A, which is attached hereto and is made a part hereof, the receipt of which is hereby acknowledged by the Trustee. Such property and all property hereafter subject to this trust shall constitute the trust estate, and shall be held, managed, administered, and distributed by the Trustee as hereinafter provided.

Additions to Trust Estate

1.02. The Trustor, and any other person, shall have the right at any time to add property acceptable to the Trustee to this trust and such property, when received and accepted by the Trustee, shall become part of the trust estate.

ARTICLE II. IRREVOCABILITY OF TRUST

This trust shall be irrevocable and shall not be altered, amended, revoked, or terminated by the Trustor or any other person.

ARTICLE III. DISTRIBUTIONS BY TRUSTEE

Income to Income Beneficiary for Life

3.01. During the life of my son, J. P. MORGAN, JR., of San Antonio, Texas, hereinafter called "the

¹ From KENDRICK, 5 TEXAS TRANSACTION GUIDE § 49.20 (1985).

Income Beneficiary," the Trustee shall pay to or apply for the benefit of the Income Beneficiary in monthly or other convenient installments all of the net income from the trust estate.

mandatory distribution of income, but time of pymt.

Invasion of Principal for Income Beneficiary

3.02. If the Income Beneficiary, at any time, is in need of funds for his proper support or maintenance, the Trustee may pay to or apply for the benefit of the Income Beneficiary, in addition to the net income from the trust estate, such amounts from the principal of the trust estate, up to the whole thereof, as the Trustee may from time to time in his discretion deem necessary or advisable for the support or maintenance of the Income Beneficiary.

Payment of Funeral Expenses of Income Beneficiary

3.03. On the death of the Income Beneficiary, the Trustee may pay out of the income or principal of the trust estate, at his discretion, the expenses of the last illness and funeral of the Income Beneficiary.

Income After Death of Income Beneficiary

3.04. After the death of the Income Beneficiary and payment of the expenses of his last illness and funeral, the Trustee shall, until no child of the Income Beneficiary is living who is under the age of twenty-one (21) years, pay to or apply for the benefit of each child of the Income Beneficiary under the age of twenty-one (21) years so much of the net income from the trust estate, up to the whole thereof, as the Trustee from time to time in his discretion deems necessary or advisable for the proper care, maintenance, support, or education of such child. The balance of the net income from the trust estate that is not distributed during the year, if any, shall be accumulated by the Trustee and added to the principal of the trust estate at the end of the year. Payments made to each child pursuant to this paragraph need not be equal and any payments made to any child pursuant to this paragraph shall not be deducted from such child's distributive share of the principal of the trust estate on termination of the trust.

Invasion of Principal for Minor Grandchildren

3.05. Should any child of the Income Beneficiary under the age of twenty-one (21) years be at any time after the death of the Income Beneficiary in need, for

any reason, of funds for his or her proper care, maintenance, support, or education after the death of the Income Beneficiary, the Trustee may in its discretion pay to or apply for the benefit of such child, in addition to the net income of the trust estate, such amounts from the principal of the trust estate, up to the whole thereof, as the Trustee may from time to time in his discretion, deem necessary or advisable for such child's care, support, maintenance, or education.

Termination of Trust and Distribution of Principal

3.06. When no child of the Income Beneficiary is living who is under the age of twenty-one (21) years, this trust shall terminate and all the trust estate then in the possession of the Trustee shall be distributed as follows:

Berry

- (1) One equal share shall be distributed to each child of the Income Beneficiary then surviving; and
- (2) One equal share shall be distributed to the surviving issue of each deceased child of the Income Beneficiary, such issue to take per stirpes.

Distribution on Premature Death of All Grandchildren

3.07. Should all of the children of the Income Beneficiary die without issue before final distribution of the trust estate as provided in Paragraph 3.06 of this Trust Agreement, then on the death of the last survivor of the Income Beneficiary and his children, the trust shall terminate and the trust estate then in the possession of the Trustee shall pass, and be by the Trustee transferred, conveyed, and distributed in fee to, the estate of the last survivor of the Income Beneficiary and the Income Beneficiary's children.

Other Income of Beneficiary for Discretionary Payments

3.08. In exercising its discretionary authority under Paragraphs 3.02, 3.04, or 3.05 of this Trust Agreement to make payments from the net income or principal of the trust estate to or for the benefit of any beneficiary, the Trustee shall take into consideration any income or other means of care, maintenance, support, or education available to such beneficiary from sources outside this trust that may be known to the

Trustee. The determination of the Trustee with respect to the necessity for and the amounts of any payments from the net income or principal of the trust estate to be made to or for the benefits of any beneficiary pursuant to Paragraphs 3.02, 3.04, or 3.05 of this Trust Agreement shall be conclusive on all persons in any manner interested in this trust.

Payments to Successive Interests

3.09. Whenever the right of any beneficiary under this Trust Agreement to payments from the net income or principal of the trust estate shall terminate, either by reason of death or other cause, all payments accrued or undistributed by the Trustee on the date of such termination shall be distributed by the Trustee to the beneficiary entitled to the next successive interest in the trust under the terms of this Trust Agreement.

Distributions in Kind or Cash

3.10. On any division or partial or final distribution of the property of the trust estate as provided in this Trust Agreement, the Trustee, in its discretion, may divide and distribute such property in kind, may divide or distribute undivided interests in such property, or may sell all or any part of the property of the trust estate and make division or distribution in cash or partly in cash and partly in kind. The decision of the Trustee, either prior to or on any distribution of the trust estate, as to what constitutes a proper division of the trust estate shall be binding on all beneficiaries.

Definitions of "Children" and "Issue"

3.11. References in this Trust Agreement to "child" or "children" mean lawful blood descendants in the first degree of the parent designated and references to "issue" mean lawful blood descendants in the first, second, or any other degree of the ancestor designated, provided always, however, that an adopted child and such adopted child's lawful blood descendants shall be considered in this Trust Agreement as lawful blood descendants of the adopting parent or parents and of anyone who is by blood or adoption an ancestor of the adopting parent or of either of the adopting parents and shall not be considered descendants of the adopted child's natural parents, except that where a child is adopted by a spouse of one of his or her natural parents such child shall be considered a descendant of such

natural parent as well as a descendant of the adopting parent.

ARTICLE IV. POWERS OF TRUSTEE

Description of Powers

4.01. In order to carry out the purposes of this Trust Agreement, the Trustee, in addition to all other powers granted by law, shall have the following powers and discretions:

Retain Assets

(1) To continue to hold any and all property received by the Trustee or subsequently added to the trust estate or acquired pursuant to proper authority if and as long as the Trustee, in exercising reasonable prudence, discretion, and intelligence, considers that the retention is in the best interests of the trust.

Investments

(2) To invest and reinvest in every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common, which men of prudence, discretion, and intelligence acquire for their own accounts.

Management of Securities

(3) To exercise, respecting securities held in the trust estate, all the rights, powers, and privileges of an owner, including, but not limited to, the power to vote, give proxies, and to pay assessments and other sums deemed by the Trustee necessary for the protection of the trust estate; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations, and in connection therewith to deposit securities with and transfer title to any protective or other committee under such terms as the Trustee may deem advisable; to exercise or sell stock subscription or conversion rights; to accept and retain as an investment any securities or other property received through the exercise of any of the foregoing powers, regardless of any limitations elsewhere in this instrument relative to investments by the Trustee.

Form of Ownership of Trust Property

(4) To hold securities or other trust property in the name of the Trustee as Trustee under this Trust Agreement or in the Trustee's own name or in the name of a nominee or in such conditions where ownership will pass by delivery.

Business Interests

(5) To continue and operate, to sell or to liquidate, as the Trustee deems advisable at the risk of the trust estate, any business or partnership interests received by the trust estate.

Sell and Exchange

(6) To sell for cash or on deferred payments and on such terms and conditions as are deemed appropriate by the Trustee, whether at public or private sale, to exchange, and to convey any property of the trust estate.

Division of Trust Estate

(7) On any division of the trust estate into separate shares or trusts, to apportion and allocate the assets of the trust estate in cash or in kind, or partly in cash and partly in kind, or in undivided interests in the manner deemed advisable in the discretion of the Trustee; after any division of the trust estate, the Trustee may make joint investments with funds from some or all of the several shares or trusts, but the Trustee shall keep separate accounts for each share or trust.

Abandonment of Trust Assets

(8) To abandon any trust asset or interest therein in the discretion of the Trustee.

Option

(9) To grant an option involving disposition of a trust asset and to take an option for the acquisition of any asset by the trust estate.

Lease

(10) To lease any real or personal property of the trust estate for any purpose for terms within or extending beyond the duration of the trust.

Property Management

(11) To manage, control, improve, and repair real personal property belonging to the trust estate.

Development of Property

(12) To partition, divide, subdivide, assign, develop, and improve any trust property; to make or obtain the vacation of plats and adjust boundaries or to adjust differences in valuation on exchange or partition by giving or receiving consideration; and to dedicate land or easements to public use with or without consideration.

Repair, Alter, Demolish, Erect

(13) To make ordinary and extraordinary repairs and alterations in buildings or other trust property, to demolish any improvements, to raze party walls or buildings, and to erect new party walls or buildings as the Trustee deems advisable.

Borrowing and Encumbering

(14) To borrow money for any trust purpose from any person, firm, or corporation on the terms and conditions deemed appropriate by the Trustee and to obligate the trust estate for repayment; to encumber the trust estate or any of its property by mortgage, deed of trust, pledge, or otherwise, using whatever procedures to consummate the transaction deemed advisable by the Trustee; to replace, renew, and extend any encumbrance and to pay loans or other obligations of the trust estate deemed advisable by the Trustee.

Natural Resources

(15) To enter into oil, gas, liquid or gaseous hydrocarbon, sulphur, metal and any and all other natural resource leases on terms deemed advisable by the Trustee, and to enter into any pooling, unitization, repressurization, community, and other types of agreements relating to the exploration, development, operation, and conservation of properties containing minerals or other natural resources; to drill, mine, and otherwise operate for the development of oil, gas, and other minerals; to contract for the installation and operation of absorption and repressuring plants; and to install and maintain pipelines.

Insurance

(16) To procure and carry at the expense of the trust estate insurance of the kinds, forms, and amounts deemed advisable by the Trustee to protect the trust estate and the Trustee against any hazard.

Enforcement of Hypothecations

(17) To enforce any deed of trust, mortgage, or pledge held by the trust estate and to purchase at any sale thereunder any property subject to any such hypothecation.

Extending Time of Payment of Obligations

(18) To extend the time of payment of any note or other obligation held in the trust estate, including accrued or future interests, in the discretion of the Trustee.

Adjustment of Claim

(19) To compromise, submit to arbitration, release with or without consideration, or otherwise adjust claims in favor of or against the trust estate.

Litigation

(20) To commence or defend at the expense of the trust estate any litigation affecting the trust or any property of the trust estate deemed advisable by the Trustee.

Administration Expenses

(21) To pay all taxes, assessments, compensation of the trustee, and all other expenses incurred in the collection, care, administration, and protection of the trust estate.

Employment of Attorneys, Advisers, and Other Agents

(22) To employ any attorney, investment adviser, accountant, broker, tax specialist, or any other agent deemed necessary in the discretion of the Trustee; and to pay from the trust estate reasonable compensation for all services performed by any of them.

Termination by Trustee of Small Trust

(23) To terminate in the discretion of the Trustee any separate trust held for an income beneficiary if the fair market value of the separate trust at any time

becomes less than \$2,000 or \$5,000 and, regardless of the age of the income beneficiary, to distribute the principal and any accrued or undistributed net income to the income beneficiary, or to his guardian, conservator, or other fiduciary.

Distribution

(24) On any partial or final distribution of the trust estate, to apportion and allocate the assets of the trust estate in cash or in kind, or partly in cash and partly in kind, or in undivided interests in the manner deemed advisable at the discretion of the Trustee and to sell any property deemed necessary by the Trustee to make the distribution.

General

(25) To do all the acts, to take all the proceedings, and to exercise all the rights, powers, and privileges which an absolute owner of the property would have, subject always to the discharge of its fiduciary obligations; the enumeration of certain powers in this Trust Agreement shall not limit the general or implied powers of the Trustee; the Trustee shall have all additional powers that may now or hereafter be conferred on it by law or that may be necessary to enable the Trustee to administer the trust in accordance with the provisions of this Trust Agreement, subject to any limitations specified in this Trust Agreement.

Limitation of Powers

4.02. All powers given to the Trustee by this Trust Agreement are exercisable by the Trustee only in a fiduciary capacity. No power given to the Trustee hereunder shall be construed to enable the Trustor or any other person to purchase, exchange, or otherwise deal with or dispose of the principal or income therefrom for less than an adequate consideration in money or money's worth; to permit the Trustor or any other contributor to the trust to borrow income or principal; or to authorize loans to the Trustor or any other contributor to the trust except on the basis of an adequate interest charge and with adequate security. The Trustee shall not use the income or principal of the trust to pay premiums on insurance on the life of the Trustor. No person, other than the Trustee, shall have or exercise the power to vote or direct the voting of any corporate shares or other securities of this trust, to control the investment of this trust either by directing investments or reinvestments by vetoing

proposed investments or reinvestments, or to reacquire or exchange any property of this trust by substituting other property of equivalent value.

ARTICLE V. DUTIES AND COMPENSATION OF THE TRUSTEE

5.01. The Trustee shall determine what is income and what is principal of each trust created under this Trust Agreement, and what expenses, costs, taxes, and charges of any kind whatsoever shall be charged against income and what shall be charged against principal in accordance with the applicable statutes of the State of Texas as they now exist and may from time to time be enacted, amended, or repealed.

Relations With Trustee

5.02. No one dealing with the Trustee need inquire concerning the validity of anything it purports to do, or need see to the application of any money paid or any property transferred to or upon the order of the Trustee.

Limitation of Trustee's Liability

5.03. No Trustee appointed under this Trust Agreement shall at any time be held liable for any action or default of himself or his agent or of any other person in connection with the administration of the trust estate, unless caused by his own gross negligence or by a willful commission by him of an act in breach of trust.

Compensation

5.04. The original Trustee hereunder and all successor Trustees shall be entitled to reasonable compensation for their services as Trustee.

Bond

5.05. No bond shall be required of the original Trustee hereunder or of any successor Trustees; or if a bond is required by law, no surety shall be required on such bond.

Successor Trustees

5.06. If JACK FROST resigns or is unable to continue to act as Trustee, DAN FLANAGAN, Travis County, Texas, is hereby appointed as successor Trustee. Any successor Trustee shall succeed as Trustee with like

effect as though originally named as such herein, and all authority and powers conferred upon the original Trustee hereunder shall pass to any successor Trustee.

Accounts

5.07. The Trustee shall each year render an account of his administration of each trust hereunder to the oldest living issue of the Trustor to whom income of such trust may be distributed (or such issue's guardian). Such person's (or the guardian's) written approval of such account shall, as to all matters and transactions stated therein or shown thereby, be final and binding upon all persons (whether in being or not) who are then or may thereafter become interested in, or entitled to share in, either the income or the principal of such trust, provided always, however, that nothing contained in this Paragraph 5.07 shall be deemed to give such person (or the guardian) acting in conjunction with the Trustee the power to alter, amend, revoke, or terminate such trust.

ARTICLE VI. SPENDTHRIFT PROVISION

The interests of beneficiaries in the principal or income of any trust created hereunder shall not be subject to the claims of their creditors or creditors of others, including creditors of a spouse of a married beneficiary, nor to legal process, and may not be voluntarily or involuntarily alienated or encumbered.

ARTICLE VII. PERPETUITIES SAVINGS CLAUSE

Unless sooner terminated as otherwise provided in this Trust Agreement, each trust created herein shall fully cease and terminate twenty-one (21) years after the death of the last survivor of the Trustor and all issue of the Trustor living as of the date each trust established herein becomes irrevocable. Upon such termination, the entire principal of the trust estate of each such trust, together with any undistributed income therefrom, shall vest in and be distributed to the persons entitled to take under the provisions of each such trust.

ARTICLE VIII. CONSTRUCTION OF TRUST

Governing Law

8.01. This Trust Agreement shall be governed by the laws of the State of Texas.

Severability

8.02. If any part, clause, provision, or condition of this Trust Agreement is held to be void, invalid, or inoperative, such voidness, invalidity, or inoperativeness shall not affect any other clause, provision, or condition hereof; but the remainder of this Trust Agreement shall be effective as though such clause, provision, or condition had not been contained herein.

Interpretative Clause

8.03. As used in this Trust Agreement, the masculine, feminine, or neuter gender, and the singular or plural number shall each be deemed to include the others whenever the context so indicates.

Copies

8.04. To the same extent as if it were the original, anyone may rely on a copy of this Trust Agreement certified by a notary public to be a true copy of this Trust Agreement. Anyone may rely on any statement of fact certified by anyone who appears from the original Trust Agreement or a certified copy thereof to be a Trustee hereunder.

IN WITNESS WHEREOF, this Trust Agreement has been signed by the Trustor and the Trustee on this 13th day of January, 1978.

TRUSTOR

TRUSTEE

/s/

J. P. MORGAN, SR.

/s/

JACK FROST

The undersigned, being the wife of J. P. MORGAN, SR., who is the person named as Trustor in the foregoing Trust Agreement, hereby states that she has read and understands all of the terms and provisions of the foregoing Trust Agreement; that she agrees and consents to the transfer to the trust of the property described in Schedule A attached to the foregoing Trust Agreement; and that she agrees and consents to the administration and distribution of such property in the manner provided in the foregoing Trust Agreement.

Executed on January 13, 1978, at San Antonio, Texas.

PRUDENCE G. MORGAN

[ACKNOWLEDGEMENTS]

Discretionary Dist of Income
D (Undist Income Added to Corpus)
Disc. Dist of Corpus

SAMPLE TRUST NO. TWO

[Irrevocable Trust Created by
Husband and Wife for Named Benefi-
ciaries]²

TRUST AGREEMENT

THIS TRUST AGREEMENT is entered into by J. P. MORGAN, SR., and PRUDENCE G. MORGAN, husband and wife, hereinafter jointly referred to as "the Trustors," residents of Bexar County, Texas, and JACK FROST, of San Antonio, Texas, hereinafter referred to as "the Trustee."

ARTICLE I. TRUST ESTATE

Transfer to Trust

1.01. The Trustors have transferred and delivered to the Trustee, without consideration on their part, the property described in Schedule A, which is attached hereto and is made a part hereof, the receipt of which is hereby acknowledged by the Trustee. Such property and all property hereafter subject to this trust shall constitute the trust estate, and shall be held, managed, administered, and distributed by the Trustee as hereinafter provided.

Additions to Trust Estate

1.02. The Trustors, and any other person, shall have the right at any time to add property acceptable to the Trustee to this trust and such property, when received and accepted by the Trustee, shall become part of the trust estate.

ARTICLE II. IRREVOCABILITY OF TRUST

2.01. This trust shall be irrevocable and shall not be altered, amended, revoked, or terminated by the Trustors or any other person.

ARTICLE III. DISTRIBUTIONS BY TRUSTEE

Distribution of Income

3.01. Until the death of the last survivor of J. P. MORGAN, JR., of San Antonio, Texas, and CHASTITY MORGAN, of San Antonio, Texas, hereinafter referred to

² From KENDRICK, 5 TEXAS TRANSACTION GUIDE § 49.21 (1985).

as "the Income Beneficiaries," the Trustee shall pay to or apply for the benefit of each of the Income Beneficiaries so much of the net income of the trust estate, up to the whole thereof, as the Trustee may from time to time in his discretion deem necessary or advisable for the proper care, maintenance, support, or education of each such beneficiary. The balance of the net income of the trust estate that is not distributed during the year, if any, shall be accumulated by the Trustee and added to the principal of the trust estate at the end of the year. Payments made to each of the Income Beneficiaries pursuant to this paragraph need not be equal.

Principal Payments to Income Beneficiaries

3.02. To the extent that the income from the trust is insufficient to provide for the proper care, maintenance, support, or education of any Income Beneficiary, the Trustee, in addition to the income payments hereinabove provided, shall in his discretion pay to or apply for the benefit of such Income Beneficiary such amount from the principal of the trust estate, up to the whole thereof, as the Trustee from time to time deems advisable for such proper care, maintenance, support, or education. Payments made to each of the Income Beneficiaries pursuant to this paragraph need not be equal.

Remainder Interest

3.03. On the death of the last survivor of the Income Beneficiaries, this trust shall terminate and all of the trust estate then in the possession of the Trustee shall be transferred, conveyed, and distributed in fee by the Trustee as follows:

- (1) One equal share shall be distributed to each child of either Income Beneficiary then surviving; and
- (2) One equal share shall be distributed to the surviving issue of each deceased child of either Income Beneficiary, such issue to take per stirpes.

ARTICLE IV. POWERS OF TRUSTEE

[Etc.]

ARTICLE V. DUTIES AND COMPENSATION OF THE TRUSTEE

[Etc.]

ARTICLE VI. SPENDTHRIFT PROVISION

[Etc.]

ARTICLE VII. PERPETUITIES SAVINGS CLAUSE

[Etc.]

ARTICLE VIII. CONSTRUCTION OF TRUST

[Etc.]

IN WITNESS WHEREOF, this Trust Agreement has been signed by the Trustors and the Trustee on this 13th day of January, 1978.

TRUSTORS

/s/
J. P. MORGAN, SR.

/s/
PRUDENCE G. MORGAN

TRUSTEE

/s/
JACK FROST

[ACKNOWLEDGEMENTS]

SAMPLE TRUST NO. THREE

[Short-Term Irrevocable Trust by
Husband and Wife (Clifford Trust)]³

TRUST AGREEMENT

THIS TRUST AGREEMENT is entered into by J. P. MORGAN, SR., and PRUDENCE G. MORGAN, husband and wife, hereinafter jointly referred to as "the Trustors," residents of Bexar County, Texas, and JACK FROST, of San Antonio, Texas, hereinafter referred to as "the Trustee."

ARTICLE I. TRUST ESTATE

The Trustors have transferred and delivered to the Trustee, without consideration on their part, the property described in Schedule A, which is attached hereto and is made a part hereof, the receipt of which is hereby acknowledged by the Trustee. Such property and all property hereafter subject to this trust shall constitute the trust estate, and shall be held, managed, administered, and distributed by the Trustee as hereinafter provided.

ARTICLE II. IRREVOCABILITY OF TRUST

This trust shall be irrevocable and shall not be altered, amended, revoked, or terminated by the Trustors or any other person.

ARTICLE III. DISTRIBUTION OF INCOME

The Trustee shall pay to or apply for the benefit of our son, J. P. MORGAN, JR., of San Antonio, Texas, hereinafter called "the Beneficiary," all of the net income of the trust estate until the Beneficiary shall die or this trust shall terminate, whichever shall first occur. Income payments shall be made at least as often as annually.

ARTICLE IV. TERMINATION OF TRUST

On the death of the Beneficiary or the expiration of ten (10) years and one day after the date of this Trust Agreement, whichever first occurs, this trust shall terminate and all of the trust estate shall be transferred, conveyed, and delivered to the Trustors, if

³ From KENDRICK, 5 TEXAS TRANSACTION GUIDE § 49.22 (1985).

then living, and if either or both Trustors are not then living, the estate of each deceased Trustor.

ARTICLE V. POWERS OF TRUSTEE

Description of Powers

5.01. In order to carry out the purposes of this Trust Agreement, the Trustee, in addition to all other powers granted by law, shall have the following powers and discretions:

Retention of Assets

(1) To retain any property received by the trust estate for as long as the Trustee considers it advisable.

Investments

(2) To invest and reinvest in every kind of property and investment which men of prudence, discretion, and intelligence acquire for their own accounts.

Management

(3) To manage, control, repair, and improve all trust property.

Sales

(4) To sell, for cash or on such terms and conditions as deemed advisable or desirable by the Trustee, and to exchange any trust property.

Adjustment of Claims

(5) To adjust or compromise any claims for or against the trust, and to agree to any rescission or modification of any contract or agreement.

Leasing and Mineral Rights

(6) To lease any property . . . [etc.]

Borrowing

(7) To borrow money and to mortgage or pledge or otherwise encumber or hypothecate trust assets as the Trustee may, in his discretion, deem advisable either from himself individually or from others.

Division and Distribution

(8) On any division or distribution of the trust estate, in the discretion of the Trustee, to divide and distribute property of the trust estate in money or in kind, including undivided interests, or partly in money or partly in kind, including undivided interests, to exercise such powers, herein conferred after the termination of the trust estate until final distribution of the trust assets; and to value trust property for purposes of determining the amount of the trust principal to be distributed to each Beneficiary named herein, which valuation, in the absence of a showing of bad faith, shall be conclusive and binding.

Limitation on Powers

5.02. All powers given to the Trustee by this Trust Agreement are exercisable by the Trustee only in a fiduciary capacity. No power given to the Trustee hereunder shall be construed to enable the Trustors or any person to purchase, exchange, or otherwise deal with or dispose of the principal or income therefrom for less than an adequate consideration in money or money's worth; to permit the Trustors or any other contributor to the trust to borrow income or principal; or to authorize loans to a person other than the Trustors or any other contributor to the trust except on the basis of an adequate interest charge and with adequate security. No person, other than the Trustee, shall have or exercise the power to vote or direct the voting of any corporate shares or other securities of this trust to control the investment of this trust either by directing investments or reinvestments or by vetoing proposed investments or reinvestments, or to reacquire or exchange any property of this trust by substituting other property of equivalent value.

The Trustee shall not use the income or principal of the trust to pay premiums on insurance on the life of the Trustors.

ARTICLE VI. DUTIES AND COMPENSATION OF TRUSTEE

[Etc.]

ARTICLE VII. SPENDTHRIFT PROVISION

The interest of the Beneficiary in principal or income of the trust estate shall not be subject to the claims of his creditors or creditors of others, nor to legal process, and may not be voluntarily or involuntarily alienated or encumbered.

ARTICLE VIII. CONSTRUCTION OF TRUST

[Etc.]

IN WITNESS WHEREOF, this Trust Agreement has been signed by the Trustors and the Trustee on this 13th day of January, 1978.

TRUSTORS

/s/
J. P. MORGAN, SR.

/s/
PRUDENCE G. MORGAN

TRUSTEE

/s/
JACK FROST

[ACKNOWLEDGEMENTS]

IN THE MARRIAGE OF THE § IN THE DISTRICT COURT
MARRIAGE OF

GEORGE P. JONES AND § 999TH JUDICIAL DISTRICT
ANNE MARIE WHITE JONES

AND IN THE INTEREST OF
JOHN PAUL JONES AND
GEORGETTE JONES, CHILDREN § BEXAR COUNTY, TEXAS

COMMISSION TO TAKE DEPOSITION
ISSUED TO OFFICER IN ANOTHER STATE

TO: Phyllis Nelson, a Notary Public for the County of Lake, State of Illinois, appointed under the laws of the State, and within the State of Illinois.

You are hereby authorized and directed to issue a subpoena duces tecum for, and to take the deposition of, and receive subpoenaed documents from, STEPHEN P. STONE, who may be found at the following place, to-wit: 1991 N. South Street, in the City of Barrington, County of Lake, State of Illinois, said deposition to begin at 10:00 o'clock a.m. on the 19th day of September, 1984, at your office at 1421 Rocky Road, Barrington, Illinois, upon written questions, attached hereto, and upon such further cross-questions, and re-direct and re-cross questions as may be served upon you by Petitioner or Respondent, with said questions to be submitted to the said witness, and you shall take, and reduce to writing, the answers of said witness to said written questions under oath, and shall receive all documents produced in response to your subpoena, the said deposition to be used in a certain cause now pending in the 999th Judicial District Court of Bexar County, Texas, Cause No. 84-CI-99999, styled "In the Matter of the Marriage of George P. Jones and Anne Marie White Jones and In the Interest of John Paul Jones and Georgette Jones, Children," at the request of Petitioner, and you shall return without delay this commission and accompanying questions and the answers of the witness thereto, and copies of all documents produced, to the undersigned Clerk of Said Court, whose official post office address is: Bexar County District Clerk, Bexar County Courthouse, San Antonio, Texas 78205.

The subpoena to be issued by you shall require the said STEPHEN P. STONE to bring with him, and then and there produce, the documents and other items described in Exhibit A attached hereto.

Witness: DAVID J. GARCIA, Clerk of the District
Courts of Bexar County, Texas.

GIVEN UNDER MY HAND AND SEAL of the Said Court, and
issued this 31st day of August, 1984.

DAVID J. GARCIA,
District Clerk

By: /s/ _____

PREPARED BY:

HART, SCHAFFNER & MARKS
1010 Power Lights Building
San Antonio, Texas 78205
(512) 224-2425

By: ABRAHAM S. WISE
State Bar No. 99999999
ATTORNEYS FOR PETITIONER

EXHIBIT A

STEPHEN P. STONE shall bring with him to the deposition and then and there produce whichever of the following documents and records are in his possession or subject to his control, except that if the original document is requested but is not in STEPHEN P. STONE'S possession, and is not subject to his control, then he shall bring and produce a true copy thereof:

1. The original Trust Agreement, and originals of any amendments thereto, for:

a. The Anne Marie White Trust;

b. Any other trust of which Anne Marie White [Jones] was settlor or trustor, or into which she has conveyed any property or property rights, or to which she has loaned money, or for which she has guaranteed indebtedness;

c. Any other trust of which Anne Marie White [Jones] was or is a beneficiary of any kind, at any time.

2. True copies of all lists of assets owned, and debts owed, at any time by each of the trusts described in item No. 1 above.

3. True copies of all documents reflecting the values of assets owned, and amounts of debts owed, at any time by each of the trusts described in item No. 1 above.

4. True copies of all documents reflecting income received at any time by each of the trusts described in item No. 1 above.

5. The originals of all documents reflecting distributions made at any time by each of the trusts described in item No. 1 above, including without limitation cancelled checks, check registers and accounting records.

6. True copies of all records reflecting any income, received by any of the trusts described in item No. 1 above, that has not been distributed as of the time of his deposition in this matter.

7. True copies of all city, state and federal income tax returns prepared on behalf of any of the trusts described in item No. 1 above, including all

*income reported
dist income deducted*

forms or schedules attached thereto or submitted in connection therewith.

8. True copies of all city, state and federal income tax-related forms given by any of the trusts described in item No. 1 above to Anne Marie White [Jones] or any other persons or entities.

9. The originals of all communications between any persons or entities relating in any way to any of the trusts described in item No. 1 above.

10. True copies of all documents not described above which reflect the assets owned at any time by any of the trusts described in item No. 1 above, and the acquisition dates of such assets, and the cost of such assets, and each such trust's use of credit, and the price for which each such trust's assets were sold or exchanged, and the basis for tax purposes of all assets presently owned by each such trust.

11. Any subpoena served upon STEPHEN P. STONE in connection with his deposition at 10:00 a.m. on September 19, 1984.

END

IN THE MARRIAGE OF THE § IN THE DISTRICT COURT
MARRIAGE OF

GEORGE P. JONES AND § 999TH JUDICIAL DISTRICT
ANNE MARIE WHITE JONES

AND IN THE INTEREST OF
JOHN PAUL JONES AND
GEORGETTE F. JONES,
CHILDREN § BEXAR COUNTY, TEXAS

INTERROGATORIES TO BE
PROPOUNDED TO STEPHEN P. STONE

Please read the following introduction to the witness before his answers are given, and include same in the transcript of the deposition.

Dear STEPHEN P. STONE: I am the attorney representing the Petitioner in the above-styled divorce proceeding. The following questions are addressed to you in connection with that case. Your answers will be given under oath and will constitute testimony which may be presented in the trial of this case. The questions and your answers will later be transcribed into a deposition which will be submitted to you for your review. At the time of review, you may use a pen to correct any inaccuracies in the deposition. You must then sign the deposition and swear to it in the presence of a Notary Public who will return the deposition to the District Clerk of Bexar County, Texas. Since your answers cannot be pursued by "on-the-spot" questioning, please amplify your response where necessary to make sure your answers will be clearly understood. Do not hesitate to answer fully every question, even if your answer would partially reiterate a prior response.

1. Please state your name, age and date and place of birth, and give your residence street address, city, county, and state of residence, as well as your home telephone number.
2. Please give your educational background, including degrees, institutions and dates, and briefly outline your employment history, giving titles, status, and the like.
3. Please identify and describe any professional organizations or associations to which you belong.

4. Do you know Anne Marie White, now married with the surname of "Jones"?

5. When did you first come to know her?

6. Are you related to Anne Marie White, by blood or marriage, and if so, in what way?

7. Are you, or have you ever been, trustee of the Anne Marie White trust; or any other trust of which Anne Marie White [Jones] was settlor or trustor, or into which she has conveyed property or property rights, or to which she has loaned money, or for which she has guaranteed indebtedness; or of any other trust of which Anne Marie White [Jones] was or is a beneficiary of any kind, at any time.

[To the Court Reporter: Please mark as "Exhibit 1" the copy of the trust agreement attached hereto.]

8. If so, is one of those trusts reflected in the Trust Agreement attached hereto and marked "Exhibit 1"?

9. If you answered question No. 7 in the affirmative, please give the name of each such trust, beginning with the name of the trust reflected in "Exhibit 1" (if applicable).

10. Were you served with a subpoena to come to this deposition?

11. Would you please give that subpoena to the court reporter for her to mark as "Exhibit 2" in this deposition?

[To the Court Reporter: Please mark as an exhibit the document given to you by the witness in response to the previous question.]

12. Please describe in general terms the records you brought with you today in response to your subpoena?

13. Please hand to the court reporter all documents you have reflecting the terms of the trusts referred to in question 7 above, including, without limitation, each trust agreement (or a true copy thereof, if the original is not available).

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

14. Please identify each exhibit just marked by the court reporter, being sure to refer to the exhibit number of the document being identified.

15. If you were once Trustee of a trust described in question No. 7 above, but are not now Trustee of that trust, please state when you ceased to be Trustee and why you ceased to be Trustee.

[Mr. Stone: I will ask you a series of questions (nos. 16 through 85) about each trust you mentioned in response to question no. 9. For the purposes of answering the series of questions the first time through, "the trust in question" is the first trust you have listed in response to question No. 9 above. The next time through the series of questions, "the trust in question" will be the second trust you have listed in response to question no. 9, and so on.]

16. Do or did you, as Trustee of the trust in question, maintain books and records and documents pertaining to such trust?

17. If so, where are those records normally kept?

18. Do records exist showing what assets are owned by the trust in question at the present time?

19. If so, where are those records normally kept?

20. Did you bring true copies of all of those records with you today?

21. If not, why not?

22. If you brought any of such copies, will you please hand those records to the court reporter for her to mark those records separately as exhibits in this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

23. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

24. Do records exist reflecting the acquisition date for each asset owned or acquired by the trust in question?

25. Did you bring true copies of all of those records with you today?

26. If not, why not?

27. If you brought any of such copies, will you please hand those records to the court reporter for her to mark those records separately as exhibits in this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

28. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

29. Do records exist which reflect the value of each asset presently held by the trust in question?

30. If so, where are those records normally kept?

31. Did you bring true copies of all of those records with you today?

32. If not, why not?

33. If you brought any of such copies, will you please hand those records to the court reporter for her to mark those records separately as exhibits in this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

34. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

35. Please state the total value of all assets held today by the trust in question.

36. Do records exist which reflect the income of the trust in question for each year during its existence?

37. If so, where are those records normally kept?

38. Did you bring true copies of all of these records with you today?

39. If not, why not?

40. If you brought any of such copies, will you please hand those records to the court reporter for her to mark them as separate exhibits in this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

41. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

42. Do records exist which reflect distributions made

by the trust in question to its Trustee(s) or to Anne Marie White [Jones] at any time?

43. If so, where are those records normally kept?

44. Did you bring true copies of all of those records with you today?

45. If not, why not?

46. If you brought any of such copies will you please hand those records to the court reporter for her to mark them as separate exhibits in this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

47. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

48. Does the trust in question contain any money or property received by the trust as income but which has not been distributed to Anne Marie White [Jones]?

49. If so, then for the trust in question please indicate how much.

50. Please state the dates, since January 1, 1980, that payments were made by the trust in question to Anne Marie White [Jones], and give the amount of payment made on each such date.

51. Has the trust in question ever paid you or anyone else any trustee's fees?

52. If so, how much has been paid to whom, and how often?

53. Have income tax returns been prepared by or on behalf of the trust in question since its inception?

54. Where are copies of those tax returns normally kept?

55. Do you have true copies of all of those tax returns with you today?

56. If not, why not?

57. If you brought any of such copies, will you please hand those records to the court reporter, for each to be marked separately as exhibits in this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

58. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

59. Has Anne Marie White [Jones] ever discussed with you the revocation of the trust in question?

60. If so, please give the date, time and place of each instance when this occurred.

61. On each such occasion, what did Anne Marie White [Jones] say to you?

62. On each such occasion, what did you say to Anne Marie White [Jones]?

63. Please give the names and current addresses of any witnesses to any discussions described in Question 59, and indicate which conversations each witnessed.

64. Has the Trust Agreement for the trust in question been revoked or amended, to your knowledge?

65. If so, when?

66. Where are copies of any such amendments normally kept?

67. Did you bring the originals, or true copies, of such amended instruments with you to this deposition?

68. If not, why not?

69. If you did bring any such documents, will you please hand such documents to the court reporter, to have each marked separately as an exhibit?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

70. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

71. Where are the originals or copies of written communications regarding the trust in question normally kept?

72. Did you bring all of them with you today?

73. If not, why not?

74. If you brought any of such documents, or true copies thereof, will you please hand them to the court reporter so she can mark each one individually as exhibits to this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

75. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

76. Were any financial statements, including, without limitation, income statements and balance sheets, ever prepared on behalf of the trust in question?

77. If so, what financial statements were prepared on what dates?

78. Where are these records normally kept?

79. Did you bring true copies of all of these records with you today?

80. If not, why not?

81. If you brought any of such copies, would you please hand these records to the court reporter so she can mark each one individually as exhibits to this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

82. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

83. Please give the date of each such financial statement.

84. Are all of the exhibits marked in connection with question no. 81 accurate?

85. If not, please explain in what way each inaccurate exhibit is inaccurate.

86. If there are any trusts described in Question 7 above for which you have not yet answered the series of questions between No. 16 and No. 85, please answer Questions Nos. 16 through 85 for each such trust in succession. If there are no trusts for which you have not answered the series of questions, then please go on to the next question. [In answering Questions Nos. 16 through 85 again, please consider "the trust in question" to be the next trust you described in answer to

Question No. 9 for which you have not answered the series of questions.]

87. Will you please hand to the court reporter each record or document which you brought with you today that has not already been marked as an exhibit, so that she can mark same as an exhibit to this deposition?

[To the Court Reporter: Please separately mark as an exhibit each of the documents given to you by the witness in response to the previous question.]

88. Please identify each exhibit just marked by the court reporter, making reference to the exhibit number.

89. Please explain the significance of each exhibit marked in connection with question no. 88.

90. Regarding the documents or records that have been marked as exhibits in this deposition (excluding Exhibits 1 and 2), please give the exhibit number of each exhibit for which the following statement is true:

I am the custodian of the records of the trust to which this exhibit relates. This exhibit (or the record from which this exhibit is copied) is kept by me in the regular course of business of such trust, and it was the regular course of business of the trust for an employee or representative of the trust, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. This record is the original or an exact duplicate of the original.

92. Please give the exhibit number of any exhibits to this deposition (excluding exhibits 1 and 2), for which the statement in the previous question is not correct.

93. For each exhibit listed by you in reponse to question no. 92, please state whether the exhibit (or the record from which the exhibit was copied) was made at or near the time of the acts, events, conditions, or opinions reflected therein?

94. For each exhibit listed by you in reponse to question no. 92, please state whether the exhibit (or the record from which the exhibit was copied) was made by a person with knowledge, or from information transmitted by a person with knowledge, of the acts, events, conditions, or opinions reflected therein.

95. For each exhibit listed by you in reponse to question no. 92, please state whether it was the regular practice of the business activity of such trust or its agents to make the memorandum, report, record, or data compilation reflected by the exhibit, or reflected by the record from which the exhibit was copied?

96. For each exhibit listed by you in reponse to question no. 92, please state whether you are the custodian of the records of that exhibit?

97. Please explain in detail why you answered in the negative as to each exhibit mentioned by you in response to question no. 92..

Thank you, Mr. Stone. I pass the witness.

END

EXHIBIT 1

Wife
TRUST AGREEMENT

I, ANNE MARIE WHITE, of Barrington, Illinois, hereby make this Declaration of Trust, which shall be known as the Anne Marie White Trust. By acceptance of this instrument, the Trustee hereinafter named agrees to administer the trust created by this instrument according to its terms.

ARTICLE I

A. I hereby transfer the property listed in Exhibit A, hereto attached, to the Trustee.

B. I, or any other person, may transfer, by will or otherwise, any other property to the Trustee, to be administered as provided in this instrument, and may subject the proceeds of any insurance policies to the terms of this instrument by designating the Trustee as Beneficiary thereof.

ARTICLE II

I may, from time to time, revoke or amend this instrument, in whole or in part, but only by an instrument in writing (other than a will) signed, acknowledged and delivered to the Trustee during my life.

ARTICLE III

This instrument and the trusts created hereby shall be construed and governed by the laws of Illinois.

ARTICLE IV

The Trustee shall pay to me during my life the income of the trust, and such portion of the principal as I may request from time to time by a written instrument delivered to the Trustee; provided, however, that if I become incapacitated, the Trustee shall, as long as such incapacity continues, withhold as much of the income as the Trustee determines not to be necessary for my support, and shall pay to any one or more of the group consisting of my husband and my descendants such amounts, from the income so withheld and from principal, as the Trustee may deem necessary for their support and education. The Trustee may make unequal payments which shall not be considered advancements. Any income not thus paid shall be added to the principal of the trust.

*Mandatory dist inc
disc. dist of prin
[at benef. dir]*

*See Taylor
P. 105*

ARTICLE V

A. I reserve during my lifetime all rights under any insurance policies held hereunder, including the right to change the beneficiary, pledge or collect the cash surrender values, and to receive all dividends. If any policy is surrendered, or if the Beneficiary of any policy is changed, this trust shall be revoked with respect to such policy upon acceptance of such surrender or change of Beneficiary by the insurance company. During my lifetime, the Trustee shall have no responsibility with respect to any policies except to hold any policies received in safekeeping and deliver them upon my written request.

B. Upon being advised of my death, the Trustee shall collect the proceeds of any policy on my life payable to the Trustee.

ARTICLE VI

After my death, the Trustee shall pay such amounts as my personal representative may request in writing for the purpose of paying all or part of the expenses of my funeral, [etc.].

ARTICLE VII

After my death, the "trust estate" shall consist of the principal and undistributed income of the trust at the time of my death, plus any property added thereto by my will, or payable to the Trustee by reason of my death, less any payments under the foregoing provisions.

ARTICLE VIII

A. Upon my death, if I am married and my husband survives me for a period of sixty (60) days, the Trustee shall divide the trust estate into two separate trusts, to be designated as "the Marital Trust" and "the Family Trust." The Marital Trust shall consist of The Family Trust shall consist of the remaining assets, or, all of the assets of the trust estate if I am not married or if my husband does not survive me for a period of sixty (60) days.

B. If my husband disclaims all or part of his interest in the Marital Trust, the disclaimed property shall be added to the Family Trust.

C. The Marital Trust shall be administered and distributed in the following manner

ARTICLE IX

The Family Trust shall be administered and distributed in the following manner:

A. The Trustee shall pay such amounts from the net income and principal as the Trustee may deem necessary for the support and education of my descendants. Any income not thus paid shall be added to the principal. The Trustee may make unequal payments of income or principal, which shall not be considered advancements.

B. Whenever there is no living child of mine under the age of twenty-one (21) years, the Trustee shall, subject to the withholding provisions of Article X, distribute the Family Trust to my then living descendants, per stirpes, or, if no descendant of mine is then living, the Family Trust shall be distributed as follows:

C. All distributions made in this Article IX shall be subject to the withholding provisions of Article X were applicable.

ARTICLE X

Whenever upon the termination of any trust under this instrument, the Trustee is directed to distribute any share of the trust (except any distribution pursuant to the exercise of a power of appointment) to any person who is under the age of twenty-one (21) years, or is incapacitated, the Trustee shall hold the share of such person (hereinafter called "the beneficiary") in a separate trust for the following purposes:

A. The Trustee shall pay all of the net income to the Beneficiary and such amounts of the principal as the Trustee deems necessary for his support and education; provided, however, that if and so long as the Beneficiary has not attained the age of twenty-one (21) years or is incapacitated, the Trustee may withhold such amounts of income as the Trustee determines not to be necessary for the support and education of the Beneficiary and any income thus withheld shall be added to the principal.

B. The Trustee shall distribute to the Beneficiary one-third (1/3) of the trust when he has (or if he shall already have) attained the age of twenty-one (21) years, and the remainder of the trust when he has (or if he shall already have) attained the age of thirty (30) years; provided, however, that if the Beneficiary is incapacitated the Trustee shall make no distribution under this paragraph as long as such incapacity continues.

C. If the Beneficiary dies before the entire trust becomes distributable, the Trustee shall distribute the balance of the trust to his estate.

D. The Trustee may at any time terminate any trust hereunder having a value of less than Five Thousand Dollars (\$5,000.00), unless the then Beneficiary is under the age of twenty-one (21) years or is incapacitated, and either distribute the trust to the beneficiary, or purchase and deliver to him a single premium annuity policy for his sole benefit.

E. Anything in this instrument to the contrary notwithstanding, each trust under this instrument which is still in existence twenty-one (21) years after the death of the last to die of my husband and all descendants of my parents living at my death shall terminate and the Trustee shall distribute the trust to the then beneficiary.

ARTICLE XI

A. For purposes under this instrument:

1) Adoption of a child shall have the same effect as if such child had been born to the adopting parents, but only if such child was under the age of twenty-one (21) years at the time of the adoption.

2) The word "spouse" includes a widow or widower.

3) A person shall be considered "incapacitated"

4) Where appropriate, words of the masculine gender [etc.].

5) The word "Trustee" includes any successor Trustee or Trustees.

6) Whenever the Trustee is directed to distribute a trust upon termination thereof, distribution shall include any accrued and undistributed income of the trust, as well as principal. Whenever the Trustee distributes any accrued or undistributed income to the Trustee of another trust, that income shall retain its character as income in the hands of the Trustee to whom it is distributed.

7) In determining what amounts are necessary for the support of any person, the Trustee shall take into account, (1) the standard of living to which such person is accustomed; (2) his obligations, if any, to support others; (3) the obligation, if any, and the

ability of others to support him; and (4) other income available for his support so far as known to the Trustee.

8) Whenever the Trustee deems it to be in the best interests of a beneficiary to whom the Trustee is directed or authorized to pay income or principal, the Trustee may apply such income or principal for the benefit of the beneficiary, or distribute it for the beneficiary's use to anyone with whom the beneficiary is residing.

9) In determining whether any testamentary power of appointment has been exercised, the Trustee may rely

10) The words "gross estate" and "adjusted gross estate" refer to the amounts described these terms in the Internal Revenue Code in force at the date of this instrument.

11) The word "persons" includes corporations.

B. No interest in income or principal in any trust under this instrument shall be assignable by any voluntary or involuntary act of a beneficiary or by operation of law, nor shall any such interest be liable to be taken for any obligation, including any obligation to pay alimony, of any beneficiary.

C. I am presently not married and have no children but I plan to marry shortly. The word "Husband" shall apply to such person to whom I am married at my death and the words "children" or "my descendants" shall include any children hereafter born to or adopted by me.

ARTICLE XII

A. My grandfather, STEPHEN P. STONE, of Barrington, Illinois, shall act as Trustee under this instrument, or if he resigns, dies, or becomes incapacitated, the FIRST STATE BANK OF BARRINGTON, Barrington, Illinois, (or any successor to its trust business) shall act as Trustee; provided, however, that the Corporate Trustee shall have no duties under this instrument until it has actual knowledge or has received notice in writing of my grandfather's death, resignation, or incapacity.

B. Any Trustee may resign by giving sixty (60) days written notice to all adult income beneficiaries. For purposes of this Article, any person who is 21 years of age or over is not incapacitated and to whom the Trustee is then directed or authorized to pay income is

an adult income beneficiary. A majority of the adult income beneficiaries may fill any vacancy caused by the resignation of the corporate trustee, and, without liability to themselves, approve the accounts of and release any Trustee ceasing to act for any reason. Such approval and release shall be binding upon all persons with the same effect as though such accounts were approved by a court of competent jurisdiction, but shall not enlarge or shift the beneficial interest of any beneficiary. Each successor Trustee appointed to fill a vacancy caused by the resignation of a corporate Trustee shall be another corporation, organized under the laws of the United States or any state thereof, having a capital and surplus of not less than \$5,000,000.

C. Without any conveyance or order of court, any successor Trustee shall have all the powers granted to the original Trustee and shall assume all the duties imposed upon the original Trustee. No successor Trustee shall have any responsibility to inquire into the acts of any predecessor Trustee, nor shall any successor Trustee be liable for any act or omission of any predecessor Trustee of which the successor Trustee has no actual knowledge. Any person may, without liability, rely on the written certification of a successor Trustee that such successor has been duly appointed and has power to act.

D. Except as otherwise provided in this instrument, the Trustee shall have the following administrative and investment powers, and any others granted by law, with respect to each trust created by this instrument, to be exercised without order of any court as the Trustee determines to be in the best interests of the beneficiaries:

1) To invest in and retain any property as provided by Illinois Revised Statutes, Chapter 148, Section 31 (relating to investments by Trustees and in force at the date of this instrument)

2) To sell any property . . . ; to exchange any property for other property; and to grant options to purchase.

3) To make loans to any person, including any beneficiary.

4) To borrow money . . . , and to mortgage or pledge any property, even though the obligation incurred may extend beyond the termination of the trust.

5) To vote any corporate stock

6) To unite with the owners of other securities in carrying out any plan for the reorganization of any corporation

7) To hold any asset in the name of a nominee, to bearer form or otherwise, without disclosure of any fiduciary relationship.

8) To purchase insurance of any kind

9) To determine in a fair and equitable manner, in cases not covered by statute in force at the time of the determination, how receipts and disbursements shall be credited or charged between income and principal; to set aside reasonable reserves for depreciation; and to charge all or part of the Trustee's regular compensation against principal.

10) To collect, pay, contest, compromise, or abandon claims of any kind, and to execute instruments containing covenants and warranties creating a charge against any assets held by, and excluding any personal liability of the Trustee.

11) To make distributions and divisions of property in cash or in kind on the basis of values at the time of distribution or division; and in so doing to allot undivided interests in property and to allocate different kinds or disproportionate shares of property or interests therein.

12) To make distributions upon termination of any trust (1) to the guardian or conservator of any beneficiary or to his parents or surviving parent or other person standing in loco parentis; and (2) at any time to accept from any such person receipts, releases and acceptances of accounts which shall be binding upon the beneficiary without the approval of any court, but which shall not enlarge or shift the beneficial interest of any beneficiary.

13) To make joint investments for any two or more trusts hereunder.

14) To pay all reasonable expenses of administration, including reasonable compensation to the Trustee and to the persons employed by the Trustee, including agents, auditors, accountants, and attorneys.

15) To enter into any transaction authorized by this Article with fiduciaries of trusts or estates in which any beneficiary hereunder has an interest, even though such fiduciary is also Trustee hereunder

E. The foregoing powers may be exercised for a reasonable period after the termination of any trust.

F. No person paying money or delivering any property to the Trustee need see to its application [etc.].

G. No surety or other security shall be required on any bond furnished by any Trustee in any jurisdiction for any purpose.

THIS DECLARATION OF TRUST was signed by me on this 15th day of June, A.D., 1973, at Hollins College, Virginia.

ANNE MARIE WHITE

ACCEPTED this 20th day of June, A.D., 1973, at Barrington, Illinois.

STEPHEN P. STONE, Trustee

NO. 84-CI-99999

IN THE MARRIAGE OF THE § IN THE DISTRICT COURT
MARRIAGE OF
GEORGE P. JONES AND §
ANNE MARIE WHITE JONES § 999TH JUDICIAL DISTRICT
AND IN THE INTEREST OF
JOHN PAUL JONES AND
GEORGETTE JONES, CHILDREN § BEXAR COUNTY, TEXAS

MOTION TO TAKE JUDICIAL NOTICE OF
CERTAIN STATUTES OF THE STATE OF ILLINOIS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Anne Marie White Jones, Respondent and Cross-Petitioner in the above-styled and numbered cause, and moves the Court pursuant to Rule 184a, Texas Rules of Civil Procedure, and Rule 202, Texas Rules of Evidence, to take judicial notice of certain laws of the State of Illinois which your Movant believes control as regards to the Anne Marie White Trust, and in support thereof would show the Court as follows:

I.

Movant believes that one of the key issues this Court will have to resolve is whether or not income from the Anne Marie White Trust (said Trust created from separate funds of Movant) earned during the marriage between the parties is community property, or separate property.

II.

Movant says that the Trust in question was created prior to her marriage to Petitioner and that the Trustee of the Trust has continuously resided in Lake, Illinois, during the existence of the Trust, and all Amendments to same. The Trust and its Amendments are attached hereto as Exhibits A & B, and same incorporated herein by specific reference. Movant directs the Court's attention to the following pertinent parts of the Trust Documents as follows:

Exhibit A - Article III - "This instrument and the trusts created hereby shall be construed and governed by the laws of Illinois."

Exhibit D - Amendment to the Anne Marie White Revocable Living Trust Original Trust Date: 15 June 1973. "20. Law. All trusts hereunder shall be construed according to the law of the State of Illinois."

III.

Movant cites the Court to Chapter 110-1/2, Illinois Annotated Statutes, §601 and §602, and Chapter 110-1/2, Illinois Annotated Statutes, §4-4 as authority for the creation of the Anne Marie White Trust (Exhibits E and F) and Chapter 40, Illinois Annotated Statutes, §503, as amended by Public Act 83-129, effective August 19, 1983, which Statute excludes income from "non-marital property" as property subject to division in a divorce (Exhibits G and H). Movant directs the Court's attention to the following pertinent parts of the above-cited Statutes:

Exhibit E

§601. "Lifetime transfer of property with retained powers or rights - Validity. An otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime, shall not, in the absence of an intent to defraud, be invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property."

§602. "Effective date - Application of Act. This Act takes effect upon becoming a law and applies to savings account trusts established on or after its effective date, and as to all other transfers this Act is declaratory of existing law."

Exhibit H

§503. "Disposition of property. (a) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage, except the following, which is known as "non-marital property":

(1) property acquired by gift, legacy or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;. . .

(7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effect of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and

(8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.

IV.

Movant would show that by applying Illinois law to any division of the community estate by a Texas Court, Movant would receive all of the corpus presently held by the Trustee of the Anne Marie White Trust, including all securities purchased by the Trustee during the marriage of the parties, as well as income earned by the Trust during the marriage.

V.

Movant requests that the Court take judicial notice of the Illinois Statutes cited hereinabove pursuant to Rule 184a, Texas Rules of Civil Procedure, and Rule 202, Texas Rules of Evidence, and apply said Statutes to any controversy that may arise in this cause with regard to the Anne Marie White Trust.

PREMISES CONSIDERED, Movant prays that upon a hearing hereof, the Court take judicial notice of the Statutes of Illinois cited and attached hereto, and Order that said Statutes be applied to any controversy arising in this cause concerning the Anne Marie White Trust, and further that under Illinois law, as applied by the Court, all the present assets of the Trust, together with all income derived from said Trust during the marriage of the parties, are the separate property of Anne Marie White Jones; and that the Court grant such other and further relief to which Movant may show herself justly entitled at law or in equity.

Respectfully submitted,

LAW OFFICES OF CARLA JACKSON

By: _____
CARLA JACKSON

One Main Center
San Antonio, Texas 78205
(512) 222-2222
State Bar No. 11111111
Attorney for Movant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to Abraham S. Wise, Hart, Shaffner & Marks, 1010 Power Light Building, San Antonio, Texas 78205, by depositing same in the United States mail, postage prepaid, on this ____ day of _____, 198__.

CARLA JACKSON

NO. 84-CI-99999

IN THE MARRIAGE OF THE § IN THE DISTRICT COURT
MARRIAGE OF
GEORGE P. JONES AND
ANNE MARIE WHITE JONES § 999TH JUDICIAL DISTRICT
AND IN THE INTEREST OF
JOHN PAUL JONES AND
GEORGETTE JONES, CHILDREN § BEXAR COUNTY, TEXAS

MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 166-A, Texas Rules of Civil Procedure, Petitioner, GEORGE P. JONES, moves this Court for a partial summary judgment as to certain issues in this case and would show this Honorable Court as follows:

I.

RULE THAT THE SO-CALLED "TRUST"
NOT REALLY A TRUST

GEORGE P. JONES moves this Court for a partial summary judgment on the point that the Anne Marie Jones Trust is an "illusory trust," or an alter ego of ANNE MARIE JONES, and that no such trust actually exists as an entity separate and apart from ANNE MARIE JONES, the individual. In support of this request, GEORGE P. JONES would show this Court the following.

The Trust is Revocable. Article II of the Trust Agreement dated June 15, 1973, provided:

ARTICLE II

I may, from time to time, revoke or amend this instrument, in whole or in part, but only by an instrument in writing (other than a will) signed, acknowledged and delivered to the Trustee during my life.

It is thus apparent from the Trust Agreement itself that ANNE MARIE JONES can terminate or amend the so-called "Trust" at any time she wishes to do so.

Retains Control Over Principal Distributions. ANNE MARIE JONES also retained, in Article IV of the Trust

Agreement, the right to designate at any time that a portion of the principal of the Trust be distributed to her, free of trust. She therefore has retained complete control over the disposition of the principal of the Trust, and can remove said principal from "Trust" at any time she desires. The principal is therefore not in the control of a trustee who may act independently of ANNE MARIE JONES, and is therefore not really held in trust.

Mandatory Distribution of Income. Article IV of the Trust Agreement provides that all income of the property in the "Trust" be distributed to ANNE MARIE JONES. The income of the property put into the "Trust" is clearly not part of the "Trust," in that said income must be distributed to ANNE MARIE JONES. The Trustee has no discretion to retain said income in trust. Yet the bulk of the income has in fact been retained in the "Trust's" bank account.

Retains Control Over Insurance Policies in the Trust. ANNE MARIE JONES also retained complete control over any insurance policies she might place into the "Trust." Article V of the Trust Agreement provides that ANNE MARIE JONES "reserve[d] during [her] lifetime all rights under any insurance policies held hereunder, including the right to change the beneficiary, pledge or collect the cash surrender values, and to receive all dividends." ANNE MARIE JONES further provided that, upon surrendering any such policy or redesignating the beneficiary of such policy, the Trust would automatically terminate as to such insurance policy. Thus, insurance policies placed into the Trust are not really held in Trust.

Amendment Perpetuates Settlor's Control. The Amendment to the Trust Agreement, dated April 10, 1983, carries forward the control which ANNE MARIE JONES retained under the Trust Agreement as originally constituted. In Paragraph 2 of the Amendment, ANNE MARIE JONES appoints herself as co-trustee of the Trust, together with her grandfather, STEPHEN P. STONE. in Paragraph 3, ANNE MARIE JONES provides that she can direct the trustee to pay to her "such part of the net income and principal as I might request from time to time." Additionally, in paragraph 10 of the Amendment, ANNE MARIE JONES gives herself the right to appoint a substitute trustee, and also to revoke any appointment of substitute trustee, as she sees fit. And ANNE MARIE JONES retains the right to "change, modify, or revoke this agreement and the trust hereby evidenced, in whole or in part" Thus, from the first Trust Agreement through the most recent amendment, it is apparent that during the lifetime of ANNE MARIE JONES, the Anne Marie White Trust is not really a trust, and that ANNE MARIE JONES, to this day, retains the power and control

over the properties held "in trust" as if no trust existed. The Anne Marie White Trust is an "illusory trust," and is an alter ego.

II.

RULE THAT THE INCOME OF THE
PROPERTY HELD "IN TRUST" HAS BEEN
RECEIVED BY ANNE MARIE JONES DURING THE MARRIAGE

Only a limited amount of the income earned during the parties' marriage from property supposedly held "in trust" for ANNE MARIE JONES has in fact been paid to ANNE MARIE JONES. GEORGE P. JONES seeks a partial summary judgment that all income arising during the parties' marriage from the property supposedly placed into "trust" by ANNE MARIE JONES has been constructively received during the marriage by ANNE MARIE JONES. The summary judgment record, including pleadings, deposition testimony, deposition exhibits, and affidavits, shows conclusively that, during the parties' marriage, income derived from the property supposedly held in trust has been received by ANNE MARIE JONES.

In support of this point, GEORGE P. JONES has attached to his affidavit in support of this Motion true copies of the state and federal income tax returns filed by the parties during all of the years of their marriage. Each of these returns reflects that the income from the property supposedly held "in trust" was in fact reported on the parties' personal income tax returns. The affidavit further shows that the parties paid income taxes on this income. Each of these returns was signed by ANNE MARIE JONES, under the penalties of perjury. Each therefore constitutes a sworn representation by ANNE MARIE JONES that the income from such property was received by her and GEORGE P. JONES.

The Fiduciary tax returns provided by the alleged "Trustee," STEPHEN P. STONE, in connection with his deposition, also reflect that the Anne Marie White Trust took a deduction on its income tax return each year, for the distribution to ANNE MARIE JONES of all income arising from the property supposedly held "in trust."

The record conclusively establishes that the income from the property which ANNE MARIE JONES supposedly put into trust was, during the parties' marriage, distributed to ANNE MARIE JONES, and was taxed to her and to GEORGE P. JONES. Additionally, as reflected by the checkbook registers included as exhibits to STEPHEN P. STONE's deposition, specific cash disbursements were made by the "Trust" to ANNE MARIE JONES, or for her benefit, during each year of the parties' marriage.

The record establishes, as a matter of law, that the income earned by the "Trust" during the parties' marriage was distributed to ANNE MARIE JONES, and was either actually or constructively received by her.

~~IV~~ III

**RULE THAT THE INCOME RECEIVED BY
ANNE MARIE JONES IS DIVISIBLE
UNDER SECTION 3.63 OF THE TEXAS FAMILY CODE**

As a matter of law this Court can, and should, rule that the income constructively received by ANNE MARIE JONES during the parties' marriage from the so-called "Trust," together with all property acquired therewith, is divisible under TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1984). Section 3.63 of the Texas Family Code provides:

§ 3.63. Division of Property

(a) In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

(b) In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the Court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been

domiciled in this state at the time of the acquisition; or

(2) property that was acquired by either spouse in exchange for real or personal property, and that would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1985). The rule of Section 3.63(b) has been adopted into the stare decisis of this State, in the case of Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982). The income in question is either community property, or it is property which would have been community property had ANNE MARIE JONES been living in Texas at the time of its acquisition. In either event, the income, and all property acquired with it, is divisible in this Texas divorce proceeding. GEORGE P. JONES asks this Court for a partial summary judgment that said property is, in fact, divisible property in this divorce proceeding.

WHEREFORE, PREMISES CONSIDERED, GEORGE P. JONES moves this Court for a partial summary judgment that the Anne Marie White Trust is an illusory trust and alter ego of ANNE MARIE JONES and not a legal entity sufficiently separate in identity from ANNE MARIE JONES as to cause the income of the property supposedly conveyed "into trust" to be owned by, or received by, anyone or anything other than ANNE MARIE JONES, the individual. Alternatively, GEORGE P. JONES moves this Court for a partial summary judgment that, even if a valid Trust is found to exist, the income of the Trust has been distributed to ANNE MARIE JONES, and constructively received by her, annually during the parties' marriage, and that such income is the community property of Petitioner and Respondent, or alternatively, is divisible under Section 3.63(b), TEX. FAM. CODE ANN. Petitioner further request relief generally.

Respectfully submitted,

HART, SCHAFFNER & MARKS
1010 Power Lights Building
San Antonio, Texas 78205
512/224-2425

By: _____
ABRAHAM S. WISE
State Bar No. 99999999

ATTORNEYS FOR PETITIONER,
GEORGE P. JONES

FIAT

The foregoing Motion of GEORGE P. JONES having been presented to the Court, the same is hereby set for hearing at 9:00 a.m. on the _____ day of _____, 1985, in the 73rd Judicial District Court of Bexar County, Texas.

Signed the _____ day of _____, 1985.

JUDGE PRESIDING

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Motion has been hand-delivered to Ms. Carla Jackson, attorney-of-record for ANNE MARIE JONES, the _____ day of _____, 1985.

ABRAHAM S. WISE

B-513

TRANSCRIPT

NO. 15362

DISTRICT COURT NO. 73RD

~~MARY HELEN CURRIE, AND IN
INTEREST OF JOHN QUIN CURRIE
AND JAMES BREW CURRIE, CHILDREN~~
Appellant

Vs.

JOHN GARNER CURRIE
Appellee

from the 73rd Judicial District Court of Bexar County, Texas;

at San Antonio,

Honorable James C. Onion, Judge Presiding.

Attorneys for Appellant: Matthews, Nowlin, MacFarlane & Barrett
John M. McCamish, Jr.
1500 Alamo National Building
San Antonio, Texas 78205

Attorneys for Appellee: Joe Frazier Brown
1117 National Bank of Commerce Building
San Antonio, Texas 78205

Kessler, Nichols & Harris
Emmett Harris
200 First State Bank Building
Uvalde, Texas 78801

PINDING-OF FACT AND CONCLUSIONS OF LAW

NO. F-254,102

IN THE MATTER OF THE :
: MARRIAGE OF MARY HELEN CURRIE :
: : IN THE DISTRICT COURT
And :
: JOHN GARNER CURRIE :
: : 57TH JUDICIAL DISTRICT
And :
: IN THE INTEREST OF :
: : BEXAR COUNTY, TEXAS
JOHN QUIN CURRIE And :
: :
JAMES DREW CURRIE :

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of the Petitioner in the above entitled and numbered cause, I make and file the following as my Findings of Fact and Conclusions of Law in such cause:

Findings of Fact

1. At the time that her suit was filed, the Petitioner had been a domiciliary of the State of Texas for six (6) months next preceding the filing thereof and a resident of Bexar County for more than ninety (90) days next preceding the filing of said suit.

2. The parties hereto, Mary Helen Currie and John Garner Currie, were married, each to the other, on December 28, 1963, and thereafter lived together as husband and wife until April 12, 1972, at which time they separated and have not since said time lived together as husband and wife.

3. Two children, namely John Quin Currie, a boy born March 15, 1960, and James Drew Currie, a boy born May 28, 1971, were adopted by said parties during the course of their marriage and while said parties were living together as husband and wife. Neither of said children owns any property, and there are no Court-ordered conservatorships, guardianships, or other Court-ordered

relationships affecting said children except for orders of temporary custody awarded Petitioner on August 28, 1973, in this suit and temporary orders of child support required of Respondent on said date in this suit.

4. Respondent, John Garner Currie, is biologically permanently sterile and has been since January 20, 1967, and by reason of such sterility is incapable of causing conception in a female human being.

5. Petitioner, Mary Helen Currie, is eniente and in the fourth month of pregnancy, at the time of trial of this cause on its merits, such pregnancy being caused by sexual relations with someone other than Respondent, John Garner Currie.

6. No other child or children will be born of the present marriage of Petitioner and Respondent, each to the other.

7. That Petitioner has engaged in sexual intercourse with three male persons other than her husband since her marriage to the Respondent, said acts having taken place between Petitioner and two of said male persons since her separation from Respondent.

8. There is no reasonable expectation or possibility of reconciliation between the parties.

9. Discord and conflict of personalities between the Petitioner and Respondent have destroyed the legitimate ends of the marriage relationship of the parties and have caused the marriage of the parties to become insupportable.

10. That since the date of separation of the parties the two children, John Quin Currie and James Drew Currie, have resided with and been in the custody of Petitioner.

11. That the best interests of said children, John Quin Currie and James Drew Currie, require that they be placed under the managing conservatorship of the Petitioner and the possessory

and said properties being of the total value of \$301,200.00.

21. The amounts of cash in the trust estates under the wills of John Nance Garner and Tully C. Garner are as follows:

A. John Nance Garner Trust, \$33,808.51.

B. Tully C. Garner Trust, \$61,341.99.

22. That the will of John Nance Garner provides that distribution of corpus and income of said trust created under said will shall be under the sole discretion of the Trustee.

23. That the will of Tully C. Garner provides that the corpus of the trust created under said will shall not be distributed until after the death of Genevieve Garner Currie.

24. Genevieve Garner Currie (Mrs. John J. Currie) is the natural mother of Respondent John Garner Currie.

25. Genevieve Garner Currie is presently 51 years of age and has a present total life expectancy of 72 years.

26. The will of John Nance Garner provides in Codicil No. Two, Paragraph 4, that the net income from the trust shall become a part of the corpus for surviving children of Genevieve Garner Currie, granddaughter of the Testator, or their issue, if they are deceased before distribution of the corpus.

27. The will of John Nance Garner provides in Paragraph IV, Subparagraph (B) (6), that the Trustee's determination of what constitutes net income is final and binding as between those entitled to income and those entitled to principal, and the Trustee may use his discretion as to the amount of income needed to preserve, repair, or otherwise protect the principal and to make proper reserves.

28. The wills of John Nance Garner and Tully C. Garner both provide that if beneficiaries of the class of the Respondent, John Garner Currie, are deceased prior to distribution of the corpus of the respective trusts of said wills said corpus shall pass to the

children of such deceased beneficiary.

29. The original suit for divorce between the parties hereto was filed in the 30th Judicial District Court of Uvalde County, Texas, on April 12, 1972, in Cause No. 10,419, styled In the Matter of the Marriage of Mary Helen Currie and John Garner Currie, and same was dismissed on October 16, 1972, on the date of filing of suit in the instant cause by Petitioner herein, Mary Helen Currie.

30. A reasonable fee for the attorneys for Petitioner in this cause is in the amount of \$15,000.00 for legal services rendered Petitioner in representing her through the trial court, and the sums of \$3,000.00 for legal services for an appeal in the Court of Civil Appeals, and \$3,000.00 for legal services in the event Application for Writ of Error is filed with the Supreme Court of Texas.

Conclusions of Law

1. The bonds of matrimony heretofore existing between Mary Helen Currie and John Garner Currie should be dissolved and Mary Helen Currie be awarded a divorce from John Garner Currie.

2. John Garner Currie should pay to Mary Helen Currie, as and for child support, the sum of \$200.00 per child for a period of two years and thereafter the sum of \$300.00 per child until further order of the Court.

3. The amount of award for attorney's fees for the attorneys of Mary Helen Currie is necessary and reasonable and should be paid by John Garner Currie directly to said attorneys.

4. After considering the facts and circumstances of this case, including the community property owned by the parties, the community debts of the parties, the separate property of the Respondent, the earning powers and abilities of the parties, the rights of each party and the children of the marriage, the cause

conservatorship of the Respondent.

12. An amount of child support to be paid by Respondent to Petitioner in the sum of \$200.00 per month per child for two years, and thereafter \$250.00 per month per child until such child attains the age of eighteen (18) years, is equitable and necessary.

13. Both parties are gainfully employed, with the Petitioner earning an annual gross salary of approximately \$7,168.00 and the Respondent earning an annual gross salary of approximately \$10,000.00.

14. That there is no necessity for requiring the child support due to be paid by the Respondent to Petitioner to be paid by anyone other than Respondent.

15. Each of the parties should be allowed to claim one of the children for tax exemption purposes.

16. The parties own as community property household furniture and fixtures and personal clothing and effects, a 1974 General Motors Corporation pick-up truck, a 1963 Chevrolet Corvette automobile, a 1973 Chevrolet Capri automobile, and retirement benefits with the Teacher Retirement System of Texas on the earnings of Respondent of approximately \$4,200.00.

17. The parties owe as community debts the sum of approximately \$11,000.00 to the First State Bank in Uvalde Texas, and approximately \$2,000.00 on the unpaid balance on the purchase price of the 1973 Chevrolet Capri automobile.

18. Respondent, John Garner Currie, owns separate property, received by gift, as follows:

A. An undivided one-third interest in three tracts of realty in Uvalde, Uvalde County, Texas, described in the Judgment of the Court herein and being a tract of land out

of Survey No. 71, Antonio Gomez, and Survey No. 72, Carlos Huizar; a part of Lot No. 154, of the original Town of Uvalde, Uvalde County, Texas; and the east forty feet of Lot No. 141, original Town of Uvalde, Uvalde County, Texas. The value of said undivided one-third interest is \$18,666.67.

B. An undelivered 240 shares of stock in the John J. Currie Ranch, Inc., a Texas Corporation, of the value of \$4,000.00.

C. An undivided one-third interest in 2,146.44 acres of ranch land in Randall County, Texas, the value of such undivided one-third interest being \$28,619.20.

19. John Garner Currie, Respondent, is a beneficiary under the wills of John Nance Garner and Tully C. Garner. Both John Nance Garner and Tully C. Garner are deceased, their wills having been admitted to probate and the Trustees under said wills (Petitioner's Exhibits 1 and 2) namely D. W. Suttle, sole Trustee under the will of John Nance Garner and Co-Trustee with Genevieve Garner Currie under the will of Tully C. Garner, now being in possession of all properties of said estates.

20. That the realty owned by the said trust estates, in undivided one-half interests by each trust, is as follows:

A. The "El Cid" Ranch in Dimmit, Zavala, and Frio Counties, Texas, consisting of 9,598.54 acres of land of the value of \$1,247,810.00.

B. The "Wolcott" Ranch in Webb County, Texas, consisting of 24,820.20 acres of the value of \$2,730,233.00.

C. The "Carla" Ranch in Dimmit County, Texas, consisting of 10,878.5 acres of the value of \$1,414,140.00.

D. Rental properties located in Uvalde, Uvalde County, Texas, as set out in the Stipulation of Fact filed herein

IN THE MATTER OF THE MARRIAGE)	OF MARY HELEN CURRIE)	IN THE DISTRICT COURT
And))	
JOHN GARNER CURRIE))	57TH JUDICIAL DISTRICT
And))	
In the Interest of))	
JOHN QUIN CURRIE and))	
JAMES DREW CURRIE, Children))	BEXAR COUNTY, TEXAS

REQUEST FOR ADDITIONAL AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes Petitioner, MARY HELEN CURRIE, in the above-captioned cause and pursuant to Rule 298 of the Texas Rules of Civil Procedure, requests the Court to make the following additions and amendments to the findings of fact and conclusions of law.

ADDITIONAL AND AMENDED FINDINGS OF FACT

1. The Court's Findings of Fact Nos. 4 and 5 are unnecessary to support the judgment and are not ultimate facts and should be deleted.
2. The Court's Findings of Fact No. 7 should be deleted in view of the fact that Respondent filed no cross-action for divorce, nor did Respondent seek the Managing Conservatorship by pleadings until a few days prior to trial and then solely to harass Petitioner.
3. If the Court's Findings of Fact numbered 4, 5 and 7 are deemed to be "equities" by the Court which is considered in dividing the property, Petitioner requests that the following findings concerning "equities" also be made:
 - (a) In March, 1969, Petitioner was treated with antibiotics (penicillin) by Dr. James Winn as a consequence of Respondent having exposed her to gonorrhoea by first having sexual relations with other females in Mexico and then having sexual relations with Petitioner.

(b) In 1970 Respondent exposed Petitioner to crab lice contracted by his having sexual relations with female person(s) other than Petitioner and Respondent treated her for same. In connection with such infestation Respondent requested that Petitioner not seek the services of a physician.

(c) On a number of occasions prior to the separation of the parties Respondent purchased items such as diamond rings, flowers, etc. for women other than his wife and had the bill for same sent to the Petitioner at their residence. During such time Respondent was having an affair and spending time with a female not his wife.

(d) Prior to the separation of the parties on at least one occasion Respondent engaged in the production of pornographic films in the home of the parties and in Petitioner's absence.

(e) Prior to the separation of the parties on at least one occasion Respondent asked Petitioner to participate in a "wife-swapping" arrangement formulated by Respondent and others. Petitioner refused.

(f) During the Christmas Holidays (Dec. 25-31, 1971), Respondent engaged in sexual relations with a female other than Petitioner while vacationing at a ski lodge in Aspen, Colorado. Coincident therewith Petitioner was caring for the children of the marriage in Amarillo, Texas, one of whom was undergoing surgery.

(g) Petitioner's first extra marital sexual relations occurred in February or March, 1972, sometime after Respondent had agreed to move out of the parties' residence, but prior to his doing so.

of the separation of the parties and their respective conduct in reference thereto, I conclude that the division of estate, assets and debts of the parties, as set forth in the Judgment, is just, right, fair and equitable, having due regard for the rights of each party.

5. The Court in finding that no other child or children will be born of the present marriage of Petitioner and Respondent, each to the other, did not consider the testimony of either of the parties hereto but made such finding only on the basis of stipulated medical testimony.

6. John J. Currie is the beneficial owner of an undivided one-third interest in the estates of John Nance Garner and Tully C. Garner, subject to defeasance by the death of John Garner Currie prior to distribution of said estates.

7. Under the terms and conditions of the will of Tully C. Garner, the corpus of the trust created by said will is to be distributed upon the demise of Genevieve Garner Curry, the mother of Respondent, she having a life expectancy of twenty-one more years as of the date of trial of this cause on its merits.

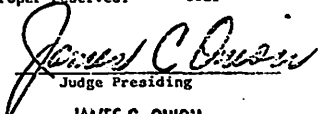
8. Under the terms and conditions of the will of John Nance Garner, the corpus of the trust created by said will is to be distributed when in the sole uncontrolled discretion of said Trustee, D. W. Suttle, the beneficiary has attained sound discretion and good business judgment and when in the uncontrolled discretion of said Trustee such distribution would be to the best interest of such beneficiary.

9. The award of cash to be paid by Respondent to the Petitioner is not made as and for alimony over a period of years but is made payable over a period of years in order that same can be paid by the Respondent without the necessity of sale of his separate property.

10. Under the will of John Nance Garner, the net income from the trust created under the will becomes a part of the corpus of the trust for distribution to the surviving children of Genevieve Garner Currie, the granddaughter of the Testator, or their issue, if such children predecease distribution.

11. Under the will of Tully C. Garner, the net income from the trust created under the will shall be paid to Genevieve Garner Currie during her lifetime.

12. Under the will of John Nance Garner, the net income from the trust shall become part of the corpus of said trust estate for distribution to the surviving children of Genevieve Garner Currie; however, the Trustee, D. W. Suttle, may use his discretion as to the amount of income necessary to preserve, repair, or otherwise protect the principal and to make proper reserves. seal


Judge Presiding
JAMES C. O'HON
PRESIDING JUDGE

FILING: FILED
May 15, 1974
No time
ELTON R. CODE
Clerk of the District Courts,
Boxar County, Texas
By: Roy G. Trevino,
Deputy

the respondent's testimony without contradiction that he was the party who wanted the divorce and I so find that he was the party who wanted the divorce.

(i) Respondent was frequently guilty of cruel treatment toward Petitioner.

(j) Prior to the separation of the parties Respondent was seldom at home and took no interest in aiding in the rearing of the children of the marriage, and cannot be expected to voluntarily contribute to their education and support.

(k) Respondent did not seek a divorce because of his wife's said sexual indiscretion. Respondent sought a divorce because of disputes with Petitioner about her going to women's club meetings and spending too much money for food and other necessities.

Unless the foregoing Findings of Fact are added to those already found by the Court, Petitioner requests that Findings 4, 5 and 7 be deleted.

4. James Drew Currie, age two years, has atypical tuberculosis and his drug bills have been as high as \$40 per month during the previous two years.
5. John Quin Currie requires prescription type shoes which must be purchased new at a cost of \$20 every three months.
6. Petitioner has no savings or other means of support other than her job from which her had a gross salary of \$7,168 last year.
7. Between 1968 and 1971 Petitioner and Respondent had earned income and estate distributions which combined ranged from \$20,000 to \$40,000 per year.
8. Prior to the parties' separation Petitioner enjoyed the amenities incident to living in a large well-kept four bedroom house with a large yard with her children and an income sufficient to support herself and her children beyond bare necessities.

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9. Petitioner's post separation circumstances require her to work and to utilize the services of a day care center for her children.
10. Since her separation Petitioner has lived in a two bedroom apartment with no yard with her children which are the most adequate accommodations she can afford.
11. Respondent received income from the John Nance Garner trust in the amount of \$19,500 during 1973 which amount was over and above the \$10,000 salary earned by Respondent.
12. Respondent received a distribution from the income of the John Nance Garner trust of \$6,243.69 in January, 1974.
13. Respondent was in arrears in his child support payments (\$200 per month per child) at the commencement and conclusion of trial in this cause.
14. Respondent purchased a new \$5,000 GMC pickup truck in November, 1973, for his own use.
15. Respondent did not pay his child support on time in either June or July, 1973.
16. Respondent's 1963 Corvette sports car and his 1974 GMC truck are fully paid for. Petitioner's 1973 Capri also acquired during the marriage has a balance due on it of \$2,000.
17. The present value of Respondent's one-third interest in the Tully C. Garner trust estate is \$398,484.45 which figure does not include the value of Respondent's interest in the estate's \$61,341.99 cash on hand.
18. Respondent's interest in the John Nance Garner trust estate is worth \$948,908.03 which figure does not include the value of Respondent's interest in the estate's \$33,800.50 cash on hand.
19. From 1968 to 1971 Respondent had as much as \$63,000 at a time in community property funds invested in the stock market.
20. Respondent lost \$41,000 of community property money in the stock market between 1968 and 1971, without the advice or consent of Petitioner, and with total

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disregard for her interest in such funds.

21. Life expectancy is not an accepted actuarial method for determining the present value of a remainder interest.
22. Petitioner's separate property including her china, silver wedding gifts and a chair have a retail value of approximately \$3,000.
23. The parties separated on or about April 12, 1972.
24. One-half of the difference in the amount of community income received by Respondent in excess of that received by Petitioner since the parties separated is \$17,404.76.
25. One-sixth of the undistributed income generated by the John Nance Garner trust during the marriage of the parties from its inception through January, 1974, equals \$44,595.01.
26. One-third of the gross receipts of the John Nance Garner trust during the marriage of the parties from inception through January, 1974, equals \$260,756.60.
27. During the marriage of the parties, from inception through January, 1974, Respondent received \$103,234.01 from the John Nance Garner trust as income distributions.
28. One-half of the difference between one-third of the John Nance Garner estate's gross receipts (\$260,756.60) and its distributions to Respondent (\$103,234.01) during marriage equals \$78,761.30.
29. The Tully C. Garner estate at the time of trial contained approximately \$509,212.99 in undistributed trust income accumulated during marriage of the parties, which figure is based upon the trust's federal income tax returns.
30. The Tully C. Garner estate at the time of trial contained undistributed income of approximately \$772,172.94, accumulated during marriage of the parties, which figure is based upon the gross receipts of the trust.
31. Petitioner has received no part of the undistributed trust income of either the Tully C. Garner or John Nance Garner estate.
32. Respondent owned an undivided one-third interest as his separate property in Lot Nos. 7 and 8 of Block 4 of the River addition to the City of Uvalde which interest Respondent valued on his Inventory and Appraisal at \$6,000.
33. In November, 1973, Respondent sold his interest in the Lot described in Finding 32 for \$12,500.
34. Petitioner did not become aware of the sale described in Finding 33 until the time of trial despite Respondent's being ordered to file a full and complete supplement to his 1972 Inventory and Appraisal on or about January 7, 1974.
35. Respondent owns 240 shares of J.J. Currie Ranch, Inc., which shares have a book value of \$18,626.17, and a fair market value of at least said amount.
36. Child support in the amount of \$500 per month per child until such child is 18 years of age is reasonable, equitable and necessary.
37. The Trustee of the John Nance Garner trust, D. W. Suttie, makes trust distributions to Respondent and the other beneficiaries whenever money is available.
38. The Trustee of the John Nance Garner trust intends to distribute the corpus of the trust by 1978 when all estate taxes are paid.
39. A reasonable fee for attorneys for Petitioner in this cause is the amount of \$40,000 for legal services rendered through trial of this cause. The sum of \$7,500 is a reasonable fee for legal services in connection with Petitioner's representation in the Court of Civil Appeals and an additional \$7,500 is a reasonable fee for legal services in the event Application for Writ of Error is filed with the Supreme Court of Texas.

40. A fee of \$6,000 is a reasonable fee for the expert appraisal services of Mr. Ray Parker which services were necessary to Petitioner in the preparation and prosecution of her case and for the protection and preservation of her interests in the estates of the parties.
 41. The sum of \$250.00 is a reasonable fee for the expert actuarial services of Mr. Bill Schnaer which services were necessary to Petitioner in the preparation and prosecution of her case and for the protection and preservation of her interests in the estates of the parties.
 42. Petitioner's attorneys have expended approximately 500 hours working in this case through trial, and such work was ordinary, reasonable and necessary in representing her and protecting her interests and those of the children in this case.
 43. The community indebtedness of approximately \$11,000 to the First State Bank in Uvalde, Texas, was incurred by Respondent for his sole use and benefit to pay his attorneys' fees and to buy a 1974 GMC truck.
 44. The Court's Finding of Fact No. 14 is clearly erroneous, not an ultimate fact issue and should be deleted. The Court is making a finding on an issue yet to be litigated in the action this court severed. (No. F-254,102(a)).
 45. The life expectancy of an average American female is 72 years.
 46. Respondent's mother, Genevieve Garner Currie, has had major cancer surgery (a mastectomy).
- Petitioner has no objections to Fact Findings Nos. 1, 2, 3, 6, 8, 9, 10, 11, 20, 21, 24, 28 and 29.

ADDITIONAL AND AMENDED
CONCLUSIONS OF LAW

1. JOHN GARNER CURRIE should pay to MARY HELEN CURRIE as and for child support the sum of \$500.00 per month per child until each such child shall have reached the age of 18 years.
2. The amount of attorneys' fees for the attorneys set forth in amended Finding of Fact No. 39 are necessary and reasonable and should be paid by JOHN GARNER CURRIE directly to said attorneys either from his share of the community or from his separate property.
3. Petitioner is entitled to reimbursement for her community share of the undistributed trust income of the John Nance Garner estate in the amount of \$78,761.30 which Respondent should be ordered to pay Petitioner as and when distribution is received.
4. Petitioner is entitled to reimbursement for her community interest in the undistributed trust income in the Tully C. Garner Trust estate amounts to \$128,696.32 which amount Respondent should be ordered to pay Petitioner as and when distribution is received.
5. Respondent should be ordered to pay Petitioner \$17,404.76 in addition to all other payments in order to reimburse her for the difference in the amount of community income actually received by Respondent in excess of that received by Petitioner since the parties separated.
6. Respondent should be ordered to pay Petitioner the sum of \$20,500.00 to compensate her for her community interest in the \$41,000.00 frivolously dissipated by Respondent in the stock market during the years 1968-71.
7. Respondent has repeatedly treated Petitioner in a cruel and unkind manner.
8. Petitioner should also be awarded the amount of \$6,000 for the expert appraisal services of Mr. Ray Parker which services were reasonable and necessary to Petitioner's preparation and prosecution of her case and for the protection and preservation of her interests in the estate of the parties.

9. Petitioner should be awarded the amount of \$250 which amount is a reasonable and necessary fee for the expert actuarial services of Mr. Bill Schnaar, which services were necessary to Petitioner in the preparation and prosecution of her case and for the protection and preservation of her interest in the estates of the parties.

10. Each party should pay any debt personally incurred by him or her prior to the granting of the divorce herein.

11. The character of the income retained by the John Nance Garner and Tully C. Garner trusts as community property of the parties cannot legally be deemed to change by designating same the "corpus" of the respective trust, and any such attempted conversion would operate to defeat Petitioner's community property interest in such income.

12. After considering the facts and circumstances of the case including the amount of community property of the parties, the large separate estate of Respondent, the earning power of the parties, Respondent's superior business opportunities, the rights of the children of the marriage, the advantages of the marriage which would have otherwise accrued to Petitioner absent Respondent's desire to divorce, Respondent's cruel treatment of Petitioner, and the assets and debts of the parties, I am of the opinion that the judgment should be modified to incorporate the amendments and additions contained in these proposed additional and amended Findings of Fact and Conclusions of Law.

13. Any finding of fact may be considered a conclusion of law and any conclusion of law may be considered a finding of fact if appropriate.

FILED:

May 22, 1974

No time

ELTON R. CUBE

Clerk of the District Courts,

Bexar County, Texas

By Roy G. Trevino,
Deputy

Judge Presiding

request for leave signed on front

-9-

15362

NO. 15,3632

B - 5139

IN THE
 COURT OF CIVIL APPEALS
 FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

MARY HELEN CURRIE,
 APPELLANT

V.

JOHN G. CURRIE,
 APPELLEE

APPELLANT'S BRIEF

FILED
 In the Court of Civil Appeals
 AT SAN ANTONIO, TEXAS

OCT 9 1974

Robert L. Cook
 CLERK

JOHN N. McCAMISH, JR.
 F. W. BAKER
 JON C. WOOD
 1500 ALAMO NAT'L BUILDING
 SAN ANTONIO, TEXAS 78205

ATTORNEYS FOR
 PETITIONER-APPELLANT

OF COUNSEL:
 MATTHEWS, NOWLIN, MACFARLANE & BARRETT

In addition, one-third of the income generated by the JNG Trust is the community property of Petitioner and Respondent. That portion of the income of the JNG trust which was distributed to Respondent, of course, had been reduced to the possession of the community. That portion of the income generated by the JNG trust which has not been distributed to the community consisted of (1) undistributed income accumulated by the trust and (2) undistributed income used to pay the expenses incident to the maintenance of the trust, for which the community estate is entitled to reimbursement. Petitioner claimed an amount equal to one-half of the community estate's interest therein or one-sixth of the total undistributed income generated by the JNG trust and either accumulated or used for the benefit of the separate property of Respondent. At minimum, Petitioner's interest should have been valued at \$44,595.01 based upon the taxable income reported by the JNG trust, as follows:

18.

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TABLE 4

Period	JNG Trust Income		Distributed** To Respondent	One-half of Diffe
	Income* 100%	33.3%		
Nov-Dec 1967	\$ 2,401.25	\$ 800.42		\$ 400.
Jan-Dec 1968	96,100.48	32,033.49	\$ 25,472.26*	3,280.0
Jan-Dec 1969	81,961.07	27,320.36	17,700.24*	4,810.0
Jan-Dec 1970	80,523.76	26,841.25	9,500.00	8,670.0
Jan-Dec 1971	62,333.21	20,777.74	10,000.00	5,388.0
Jan-Dec 1972	89,232.98	29,744.33	14,817.82	7,463.0
Jan-Dec 1973	131,954.90	43,984.97**	19,500.00	12,242.0
Jan 1974	<u>32,764.33</u>	<u>10,921.44**</u>	<u>6,243.69</u>	<u>2,338.0</u>
Total	\$577,271.98	\$192,424.00	\$103,243.01	<u>\$44,595.0</u>

* Per Tax Return, unless otherwise noted

** Per Trust Records, unless otherwise noted.

19.

Since all of the receipts of the JNG trust were deposited in the same bank account, and all nature of income and increases were inextricably commingled, the total that Petitioner should have been awarded was \$78,761.30, determined as follows:

TABLE 5

JNG Trust Receipts

<u>Period</u>	<u>Gross Receipts*</u>		<u>Distributed* To Respondent</u>	<u>One-half (1/2)</u>
	<u>100%</u>	<u>33.3%</u>		
Nov-Dec 1967	\$ 22,747.56	\$ 7,582.52		\$ 3,791.26
Jan-Dec 1968	206,434.51	68,811.50	\$ 25,472.26**	21,669.62
Jan-Dec 1969	156,925.07	52,308.35	17,700.24**	17,304.06
Jan-Dec 1970	81,616.07	27,205.36	9,500.00	8,852.68
Jan-Dec 1971	62,849.64	20,949.88	10,000.00	5,474.94
Jan-Dec 1972	85,751.28	28,583.76	14,817.82	6,882.97
Jan-Dec 1973	133,162.92	44,387.64	19,500.00	12,443.82
Jan 1974	<u>32,782.76</u>	<u>10,927.59</u>	<u>6,243.69</u>	<u>2,341.95</u>
Total	\$782,269.81	\$260,756.60	\$103,234.01	<u>\$78,761.30</u>

* Per Trust Records, unless otherwise noted
 ** Per Tax Returns

Similarly, Petitioner claimed one-sixth of the income generated by the Tully C. Garner trust since his death which had not been distributed to Genevieve Garner Currie as "net income" (as defined in the Will of Tully C. Garner) as Petitioner share of the community interest of the parties. Income generated by the TCG trust and undistributed again consisted of (1) undistributed income accumulated during the marriage and thus part of the remainder interest of Respondent, and (2) undistributed income also earned during the marriage used to pay the expenses incident to the maintenance of Respondent's beneficial remainder interest in the trust, for which the community estate of the parties is entitled to reimbursement.

Petitioner's minimum community interest of \$84,868.83 in the TCG trust can be summarized as follows:

[NO COMMINGLING]

TABLE 6

<u>TCG Trust Income</u>				
<u>Period</u>	<u>Income*</u>	<u>Distributed to Genevieve Garner Currie</u>	<u>Undistributed Income</u>	<u>Petitioner's 1/6 Interest</u>
Oct-Dec 1968	\$ 19,063.54	-	\$ 19,063.54	\$ 3,177.26
Jan-Dec 1969	106,882.14	\$ 54,000.00	52,882.14	8,813.69
Jan-Dec 1970	95,684.35	33,000.00	62,684.35	10,447.39
Jan-Dec 1971	75,645.25	35,000.00	40,645.25	6,774.21
Jan-Dec 1972	259,937.99	35,221.11	224,716.88	37,452.81
Jan-Dec 1973	155,045.32***	80,000.00**	75,045.32	12,507.55
Jan 1974	<u>34,175.51**</u>	-	<u>34,175.51</u>	<u>5,695.92</u>
Total	\$746,434.10	\$237,221.11	\$509,212.99	<u>\$84,868.83</u>

* Per Tax Returns, unless otherwise noted (Pet Ex 19-23).
 ** Receipts and Distribution per trust records (Pet Ex 114-178).

[COMMINGLING]

Furthermore all receipts of the Tully C. Garner trust were deposited in the same bank account, and all nature of income and increases were inextricably commingled. Consequently the total award to Petitioner with regard to the TCG trust should have been \$128,696.32 determined as follows:

TABLE 7

<u>Period</u>	<u>Gross Receipts*</u>	<u>Distributed to Genevieve Garner Currie*</u>	<u>Undistributed Income</u>	<u>Pet's 1/6</u>
Oct-Dec 1968	\$ 36,532.02		\$ 36,532.02	\$ 1
Jan-Dec 1969	240,866.51	\$ 54,000.00	186,866.51	3
Jan-Dec 1970	108,022.46	33,000.00	75,022.46	12
Jan-Dec 1971	77,039.05	35,000.00	42,039.05	
Jan-Dec 1972	357,718.18	35,221.11	322,497.07	5
Jan-Dec 1973	155,045.32	80,000.00*	75,045.32	1
Jan 1974	<u>34,175.51</u>	-	<u>34,175.51</u>	
Total	\$1,009,399.05	\$237,221.11	\$772,177.94	<u>\$128,696.32</u>

* Per Trust Records (Pet Exs 114-178)
 ** Per Tax Returns, unless otherwise noted (Pet Ex 19-23).

In summary Petitioner was awarded \$50,000 for her interest in the community payable over ten years and some insignificant items of personalty. The undisputed evidence shows that the value of her one-half of the community income without regard to the commingling of funds by trustees is \$146,868.60. Petitioner's community interest calculated on a gross receipts basis is \$224,862.38. Respondent, on the other hand, received trust interests of which he was found by the Trial Court to be the beneficial owner "subject to defeasance" (T 120) which interests coupled with Respondent's other real estate holdings are conservatively worth in excess of 1.4 million dollars.

POINTS OF ERROR

1. THE TRIAL COURT ABUSED ITS DISCRETION BY MAKING A GROSSLY INEQUITABLE DIVISION OF THE MARITAL ESTATE IN FAVOR OF RESPONDENT.
2. THE TRIAL COURT'S FINDINGS OF FACT NOS. 12, 14, 30, AND CONCLUSIONS OF LAW NOS. 2, 4, 7, 8 and 11, ARE IN LIGHT OF THE EVIDENCE AN ABUSE OF DISCRETION AND AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE. See Williams v. Williams, 325 S.W.2d 682, 684 (Tex. Sup. 1959)
3. THE TRIAL COURT ERRED BY REFUSING TO DETERMINE BOTH THE CHARACTER AND THE VALUE OF EITHER THE COMMUNITY OR THE SEPARATE PROPERTY OF THE PARTIES.
4. THE TRIAL COURT ERRED BY FAILING TO AWARD PETITIONER ONE-HALF OF ALL UNDISTRIBUTED TRUST INCOME BENEFICIALLY OWNED BY RESPONDENT.
5. THE TRIAL COURT ERRED BY LIMITING PETITIONER'S RECOVERY FOR ATTORNEYS' FEES TO \$15,000.00.
6. THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING PETITIONER'S RECOVERY FOR ATTORNEYS' FEES TO \$15,000.00.
7. THE TRIAL COURT ERRED BY FAILING TO AWARD PETITIONER ANY REIMBURSEMENT FOR EXPERT WITNESS AND ACCOUNTING FEES.
8. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD PETITIONER ANY REIMBURSEMENT FOR EXPERT WITNESS AND ACCOUNTING FEES.
9. THE TRIAL COURT'S FAILURE TO DETERMINE THE PROPER VALUE OF THE MARITAL ESTATE RESULTED IN AN ERRONEOUSLY LOW AWARD OF ATTORNEYS' FEES.

10. THE TRIAL COURT'S ABUSE OF DISCRETION IN THE DIVISION OF THE MARITAL PROPERTY RESULTED IN A SIMILAR ABUSE WITH REGARD TO ATTORNEYS' FEES AND EXPERT WITNESS AND ACCOUNTING FEES.
11. THE TRIAL COURT ERRED BY SEVERING DEFENDANT TRUSTEES AND TRUST BENEFICIARIES FROM THIS ACTION WHICH PARTIES WERE NECESSARY TO A COMPLETE AND CORRECT ADJUDICATION OF THIS CASE.
12. THE TRIAL COURT ABUSED ITS DISCRETION BY SEVERING DEFENDANT TRUSTEES AND TRUST BENEFICIARIES FROM THIS ACTION WHICH PARTIES WERE NECESSARY TO A COMPLETE AND CORRECT ADJUDICATION OF THIS CASE.
13. THERE IS NO EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF FACT NO. 14 (T 116) THAT NO NECESSITY EXISTS FOR ORDERING ANYONE ELSE TO PAY RESPONDENT'S CHILD SUPPORT.
14. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING FACT NO. 14 THAT NO NECESSITY EXISTS FOR ORDERING ANYONE ELSE TO PAY RESPONDENT'S CHILD SUPPORT.
15. THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING OF FACT NO. 14 BY FINDING AS A FACT THAT NO NECESSITY EXISTS FOR ORDERING ANYONE ELSE TO PAY RESPONDENT'S CHILD SUPPORT.

ARGUMENTS AND AUTHORITIES

1. THE TRIAL COURT ABUSED ITS DISCRETION BY MAKING A GROSSLY INEQUITABLE DIVISION OF THE MARITAL ESTATE IN FAVOR OF RESPONDENT
2. THE TRIAL COURT'S FINDINGS OF FACT NOS. 12, 14, 30, AND CONCLUSIONS OF LAW NOS. 2, 4, 7, 8 AND 11, ARE IN LIGHT OF THE EVIDENCE AN ABUSE OF DISCRETION AND AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE. See Williams v. Williams, 325 S.W.2d 682, 684 (Tex. Sup. 1959)

Petitioner is well aware of the discretion accorded a trial judge to divide marital property and that such property may be divided unequally. Hedtke v. Hedtke, 248 S.W. 21 (Tex. Sup. 1923); In Re Marriage of McCurdy, 489 S.W.2d 712 (Tex. Civ. App.--Amarillo 1973, writ dismissed); Smith v. Manger, 449 S.W.2d 347 (Tex. Civ. App.--San Antonio 1970, no writ). "Unequally," however, does not mean "inequitably."

Normally unequal divisions have been designed to assist the less able and gifted party from the point of view of earnings capabilities, overall wealth, business opportunities, further responsibilities with regard to raising the children, and further need for support and/or to compensate the innocent party for the loss of an advantageous marriage. See Miller v. Miller, 463 S.W.2d 477 (Tex. Civ. App.--Tyler 1971, writ refused n.r.e.); Waggener v. Waggener, 460 S.W.2d 251, 253 (Tex. Civ. App.--Dallas 1970, no writ).

In the instant case, every one of the foregoing considerations militate in favor of Petitioner's receiving at least as much as Respondent, if not outright then in trust for the benefit of Petitioner and her children. Instead, the Trial Court awarded Petitioner property (furniture, car, etc.) worth at most \$5,000 (\$3,000 of which was her separate property) plus \$50,000 over 10 years which, discounted at 6% is presently worth \$27,919.00* for a total of \$32,919. This represents approximately 2% of the present value of the \$1,428,000 of the property set aside to Respondent (See Table I, supra at p14). Stated another way, Respondent received fifty dollars worth of property for every dollar set aside for Petitioner. To further diminish her award the Trial Court held that Petitioner's payments from Respondent were taxable to her. Surely, such a grossly unequal result is inequitable and would constitute an abuse of discretion under any circumstances, much less those herein involved.

The meagerness of the Trial Court's award is further highlighted when one considers that Petitioner has additional obligations for attorneys' fees as a consequence of the Trial Court's inadequate award as well as an obligation to pay expert witness fees and other expenses of trial. Further, the Trial

*Lakes Monthly Installment and Interest Tables (5th Ed.)

Judge made no provision for Respondent to share even the cost of extraordinary medical care for the children despite their demonstrated need for such care in the past.

The trial results are a total non sequatur without any rational basis when considered in light of the evidence and undisputed facts. Specifically, Petitioner demonstrated at trial that Respondent had superior earning power, a superior education (a Masters Degree in business administration) (SF Resp 99), vastly greater resources, less future need, [e.g. he lives rent free (SF 98-9)], superior business opportunities by virtue of his great wealth and that Respondent wanted and was the moving force behind the divorce (SF 103). Further, Petitioner demonstrated that she earned \$7,100 per year which, in addition to sporadic child support payments of \$400 per month, was her sole source of support for her children and herself. Further, it is undisputed that Petitioner has no separate estate of consequence. By contrast Respondent received from salary, and trust distributions over \$30,000 in 1973 and a \$6,200 distribution in January, 1974, which distributions as the evidence shows, will continue or increase.

As more fully set forth under Points of Error 3 and 4, *infra* the undistributed trust income from the JNG and TCG trusts consti

community property of the parties. The Trial Court's failure to award Petitioner even one-half of this amount of such income is an abuse of discretion as a matter of law. But, even assuming that such income was not community, which is incorrect under law, the enormous disparities in the Trial Court's award compel the finding of abuse. As the Court pointed out in Lucas v. Lucas, 365 S.W.2d 372 (Tex. Civ. App.--Beaumont 1962, no writ):

The trusts involved were created at least in part for the support of appellee. Being the husband of appellant and father of her children, he owes them the duty of support. When a man is married the obligation to his family is considered as a part of the cost of support for himself. It is against public policy to allow such a person to be well taken care of by a trust when those who have every right to look to him for support are doing without. Seidenberg v. Seidenberg, D.C., 126 F.Supp. 19; 96 U.S. App. D.C. 245, 225 F.2d 545. See also, Bogert, Trusts & Trustees, Sec. 23, pp.484-492 (Emphasis supplied) 365 S.W.2d at 376

In addition to depriving Petitioner of undistributed trust income by way of reimbursement or otherwise, the Trial Court further abused its discretion in the following respects:

- (1) By failing to award Petitioner one-half of Respondent's income over and above the income received by Petitioner

from April, 1972 (date of separation) until trial. This amounted to \$17,404.76 (Requested Finding of Fact No. 24 and Conclusion of Law No. 5 [T 127, 130]).

- (2) By failing to award Petitioner \$20,500 as her share of community funds squandered by Respondent. Reaney v. Reaney, 505 S.W.2d 338 (Tex. Civ. App. --Dallas 1974); Pride v. Pride, 318 S.W.2d 715 (Tex. Civ. App. --Dallas 1958, no writ);
- (3) By failing to award Petitioner \$78,761.30 as reimbursement for her community share of the undistributed trust income of the JNG trust and \$128,696.32 for her community interest in the undistributed trust income of the TCG trust. See pp. 20-23 of this Brief. (Requested Conclusions of Law Nos. 3 and 4 [T 130]). See Fulwiler v. Fulwiler, 419 S.W.2d 251 (Tex. Civ. App.--Eastland 1965, no writ); Cervantes v. Cervantes, 76 S.W. 790 (Tex. Civ. App. 1903, writ dismissed). Speers, Marital Rights in Texas, § 379 (1961, Supp. 1974); Annotation, Use of Community Funds in Improving or Discharging Encumbrance on Separate Property, as Grounding Right to Reimbursement Lien or Charge, 54 A.L.R.2d 429 (1958), as supplemented by A.L.R.2d Later Case Service (1967, Supp. 1973).

- (4) By failing to award Petitioner the amount of \$6,000 for the expert appraisal services of Mr. Ray Parker which services were reasonable and necessary to Petitioner's preparation and prosecution of her case and for the protection and preservation of her interests in the estate of the parties. (Requested Conclusion of Law No. 8).
- (5) By failing to award Petitioner the sum of \$250 which amount was a reasonable and necessary fee for the expert actuarial services of Mr. Bill Schnaer which services were necessary to Petitioner in the preparation and prosecution of her case and for the protection and preservation of her interests in the estate of the parties. (Requested Conclusion of Law No. 9 [T 131]).
- (6) By failing to award Petitioner \$40,000 for legal services rendered through trial of this cause and \$7,500 for each appeal which fees are reasonable and clearly supported by the evidence. (Requested Finding of Fact No. 39 and Conclusion of Law No. 2 [T 128, 130]).

- (7) By failing to award child support in an amount sufficient to discharge Respondent's obligation to support his children. (Requested Findings of Fact Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, and Conclusion of Law No. 1 [T 125, 126, 130]).
- (8) By failing to award Petitioner a substantial amount of all of the property of the parties.
- (9) By considering as the Findings of Fact demonstrate only the "equities" requested by Respondent and ignoring the cruel and grossly inequitable manner in which Petitioner was treated by Respondent.

Anyone of these abuses of discretion would require reversal of this case. In view of all of the foregoing failures, collectively the Trial Court's Conclusion of Law No. 4* is clearly erroneous and against the great weight and preponderance of the evidence.

*After considering the facts and circumstances of this case, including the community property owned by the parties, the community debts of the parties, the separate property of the Respondent, the earning powers and abilities of the parties, the rights of each party and the children of the marriage, the cause of the separation of the parties and their respective conduct in reference thereto, I conclude that the division of estate, assets and debts of the parties, as set forth in the Judgment, is just, right, fair and equitable, having due regard for the rights of each party.

The division of the property of the parties was manifestly unjust and unfair. See Dorfman v. Dorfman, 457 S.W.2d 417 (Tex. Civ. App.--Texarkana 1970, no writ). And consequently Petitioner should be granted a retrial of all matters concerning the division of property, child support and fees, forthwith.

3. THE TRIAL COURT ERRED BY REFUSING TO DETERMINE BOTH THE CHARACTER AND THE VALUE OF EITHER THE COMMUNITY OR THE SEPARATE PROPERTY OF THE PARTIES.

The Trial Court's multiple abuses of discretion stemmed at least in part from the commission of a number of errors of law. That Court pursuant to Article 3.63 of the Family Code was obligated to decree an equitable division of the marital estate of the parties. Williams v. Williams, 325 S.W.2d 682 (Tex. Sup. 1959); Ex Parte Scott, 133 Tex. 1, 123 S.W.2d 306 (1939) Blancas v. Blancas; 495 S.W.2d 597 (Tex. Civ. App. --Texarkana, 1973 no writ); Henderson v. Henderson, 425 S.W.2d 363 (Tex. Civ. App.--San Antonio 1968, writ dism'd). In order to do this both logically and as a matter of law the Trial Court was obligated to determine the character of the marital property as either separate property or community property in accordance with Section 5.01 of the Code.* Davis v. Davis, 495 S.W.2d 607 (Tex. Civ.

*Section 5.01 Marital Property Characterized

- (a) A spouse's separate property consists of:
- (1) the property owned or claimed by the spouse before marriage;
 - (2) the property acquired by the spouse during marriage by gift, devise, or descent; and
 - (3) the recovery for personal injuries sustained by the spouse during marriage.
- (b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

App.--Dallas 1973, writ dismiss'd). Baker v. Baker, 498 P.2d 315 (Sup. Ct. Wash. 1972); See Ferguson v. Ferguson, 202 N.W.2d 760 (Sup. Ct. N.D. 1973). Despite Petitioner's request for Additional and Amended Findings of Fact and Conclusions of Law (T 123) and an extensive trial brief (Appendix 1), the Trial Court made only a single finding of fact (No. 16, T 114) concerning community property that certain furniture, autos and a small retirement fund were community property. Thus, with the exception of a few items of personalty of relatively nominal worth, neither the character of the property contained (or not contained) in the marital estate nor its value was determined by the Court. (T 123). The Trial Court's failure, to determine the character and value of the property was the genesis of virtually every error set forth herein, including the grossly unequal division of community assets in favor of Respondent. While the Trial Court did find the value of certain items of property in dispute, he never valued Respondent's interest in any of the marital property.

Thus, the Court rendered itself unable to discharge its statutory duty to either the Petitioner or the children by virtue of having failed to determine and, therefore, having necessarily failed to consider these vital facts. The Texas Supreme Court stated this obligation as follows:

The Trial Court shall consider all of the facts and circumstances shown by the evidence and then partition the community property . . . in such manner as may be just and right. Hailey v. Hailey, 331 S.W.2d 299, 303 (Tex. Sup. Ct. 1960) (Emphasis added).

And as the Court held in Baker v. Baker, supra,

"The Court, in a divorce action, must have in mind the correct character and status of the property as community or separate before any theory of division is ordered. Blood v. Blood, 69 Wash 2d 680, 419 P2d 1006 (1966); Shaffer v. Shaffer, 43 Wash. 2d 629, 262 P2d 763 (1953)." 498 P2d at 315

4. THE TRIAL COURT ERRED BY FAILING TO AWARD PETITIONER ONE-HALF OF ALL UNDISTRIBUTED TRUST INCOME BENEFICIALLY OWNED BY RESPONDENT.

The community property nature of undistributed trust income is a much debated but easily resolved issue. See Davis, Income Arising From Trust During Marriage is Community Property, 29 Tex. B.J. (Nov. 1966); Counts, Trust Income - Separate or Community Property, 30 Tex. B.J. 851 (Nov. 1967). To date, courts have had little problem holding that income distributed from a trust created by a third party for the benefit of a party to a marriage is the community property of the beneficiary and his spouse, if the income is derived from dividends, rents or other sources which would normally be considered community when earned by a married person from

his separate property. Colden v. Alexander, 171 S.W.2d 328 (Tex. Sup. 1943); Commissioner v. Sims, 148 F.2d 754 (5th Cir. 1945); McFaddin v. Commissioner, 148 F.2d 570 (5th Cir. 1945); Commissioner v. Snowden, 148 F.2d 579 (5th Cir. 1945); Commissioner v. Porter, 148 F.2d 566 (5th Cir. 1945); Commissioner v. Wilson, 76 F.2d 766 (5th Cir. 1935); Commissioner v. Terry, 69 F.2d 969 (5th Cir. 1934).

With regard to undistributed trust income the same result was reached in Texas in Mercantile National Bank v. Wilson, 279 S.W.2d 650 (Tex. Civ. App.--Dallas 1955, writ ref'd n.r.e.). The decision of the Dallas Court of Civil Appeals has been recently explained as follows:

The principal contention which was made before the circuit court to avoid the characterization of trust distributions as community was that the income itself was the gift which the beneficiary had received from the settlor, and hence was separate property. The refusal of the court to accept this argument apparently stemmed primarily from the Supreme Court decision of Irwin v. Gavit [268 U.S. 161 (1925)], in which Justice Holmes concluded that trust distributions were not gifts for federal tax purposes on the grounds that "a gift of the net income of a fund ordinarily is treated by equity as creating an interest in the fund."

The court held, therefore, that the equitable interest in the trust was itself the subject matter of the gift. Using this approach the circuit court decisions reason that the equitable interest of a married beneficiary of a trust is also property for purposes of the community property laws, and that the income derived from it in the form of trust distributions is, therefore, community property.

Branscomb and Miller, Community Property and the Law of Trusts 20 S.W.L.J. 699, 713 (1966).

In the instant case it cannot be questioned that Respondent has an equitable interest in the corpus of the trust established by the Will of John Nance Garner (Pet Ex 1), which beneficial interest he acquired by devise under the terms of that Will. [See Trial Court's Conclusion of Law No. 6 finding that Respondent "is the beneficial owner of an undivided interest in the estates of John Nance Garner and Tully C. Garner, subject to defeasance. . . ." (T 120)] Clearly such beneficial ownership in accumulate income as well as the corpus is a present property interest subject to division by the court even if such division is made on an "as and when distributed" basis. Implicit in the Trial Court's Conclusion is that Respondent's beneficial interest in this property is a completely vested equitable right, subject only to his death prior to distribution, in which event his beneficial ownership, by the terms of the Will, passes to his surviving children.

Respondent's unfettered rights to trust property as well as the "flow through" nature of these trusts is further emphasized by the fact that neither trust contains any spendthrift provision and Respondent's vested equitable interest as well as his right to receive distributed income, is fully subject to alienation, hypothecation, and the claims of creditors.

While the discretion of the Trustee concerning the time and amount of distributions is "uncontrolled" under the terms of the Will, the Trustee's practice has been to distribute whatever available funds the beneficiaries request, and, under Texas law, his discretion is not absolute (SF Suttle 232-3). State of Texas v. Rubion, 158 Tex. 43, (1957); Rust v. Rust, 211 S.W.2d 262 (Tex. Civ. App.--Austin 1948) aff'd 147 Tex. 181, 214 S.W.2d 462; Lucas v. Lucas, 365 S.W.2d 372 (Tex. Civ. App.--Beaumont 1962, writ dism'd); Bogart, Trusts & Trustees § 560 (2d ed. 1960, Supp. 1973).

The facts further evidence the "flow through" nature of these trusts as is amply demonstrated by Trustee Suttle's testimony in response to being queried concerning what factors he considered in making distributions.

"I haven't acted solely, exercised sole discretion at all in the Tully C. Garner estate, nor have I exercised sole discretion in the John Nance Garner estate. I have always consulted the heirs to see what they wanted and desired, because it was their decision, really, to make since they were the real owners of the property. And, likewise, when it came to distributions, if they wanted distributions, well, they had to clear it through the accountant, and as long as we did not over-distribute, or as long as it was within the terms of my discretion and the terms of the will, why, I approved giving them whatever the estate could afford each year. (SF Suttle 232-3) (Emphasis supplied)

Furthermore, under the Will, the Trustee must either pay out income to the beneficiary of each separate trust or retain it to be distributed with the corpus to either the beneficiary or, if deceased, his children. The Trustee has no discretion to distribute income attributable to Respondent's trust to anyone else.

As will be discussed in more detail below, the determination of whether property acquired during marriage is community or separate depends upon the method by which the property is acquired. Texas Family Code §5.01; Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925). Respondent's income generated by his beneficial ownership of a portion of the corpus of the JNG trust was not acquired by gift, devise or descent, but was "earned" from the separate property. Lesage v. Gateley, 287 S.W.2d 193 (Tex. Civ. App.--Waco 1956, writ dism'd). It is "property possessed" by Respondent during the marriage and is therefore "presumed to be community property." Texas Family Code §5.02. While some of the income generated by Respondent's equitable interest in the trust corpus was due to royalties, bonuses and exploration damage, these funds were completely commingled with income from rents, grazing leases, interest, and oil leases. Dealing with a similar situation in McFaddin v. Commissioner, supra, the Fifth Circuit Court of Appeals stated that:

[T]he taxpayers were beneficial owners of the trust properties, and every part and parcel of them, including income from them, belong beneficially to them, either as separate or as community property in the same way that it would have belonged to them had the property been deeded to the taxpayers and operated by themselves. The greater part of the normal income from the property during the years preceding the tax years in question was community income. When it was commingled in a common bank account with other funds of the trust so that the constituents had lost their identity, the whole fund became community, Id. at 572-73.

The burden to prove by satisfactory evidence that Respondent's income attributable to his interest in the JNG trust is other than the community property of the parties was on Respondent. Tarver v. Tarver, 394 S.W.2d 780 (Tex. Sup. 1965); Wilson v. Wilson, 145 Tex. 607, 201 S.W.2d 226 (1947). Speer's Marital Rights in Texas §399 (1961). At trial Respondent made no effort to trace trust income and thus, no evidence of record exists to demonstrate in any way that the completely commingled trust income of the JNG and TCG trusts is other than community property. Hodge v. Ellis, 154 Tex. 341, 277 S.W.2d 900 (1955); Rippy v. Rippy, 49 S.W.2d 494 (Tex. Civ. App.--Austin 1932, - writ ref'd).

As pointed out above, the Texas Supreme Court's opinion in Arnold v. Leonard, supra, sets out the fundamental principles

that are to be applied in determining whether property is separate property or community property. In construing Section 15 of Article 16 of the Constitution of the State of Texas, the Court stated:

The plain and obvious import of the language of the Constitution is to prescribe a test by which to determine when an acqust by the wife becomes a portion of the wife's separate estate. The test during coverture relates to the method by which the property is acquired. If the method be by gift, devise or descent to the wife, then the Constitution makes the property belong to the wife's separate estate. If the method of acquiring during the marriage be different, then the property falls without the class of separate estate of the wife, as fixed by the Constitution. 273 S.W. at 801.

While Article 16 speaks in terms of the separate property of the wife it is clear that Texas law defining separate property is the same with regard to the husband. See Texas Family Code §5.01; Hilley v. Hilley, 342 S.W.2d 565 (Tex. Sup. 1961); Arnold v. Leonard, supra.

Since the income generated by the JNG trust consisted of earnings of the trust corpus, and was not acquired by gift, devise or descent, or for recovery for personal injuries, such income is, by definition, community property. As the Texas Supreme Court pointed out in Hilley v. Hilley, supra:

"Article XVI, Section 15, of the Constitution, and Article 4614 of the statutes define the wife's separate property as that owned or claimed by her before marriage and that acquired afterward by gift, devise or descent. The husband's separate property is defined in similar terms by Article 4613 [now Article 5.01(a)(1) and (2)]. Article 4619 [now Article 5.01(b)] provides that all property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed community property. All marital property is thus either separate or community. If acquired before marriage by any method, or after marriage by gift, devise or descent, it is separate; otherwise it is community. There are only two exceptions. Property purchased with separate funds is separate. Love v. Robertson, 7 Tex. 6, 56 Am.Dec. 41, and community property partitioned in the manner provided in Articles 4624a and 881a-23, becomes separate property." 342 S.W.2d at 567-8 [Emphasis supplied]

With regard to the Tully C. Garner trust, the life-beneficiary, Genevieve Garner Currie, is entitled only to the "net income" of the trust, which is defined in the Will of Tully C. Garner by the following language:

... after deducting the expenses of trust and any other withholding as is herein expressly provided for, shall pay over the remaining income, i.e., net income (Pet. Ex. 2)

Income generated by the corpus of the trust but not distributed as "net income" to the life-beneficiary becomes part of the "corpus" or vested beneficial interest of the remainder-beneficiaries. This includes the amount of "expenses" spent to maintain, improve and pay charges and encumbrances on the beneficial remainder interests or "corpus," as well as the "other withholding," which, as provided in the Will, are described therein as follows:

... The Trustees' determination as to what constitutes "net income" as between those taking the income and those entitled to the principal under said trusts shall be final and binding as between those entitled to income and those entitled to principal, it being my intention that the Trustees may use their discretion as to the amount needed to preserve, repair or otherwise protect the principal and to make reasonable and proper reserves to determine the allocations of premiums, discounts and other receipts and disbursements as between income and principal, and may vary their practice in regard to their method of determination as between income and principal from time to time as they may deem to be the best practice for the trust estates.

Thus, that portion of Respondent's remainder interest in the TCG trust attributable to undistributed income is, like the undistributed income of the JNG trust, made up of earnings from Respondent's separate property, not acquired by gift, devise or descent, and is hence community property of the parties under the Constitution and §5.01 of the Texas Family Code. Hilley v. Hilley, supra. All such undistributed income acquired by these trusts during the marriage of these parties was community property at that time, and neither the Legislature, the settlor nor the Trustees of the trusts could change its status. Arnold v. Leonard, supra; Mercantile National Bank v. Wilson, supra. See Davis, Income Arising From Trusts During Marriage is Community Property, 29 Tex B.J. 901, 975-976 (1966); Branscomb and Miller, supra, at 723-725.

Additional authority for the proposition that undistributed trust income is community property is found in Mercantile National Bank v. Wilson, supra, wherein the Court specifically held that:

The first and preliminary material question, in our opinion, is whether or not the undistributed profits or income from the trust in the hands of the trustee is community property. We must answer that the income on the trust corpus was community property from the date of the marriage of appellee to George O. Wilson, now deceased, until the time of the death of George O. Wilson. 279 S.W.2d at 653-654 (Emphasis supplied.)

As described above, this holding is based upon the fact that the beneficiary, Respondent here, owns, as his separate property, a present vested beneficial interest in each trust corpus. Income generated by this property, like all earnings from separate property, is part of the community estate. But see Buckler v. Buckler, 424 S.W.2d 514 (Tex. Civ. App.--Fort Worth, 1967 writ dismissed) involving income from a spendthrift trust.

Nor does it matter that the parties cannot reduce this income to their immediate possession. As in the case of pension, annuities, profit sharing plans and retirement funds, the status of the income and the rights of the parties thereto are established when the income comes into existence, and the community rights exist in that property even though it cannot be reduced to possession by the husband and wife at the time of divorce. Busby v. Busby, 457 S.W.2d 551 (Tex.

1970); Herring v. Blakeley, 385 S.W.2d 843 (Tex. 1965); Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App.--Dallas 1973); Schmidt v. Schmidt, 261 S.W.2d 892, (Tex. Civ. App.--Galveston, 1953, writ ref'd), and cases cited therein.

Further, Texas courts have consistently held that the absence of the right to control property does not change the nature of the earnings therefrom, nor can the right to control in another be used to deprive a spouse of his or her property rights in the income. Herring v. Blakeley, supra. See Gohlman, Lester & Co. v. Whittle, 114 Tex. 548, 273 S.W. 808 (1925). Thus, while the Trustees of the John Nance Garner and Tully C. Garner estates may have exclusive (albeit unexercised) control of the income arising from the corpus of these trusts, they cannot change the status of Respondent's interest in the income as community property, and thus deprive Petitioner of her rights thereto. And yet it is abundantly clear that Petitioner was deprived of all of her rights to this trust income which one may fairly presume would not have happened had the Trial Court properly characterized such income as community property.

To summarize, Respondent's equitable title to the trust corpus in his separate trust under the Will of John Nance Garner vested in him upon the death of John Nance Garner. His equitable remainder interest in the corpus of the Tully C. Garner trust likewise vested upon the death of Tully C.

Garner. In both instances, the Trustee(s) hold mere legal title. Williams v. Thompson, 375 S.W.2d 489 (Tex. Civ. App.--Houston 1964); Rust v. Rust, supra, Schmidt v. Schmidt, supra. Even though the trust instruments may state that the Trustees have "uncontrolled discretion" to handle the funds generated by the corpus, including the determination as to distribution, the Texas cases hold that the Trustee does not have absolute discretion. State v. Rubion, 308 S.W.2d 43 (Tex. Sup. 1957); Rust v. Rust, supra; Lucas v. Lucas, 365 S.W.2d 372 (Tex. Civ. App.--Beaumont 1962). And the fact of the matter is that no such uncontrolled discretion is exercised even if it was available. (SF Suttle, supra)

Respondent's vested equitable interests in the trust corpus were acquired by devise during the marriage, and are thus, except to the extent commingled with community property, his separate property. The undistributed income attributable to his interest in each trust corpus arising during the marriage was not acquired by a method which would establish its character as separate property of Respondent, and, therefore was and is community property of the parties to this marriage. It makes no difference that the income was not distributed or cannot be reduced to possession by Respondent. It is and remains community property. See Davis, supra, at pp. 976-977. And the Trial Court's total failure to find as a matter of either fact or law that the undistributed income as a community

asset and divide it accordingly constitutes clear reversible error.

A. Undistributed Income Accumulated By The Trust.

As the property in the JNG Trust generated income, all earnings and increases were deposited by Louise H. Bunting, bookkeeper for the trusts, in a checking account at the First State Bank of Uvalde, Texas. Into another account at the same bank, Mrs. Bunting put all of the earnings and increases attributable to the property of the Tully C. Garner Trust (SF 209-10). While some of this income was attributable to oil and gas royalties and bonus payments and other "capital" items, the vast majority of the earnings of each trust corpus, as shown by the schedules attached to the fiduciary income tax returns (Pet. Ex. 13-23), was normal income from the property, attributable to rents, grazing leases, oil leases, and hunting leases.

When this community income was commingled in the single bank account for each trust with other funds of the trust, so that the constituents had completely lost their identity, the whole fund became community. Tarver v. Tarver, supra; Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962); Wilson v. Wilson, 201 S.W.2d 226 (Tex. Sup. 1947). See Speer's Marital Rights in Texas §392 (1966 Supp. 1974), and cases cited therein.

From the bank account into which all moneys generated by the corpus of the JNG Trust were deposited, were paid various expenses of the trust, including Federal Estate Taxes, State Inheritance Taxes, local ad valorem taxes, and repair and maintenance of the property, as well as distributions to Respondent and the other beneficiaries. On January 31, 1974, the balance in this account was \$33,808.51. One-third of this money as well as one-third of all other undistributed income retained by the trust was community property of the parties, and Petitioner's interest should have been recognized by the Trial Court, or alternatively, Respondent should have been ordered to pay Petitioner an amount equal to at least one-sixth of this amount, i.e., one-half of their one-third, under such terms and conditions as the Court deemed just and proper under these circumstances. Unfortunately, as reflected by the Trial Court's refusal to make requested finding of fact and conclusion of law, the Trial Court chose effectively to award Respondent all such moneys without any evidence to support such a result.*

B. Undistributed Income Used to Pay Expenses Incident to the Maintenance of the Trust.

It is undisputed that all of the funds generated by the corpus of the JNG trust, were deposited in the checking

*For the same reasons, the same result would necessarily obtain with regard to the \$61,341.99 in the TCG trust account. (See Tr. 118, Finding of Fact No. 21.)

account in the First State Bank of Uvalde, Texas, and that all of undistributed income of the TCG trust was likewise deposited in that checking account, and thus, were, as pointed out above, community property. Since the inception of each trust, large amounts of these funds have been used to pay Federal Estate Taxes, State Inheritance Taxes, local ad valorem taxes, and repair, maintenance and improvement of the trust corpus (See, e.g., Pet. Ex. 5-12 and 38-178 which are the Estate Tax Returns and the monthly income and disbursement statements, respectively). Where community funds were used to pay charges, encumbrances, or interest to which the separate property of the husband is subject, or where community funds are used in making improvements on separate property of the husband, such payments are an equitable charge on the separate estate of the husband in favor of the community, and the community estate of the parties is entitled to reimbursement upon dissolution of the community by divorce. Speer's Marital Rights in Texas §379 (1961, Supp. 1974); Annotation, Use of Community Funds in Improving or Discharging Encumbrance on Separate Property, as Grounding Right to Reimbursement, Lien or Charge, 54 ALR2d 429 (1957), as supplemented in ALR2d Later Case Service (1967, Supp. 1973).

By State and Federal law, estate taxes, inheritance taxes and local ad valorem taxes become charges against and encumbrances on the property in the estate and subject to ad valorem taxation. In the case of an encumbrance on separate property paid with community funds, the measure of reimbursement is the amount expended from such funds. Ibid; Cervantes v. Cervantes, 76 S.W. 790 (Tex. Civ. App. 1903, writ dism'd). For community funds expended in improving separate property, the measure of reimbursement is, in ordinary circumstances, the enhancement in value resulting to the property from the improvements. Ibid. As can be seen from the exhibits in this case, the properties which constitute the corpus of the JNG and TCG trusts have increased in value substantially since the trusts were created to date of trial. [Compare Pet Exs 6 and 9 (Federal Estate Tax Returns) which valued the ranch properties at approximately \$1,840,000 with the Trial Court's Findings of Fact No. 20 (T 114) which finds the value of these same properties to be \$5,520,000.] Reimbursement as a matter of law should, however, be limited to the amount of the community funds used. See Collins v. Bryan, 88 S.W. 432 (Tex. Civ. App. 1905); Cone v. Cons, 266 S.W.2d 480 (Tex. Civ. App.--Amarillo 1953, writ dism'd). In the case

of the JNG trust Petitioner proved the amount of reimbursement due to be \$73,126.55* and in the case of the TCG trust Petitioner proved the amount to be \$118,472.65.*

Since the right to reimbursement is an equity, mathematical certainty in its determination is not required. Fulwiler v. Fulwiler, 419 S.W.2d 251 (Tex. Civ. App.--Eastland 1965, no writ). Nevertheless, mathematical certainty is hardly necessary to demonstrate that the Trial Court effectively but erroneously forced Petitioner to relinquish reimbursement rights worth over \$200,000 for \$50,000 paid over a 10 year period.

*The amount of reimbursement due Petitioner set forth above is calculated by subtracting one-sixth of each trust's cash on hand in Jan. 1974 (Finding of Fact No. 21 - T-118) from one-sixth of gross receipts. In the case of the TCG Trust the gross receipts figure has been lowered to reflect distribution to Respondent's mother. See Tables 5 and 7, supra.